THE CONSTITUTIONAL RIGHT TO A REMEDY

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The American Bill of Rights, to which United States Supreme Court Justice William J. Brennan was so devoted, is one of the supreme achievements of the human spirit. In ten concise paragraphs, it encapsulates most of the basic rights and freedoms that most of the world now regards as the basis of individual liberty and human dignity.[2] But Justice Brennan, for one, never forgot that every American had even more protection from government oppression. Ever mindful of his roots as a state judge (with stints on the New Jersey trial, appellate and supreme court benches), he urged the bench and bar to rely on state bills of rights as well as the federal one.[3] He recognized thatstate constitutions, too, are a font of individual liberties, their protections often extending beyond those required by the Supreme Court's interpretation of federal law. The legal revolution which has brought federal law to the fore must not be allowed to inhibit the independent protective force of state law — for without it, the full realization of our liberties cannot be guaranteed.[4]

Most state bills of rights are longer than the first ten amendments, and thus they contain rights and guarantees not found in the federal constitution. The most widespread and important of these unique state provisions is probably the guarantee of a right of access to the courts to obtain a remedy for injury. It is one of the oldest of Anglo-American rights, rooted in Magna Carta[5] and nourished in the English struggle for individual liberty and conscience rights.[6] Today, it expressly or implicitly appears in forty state constitutions.[7]

While there are thirty-two different versions[8] among the forty states, there are two major variants. Ten states use language devised in the seventeenth century by Sir Edward Coke.[9] Their constitutions provide something like this:

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

Twenty-eight states use a more compact form,[10] reading something like this:

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

Today, these traditional words are invoked to challenge procedural impediments to judicial access or to block substantive modifications to established causes of action or remedies. In the last quarter century

alone, state supreme courts have relied on the right to a remedy to strike down laws that lacked discovery rule exceptions to a time bar on bringing suit,[11] allowed limitations to run against minor plaintiffs,[12] or interposed terms of repose on claims against architects and builders,[13] engineers,[14] suppliers[15] and manufacturers.[16] Repose statutes have also been invalidated that limited the time to bring certain types of claims, such as workers' compensation[17] or hazardous material exposure.[18] Courts have also struck down laws that granted sovereign immunity to municipalities for proprietary functions,[19] permitted defamers to retract and avoid liability,[20] and prevented guests from suing automobile drivers for ordinary negligence.[21] In the medical malpractice area, courts have knocked down statutes capping non-economic damages for medical malpractice victims[22] and requiring medical malpractice claims to be screened by experts before filing.[23] Finally, courts have used the provision to open judicial proceedings to the public,[24] including juvenile hearings,[25] to forbid using filing fees for general state revenue,[26] and to proscribe the payment of penalties or fines as a condition for challenging them in court.[27]

These holdings demonstrate the significance of the remedy guarantee. But they do not establish the parameters of its application, because during the same quarter century, other courts in other jurisdictions (or sometimes even the same courts in the same jurisdiction) have upheld each of these types of laws against a remedies challenge.[28] As one judge has aptly concluded: "In some states, [the right to a remedy] is second only to the due process clause in importance; while in other states, it is little more than an interesting historical relic."[29]

These disparate results are essentially inexplicable. They cannot be harmonized by reliance on textual distinctions among the states. There is no correlation between the words of a particular guarantee and how expansively the courts of that state have applied it.[30] Nor can these different outcomes be explained by historical, social, political or cultural variations between the states.[31] In each section of the country, whether the constitution is old or new, the judges elected or appointed, or the political culture traditional or progressive, some state courts defer unhesitatingly to legislative choices, while others routinely strike down any statutes that impede access to the courts or impair recovery under traditional theories.[32] Finally, these distinctions cannot be explained by divergent intentions among the particular framers and ratifiers of the individual state constitutions. In most states, there is almost no historical record to explain what the framers and ratifiers thought the provision would accomplish.[33] More often than not, such provisions were adopted without a word of debate or a dissenting vote,[34] while in many others there was but a cursory modification before approval.[35] The occasional nugget in

the framers' debate[36] or in complementary constitutional provisions[37] is definitely the exception, not the rule.

An obvious explanation for such disparities is the absence of a corresponding guarantee in the United States Constitution. Not only do states lack the benefit of federal interpretation, but they also lack the intensive scholarship and focused public debate that has helped develop and refine our federal rights. To be sure, more treatises and law journals are addressing the right to a remedy than ever before, and that is all to the good. But like the dog's bark in the Sherlock Holmes story "The Adventure of Silver Blaze" by Arthur Conan Doyle, the real significance is what is not there. There are no right to a remedy chairs at any law school. No interest groups solicit funds to support or oppose a wider acceptance of their favored interpretation of the provision. I have never located a legal symposium devoted to the guarantee, or even a journal article followed by replies or comments. I suspect that no one has ever been tenured at an accredited law school based on remedies research. The states can't even agree on nomenclature: I have found eight different names for the guarantee in cases and convention debates.[38] The American legal community would never have ignored a federal constitutional right of even remotely comparable importance.

Since that the United States Supreme Court is unlikely to recognize a remedy guarantee within federal due process,[39] it seems that state litigants and state courts are on their own. In my view, state courts should welcome this opportunity. If we are truly worthy of Justice Brennan's confidence in state courts as equal partners in defining basic rights and responsibilities, then the bench and bar should be able to make the right to a remedy more than a wild card in the creative litigator's deck. If we can't tell precisely why the framers in Texas included this clause while those in New York did not, we can nevertheless discover why English reformers created the guarantee, why American patriots preserved it, and how its purpose can be fulfilled today. Within each jurisdiction, the courts should articulate a sufficiently coherent doctrine to allow for the guarantee to be applied consistently and predictably. If two states develop divergent doctrines, each state's courts should be able to say why: either one state is right and the other wrong, or some legitimate distinction permits both states to be right.

If state courts are equal to this task, then independent state constitutional jurisprudence is on solid grounds. If in interpreting other constitutional guarantees, such courts happen to differ with federal precedent about corresponding rights, such divergence is defensible and perhaps desirable. But if state courts cannot make any sense out of their most important unique guarantee, then maybe a "lockstep" approach is the most practical, if not the most principled, method of interpreting those rights found in both state and federal

constitutions.

I. Origins of the Right to a Remedy

To understand the right to a remedy, most states look first to the guarantee's origin and development in England. Judges have long been impressed by its pedigree, dating from 1215 and the Great Charter on the field at Runnymede and confirmed in 1225 as Chapter 29 of the "final version" of Magna Carta.[40] But the modern significance of the right to a remedy began in 1641, when Sir Edward Coke's Second Part of the Institutes of the Laws of England was posthumously published.[41] Coke described Chapter 29 of Magna Carta as a "roote" from which "many fruitfull branches of the law of England have sprung."[42] One such branch was the protection of individuals' rights from official acts of oppression, the precursor to modern due process. Coke then moved to "the rights of subjects in their private relations with one another,"[43] where he gave this gloss on Magna Carta:

[E]very Subject of this Realm, for Injury done to him in goods, lands, or person, by any other Subject, Ecclesiastical or Temporal whatever he be, without exception, 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 denyal, and speedily without delay; for Justice must have three Qualities: it must be . . . free; for nothing is more odious than Justice [let] to sale; . . . full, for justice ought not to limp, or be granted piece-meal, and . . . speedily: Delay is a kind of Denyal: And when all these meet, it is both Justice and Right.[44]

Much of this language survives intact as the remedies guarantees of some states.[45]

During the next century, Sir William Blackstone described the right to a remedy as one of the critical means through which a civilized society served its principal aim _ the preservation of an individual's absolute rights to life, liberty, and property.[46] In his Commentaries on the Laws of England,[47] first published in Oxford between 1765 and 1769, Blackstone divided the rights of persons into two categories. The three absolute rights of personal security, personal liberty, and property existed in a state of nature.[48] Other rights were merely relative, arising only because men live in society and have relationships with other people.[49] Absolute rights could not be protected simply by declaratory law; individuals required means of vindicating them.

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

security, personal liberty, and private property.[50]

The right to a remedy was one of the five subordinate rights through which society vindicated its primary task of protecting the absolute rights of men,[51] and it encompassed both the substance of the law and the procedures through which courts applied that law.[52] Thus, once a person was injured, the right to an "adequate remedy" immediately attached, though judicial process might be necessary to ascertain the exact parameters of that right.[53] The right to a remedy dictated that common law courts must be courts of general jurisdiction, open to hear any and all cases involving injury to individual rights, "[f]or it is a settled and invariable principle in the laws of England, that every right when withheld must have a remedy, and every injury its proper redress."[54] Thus when Blackstone quoted Coke's dictum that justice be granted fully and without delay, he was concerned not merely with the physical availability of judicial process, but with the substantive opportunity to assert claims to protect absolute rights.[55]

Coke nor Blackstone would have empowered judicial officers to protect rights against all government intrusion. In their time, no one accorded "power" to the courts to strike down a legislative action, Bonham's case (whatever it means) notwithstanding.[56] As Blackstone stated:

[Parliament] being the highest and greatest court, over which none other can have jurisdiction in the kingdom, if by any means a misgovernment should any way fall upon it, the subjects of this kingdom are left without all manner of remedy.[57]

Thus Blackstone clearly saw the remedies guarantee only as a check on royal abuse of power, not parliamentary excess.

Unlike Coke and Blackstone, the revolting American colonists saw both Crown and Parliament as oppressors.[58] Parliamentary initiatives during the 1760s and 1770s convinced the colonists that the informal constitution securing English rights against royal infringement was inadequate protection against all possibilities of government oppression. When independence was declared, some of the new American states began adopting formal written constitutions to give structure to their new governments and to give added security to the most fundamental rights. As Gordon Wood notes, they recognized that laws protecting their basic freedoms must be of "a nature more sacred than those which established a turnpike road."[1]

By the end of 1776, two states had adopted constitutions guaranteeing the right to a remedy.[2] Four more states[3] adopted the right before the federal Constitution was ratified, as did all three new states that joined the union before 1800.[4]

In the absence of any surviving debate or discussion from the adoption of these provisions, our best opportunity to discover how the

early framers intended to adapt the wisdom of Coke and Blackstone to the American experience comes from early judicial interpretations of the right. If the framers really intended to place a constitutional shield around the common law, that notion should appear in opinions applying the guarantee.[5]

II. Early Interpretations

The first case I have found that mentions the remedies guarantee of a state constitution was decided in 1814. Upholding a Massachusetts law that abolished the common law right of landowners to sue mill owners for flooding, substituting a payments schedule instead, the Supreme Judicial Court, reasoned:

If it should be said that the legislature itself has not the constitutional authority to deprive a citizen of a remedy for a wrong actually done to him, the answer is obvious, that they have a right to substitute one process for another. . .[6]

Early nineteenth century courts invariably recognized an adequate substitute as a defense to a remedies attack,[7] even if the substituted remedy was "less convenient" or "more tardy and difficult."[8]

The remedies guarantee was first mentioned in an opinion striking down a law in 1821. The Supreme Court of Errors and Appeals of Tennessee relied on several federal and state constitutional grounds to invalidate a statute providing a two-year moratorium on executing on a judgment for debt unless the creditor agreed to accept the notes of certain banks in satisfaction. The Court noted that "[i]n Magna Charta this [the remedies] restriction is upon royal power; in our country it is upon legislative and all other power."[9] But based on Sullivan's commentaries on Coke, the Court read the right to a remedy as protecting only "original and judicial process;"[10] that is, "the mean whereby we may attain the end" of justice, or law.[11] Thus, where "the law, operating on the contract when first made, held out to the creditor the promise of immediate execution after judgment,"[12] the new statute for it violated the right to a remedy.

In reviewing statutes, nineteenth-century courts often applied the remedies clause interchangeably with federal and state impairment of obligation of contracts clauses, federal and state due process or due course guarantees, and federal and state prohibitions against ex post facto or retroactive laws.[13] Debtor protection laws were struck down in this scattershot manner on several occasions before the Civil War, with the opinions not articulating the extent to which the remedies clause contributed to the end results.[14]

The first case to strike down a government action based solely on the remedies clause again came from Tennessee, decided in 1835.[15] The action condemned was not a law, but a justice-of-the-peace court rule requiring all motions for new trial to be made on the first Saturday after trial. Because "[i]t is the business of the courts to be open,

where right and justice shall be administered," the rule had to yield to the constitution.[16] Later, several state courts voided laws that taxed access to the courts in one way or another beyond what was needed to support the judicial machinery.[17]

The first case I have found that struck down a statute primarily on the basis of the remedies clause did not come until 1862, when the Supreme Court of Minnesota struck down a law denying access to the courts of the state to anyone "aiding the Rebellion." After expounding their support for the Union cause, the justices observed that "in the end all must regard as a matter of pride and gratification, that in this state no one, not even the worst of felons, can be denied the right to simple justice."[18]

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

[T]he remedy is under the control of the state; and, so long as the legislation only alters or impairs it, to what the judiciary deems a reasonable extent, then it is not within the constitutional prohibition; but when it does so to an unreasonable extent, then it is. . . .[T]his is . . .but a judicial discretion to revise legislation; and in my judgment, there is no authority for it in the constitution.[19]

And in 1861, the Kentucky Supreme Court concluded:

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

Any other construction would make it inconsistent with other clauses of the constitution, and, in fact, render it practically absurd.[20]

Not until after the Civil War was there any reported opinion dealing with a remedies clause challenge to a statute limiting a tort claim. In 1874, the Pennsylvania Supreme Court upheld a law providing those who worked on or near a railroad only the same right to sue the railroad as the railroad's employees would have.[21] The Court concluded that no fundamental right had been "cut off or struck down,"[22] because the doctrine of respondeat superior "is only an offspring of law."[23] Since the servant could still be sued for negligence, the law was constitutional. But the next year, the Supreme Court affirmed a judgment striking down a statute that limited a railway's damages to $5000 for death and $3000 for personal injury, and the Supreme Court affirmed.[24] While the court cited the Pennsylvania Constitution of 1874, it is not clear whether it relied solely on the remedies clause or a provision providing for no limitation of damages.[25] Five years later the Supreme Court of Pennsylvania explained:

[W]e are not convinced that Railroad v. Cook should be overruled. Its authority is in conservation of the reserved right to every man, that for an injury done him in his person, he shall have a remedy by due course of law. The people have withheld power from the legislature to deprive them of that remedy, or to circumscribe it so that a jury can give only a pitiful fraction of the damage sustained. Nothing less than the full amount of pecuniary damage which a man suffers from an injury to him in his lands, goods or person, fills the measure secured to him in the Declaration of Rights.[26]

Finally, in 1887, a federal district judge in Oregon alluded to the remedies clause as a grounds for invalidating a tort statute.[27] The plaintiff sued a county for injuries sustained while crossing a defective bridge in a horse-drawn buggy.[28] While the case was pending, the limited suits against counties to contract actions.[29] The court stated that in its judgment, the statute was invalid because "the legislature cannot, in the face of [the remedies clause], deny to anyone a remedy by due course of law for an injury arising from the wrongful act or omission of a county."[30] However, the court concluded it was "content to rest the decision of this case on the conclusion that the amendment . . . does not and was not intended to affect the plaintiff's right of action" because it was passed after the action commenced, and, as a rule of construction, had to be interpreted as applying to future actions.[31]

Not until 1901 did a court rely squarely on the right to a remedy.[32] In Mattson v. Astoria, a municipal ordinance completely eliminated all remedies for persons injured by a defective public street.[33] The Oregon Supreme court held that "[t]he constitutional provision guaranteeing to every person a remedy by due course of law for injury done him in person or property . . . was intended to preserve the common-law right of action for injury to person or property, and while the legislature may change the remedy or form of procedure, attach conditions precedent to its exercise, and perhaps abolish old and substitute new remedies, it cannot deny a remedy entirely."[34]

In the last two decades of the nineteenth century, courts refused to resort to the remedies guarantee to strike down legislation, except that which struck down "vested" rights of action, such as those that spring "from contracts, or from principles of common law."[35] State judicial realization of the full import of the remedies clause did not come until the heydey of Lochnerism.[36] Just as an earlier generation of state courts had used the remedies clause in combination with impairment of contracts, state courts now used the remedies clause in tandem with substantive due process to "enact Mr. Herbert Spencer's Social Statics."[37] promote Herbert Spencer's world view.

This aggressive use of the remedies clause, however, was tempered when state courts faced challenges to emerging workers' compensation systems. All states eventually adopted these plans, and

they were generally upheld by the courts, although in some instances constitutional amendments were necessary to satisfy or overcome judicial objections.[38]

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

Most state courts also upheld legislative repeal of the so-called heart balm actions in the mid-twentieth century, but their reasons for doing so added still new variations to the doctrine.[39] For example, in Pennington v. Stewart, the Indiana Supreme Court held that the affections of the plaintiff's wife were not property rights.[40] It further held that because marriage and divorce were controlled by the legislature, and a cause of action for alienation of affections was an incident marriage, it was also within the purview of the legislature to alter or eliminate the cause of action.[41] Furthermore, in Haskins v. Bias, the Ohio Court of Appeals held that these causes of actions were no longer "properly considered recognizable at law" and had been severely criticized because "of their peculiar susceptibility to abuse and the changing attitude toward the status of women."[42] Article I, Section 16 of the Ohio Constitution did not apply because the court had previously held it only applied to "wrongs that are recognized by law."[43] One commentator, criticizing the heart-balm decisions, observed: "The fact that the legislature's decision was not controversial does not make it constitutional if it denies fundamental rights."[44] And widely divergent outcomes resulted from challenges to the various statutes of repose passed in the 1960s and 1970s to help architects, engineers, builders and others in the construction field. Because these statutes cut off certain claims before they even arose, they were in tension with the established remedies doctrine in many states. Yet most of these statutes have been upheld against remedies attacks,[45] though a significant number have been struck down.[46]

Another wave of remedies challenges were brought against laws passed in the 1970s and 1980s regulating medical malpractice suits. Many portions of these statutes, if not entire laws, were struck down

on equal protection,[47] jury trial,[48] privileges and immunities,[49] and due process,[50] separation of powers grounds,[51] as well as on the right to a remedy.[52] At the same time, state courts upheld a number of statutes against all such attacks.[53]

Now remedies challenges are being leveled against many recent "tort reform" laws. Taking advantage of new state constitutional law treatises, law review articles, and increased interstate dialogue between state appellate justices, many current remedies opinions are often longer and more thoughtful, but as yet they are no more consistent. Indeed, current variations between and even within states are truly confounding. Justice Linde memorably observed that his own Supreme Court of Oregon "has written many individually tenable but inconsistent opinions" about the remedies guarantee.[54]

III. Categories of Recent Decisions

Some scholars, wading through this morass, have attempted to classify or systematize the various approaches.[55] Many of their approaches are instructive, though I do not find any compelling. At best, the disarray may be organized into certain rubrics which recur from state to state.

A. Quid Pro Quo

First, all states apparently recognize the doctrine of a substitute remedy, or quid pro quo, as a justification for legislative change. But some states hold that the substitute need only benefit society as a whole,[56] while others require that it benefit the individual plaintiff.[57] And when they require an individual benefit, courts differ on how closely the new remedy must replicate the one it replaced.[58]

Even more disparity occurs when the statute does not provide a quid pro quo. Some courts hold that such laws must invariably be struck down.[59] More opinions take something of a "due process" approach — that is, the courts will uphold the legislative choice if it bears a rational or perhaps a reasonable relationship to a legitimate or permissible legislative goal.[60] But still other opinions, borrowing federal equal protection terminology, require something akin to intermediate scrutiny in deciding whether to permit the legislative restriction.[61] A few decisions have required "an overpowering public necessity" to uphold a restriction without a substitute remedy.[62] Finally, some opinions use different standards of scrutiny based on the nature of the remedy being infringed.[63]

In evaluating the restriction, some opinions look only at the legislative purpose in changing the law, while others "balance" the loss of the plaintiff's loss of a remedy against the general benefit to society.[64] The standards articulated by courts for conducting this balance typically provide little guidance to constrain the judges' personal preferences.[65]

B. Application to Common Law Only

Second, regardless of the standard employed, most decisions hold that the remedies clause only impedes legislatures from altering or amending a common law remedy, not a statutorily-created one.[66] Some opinions hold that the common law remedy must be "well-established."[67] That can merely mean that the remedy is older than the statute that allegedly impairs it,[68] or that the remedy was settled when the constitution was adopted.[69] But all these distinctions assume that the bench and bar can tell whether today's cause of action is the same or different than one from a century or two ago, a task that sometimes confounds even legal historians.[70]

Some judges reject all these distinctions as artificial.[71] They see the guarantee as encompassing both statutory and common law provisions with importance rather age or pedigree being the principal inquiry. For example, one justice would apply the remedies provision to protect a statute, a judicial holding or even a custom which is "engrained into the fabric of the law so as to acquire fundamental and basic status."[72]

C. Delay or Denial of Access

Third, some opinions limit only statutes that delay or deny access to the courts, not those that deny or restrict substantive relief.[73] Thus, in medical malpractice cases, Missouri has struck down pre-suit screening panels but upheld caps on damages.[74] Others protect only against retroactive changes in the law. Thus, the legislature can change or abolish any cause of action, but the remedies clause protects the claims of those individuals whose causes of action had accrued at the time of the change.[75] And some decisions hold, that the remedy clause is not violated by the complete abolition of a remedy if the legislature has left a plaintiff a similar remedy against other defendants.[76]

D. No Restriction on Legislation

Finally, a significant number of opinions hold that the remedies guarantee does not constrain any substantive legislation. For example, in North Carolina, "the remedy constitutionally guaranteed must be one that is legally cognizable. The legislature has the power to define the circumstances under which a remedy is legally cognizable and those under which it is not."[77] Other courts have reached the same result by describing the guarantee as merely a general principle, not a constitutional standard.[78]

IV. Should the Guarantee be Narrowly Construed?

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

First, the paucity of historical information significantly impedes our

ability to interpret and develop the clause with any confidence.[79] Some jurists and scholars have suggested that constitutional texts which have never engendered broad interest or public debate do not deserve to be interpreted in the same broad fashion as the "great ordinances of the Constitution."[80]

Second, it is difficult to put parameters on the scope of judicial review in a remedies challenge. For example, if Congress is to make no law respecting the establishment of religion, then a court can test a law against a judicially-fashioned standard of what constitutes establishment. But the essence of lawmaking is the fixing of rights and responsibilities and the creation of remedies when they are breached. Logically, any change in any law that may be enforced through a civil action could violate the a remedies guarantee. But no one contends that the law can or should be frozen, or that only the judicial branch should be empowered as the agent of change. Thus, the remedies clause is clearly in tension with the separation of powers doctrine that is the genius of the American system. For example, forty-two states have constitutional or statutory reception clauses, providing that the common law shall control unless and until changed by statutory law.[81] The remedies guarantee must be harmonized with the legislature's undoubted right to make broad policy.[82] As one justice has queried: "How do courts supply content to the provision without overstepping their traditional role and legislating themselves?"[83]

Third, our view of the common law is quite different from that of the founders two centuries ago. Their guides were Coke and Blackstone, for whom the common law was not simply a judicial creation. Rather it was a pre-existing body of truth, in part or in whole divinely inspired, [84] that was merely "discovered" by judges. Thus, "[c]ases were mere evidence of the law as opposed to comprising the law itself."[85] Today, we regard the common law as dynamic, not static. We see judicial opinions not as "mere evidence of the law's content,"[86] but as the law itself. Is this mutable, temporary, and very obviously human law as worthy of constitutional protection as a "brooding omnipresence in the sky?"[87]

Fourth, the scope and function of the common law has changed rather dramatically since most states adopted their remedies provisions. In 1776, and well into the nineteenth century, most law was judge-made, not statutory.[88] Christopher Columbus Langdell, after all, felt able to teach the "science" of law exclusively through the "case method."[89] But as codified law increased, more rights and remedies were legislatively, not judicially, created.[90] From wrongful death acts to private antitrust actions to the Uniform Commercial Code to consumer protection statutes, legislatures, not courts, now are the prime creators of new rights and remedies. Can state courts in good conscience say to their legislatures, "well, sure, you've created all

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

Fifth, and finally, the aggressive use of the remedies guarantee creates the danger of a "see-saw" battle between judges and legislators.[91] Already, legislatures in at least two states have sent constitutional amendments to the voters to overrule remedy decisions by the state supreme court.[92] Moreover, the continued judicial rejection of popularly supported legislative changes risks "federalizing" more law, as proponents of reform will turn to Congress to provide national solutions to problems traditionally left to the states. One example is the on-going attempts to federalize the law of products liability.[93] I do not say that courts should disregard the law for prudential concerns. But as a Texan, I do offer for guidance Congressman David Crockett's motto: "Be sure you are right, then go ahead."[94]

V. New Approaches to Interpreting the Remedies Guarantee

Mindful of such considerations, many scholars have devised new approaches to reign in the remedies clause. For instance, one professor would allow the legislature to abolish a cause of action entirely, because that's substantive, but not to place limitations or restrictions on that could be deemed procedural on the same cause of action.[95] That has the perverse effect of encouraging the legislature to make wholesale changes in common law principles when a mere tweak could satisfy the perceived need for change. Another commentator suggests that "[a]n open courts clause analysis consistent with the origins of the provision should focus not on whether the legislature has abolished a 'remedy' but on whether the challenged action compromises the judiciary as an independent branch of government."[96] This may be close to right, but it needs more explication to be useful. Some of my colleagues feel compromised when ever the legislature is sitting, while for others only a reduction in judicial pay would meet that standard! Finally, one scholar's proposal that a court may authorize a remedy only when the legislature has created a right without a remedy[97] would be useful only if the lawmakers are singularly perverse or dim-witted.

Given all these problems, is the remedies guarantee merely constitutional detritus, like a Rhode Islanders' fundamental right to gather seaweed on the beach?[98] Not at all. Certainly, remedies jurisprudence has much to offer in enhancing access to justice the best years of the clause may lie ahead. As one scholar has noted,

“the state declarations embody a much broader concept of access than does the first amendment as interpreted by the Supreme Court.”[99] In an era when “there is too much law for the rich and too little law for the poor,” in Derek Bok’s felicitous phrase[100] the remedies clause may impose some level of responsibility on courts to see that all citizens secure the promise of equal justice under law.[101] When one sees legislatures willing to create new courts only if they will produce a positive revenue stream from fines and fees, the guarantee may help preserve an independent and co-equal judiciary.[102] And when our nation’s highest court refuses to let cameras broadcast its proceedings, and allows near-contemporaneous audio broadcasts only if the presidency is perceived to be at stake,[103] the open courts guarantee might be read to ensure meaningful public access to state court proceedings in an era of tiny courtrooms but global interconnectivity.

As to whether and to what extend the right to a remedy should preserve substantive rights from legislative encroachment, I must confess continued irresolution. But let me offer one hypothesis, or rather a provisional hypothetical, of how a close reading of history might support a definite, but limited, role for the guarantee in curbing legislative excess. Consider again Blackstone’s hierarchy of rights, which was familiar to the framers of our eighteenth and nineteenth century constitutions.[104] Blackstone considered the primary absolute rights — personal security, personal liberty, and property — to be protected by the subordinate absolute rights, such as right to a remedy.[105] Many causes of action that legislatures have typically sought to restrict, including loss of consortium, alienation of affections or respondeat superior, would surely to Blackstone be mere relative rights that could be altered or abolished.[106] Moreover, even absolute rights could be protected through administrative schemes or alternate dispute resolution mechanisms, so long as these procedures adequately protected the claimant. Furthermore, many elements of damages that have raised legislative skepticism, such as mental anguish or hedonic damages, would not be proscribed by Blackstone because freedom from psychological torment was not regarded as an absolute right. Punitive damages and other elements which do not redress an injury would also be outside the scope of the Blackstonian remedy.

But if a legislature, perhaps buckling to inordinate pressure from a well-organized and highly vocal special interest group, sought to deny all recovery for a well-recognized action that did implicate absolute rights, the remedy guarantee would come into play. Under this approach, medical lobbyists would be checked if they convinced a state to abolish all medical malpractice claims, railroad interests could not succeed in eliminating all crossing claims, and retail groups could not end all slip and falls. As the Supreme Court of Maine has

concluded, the remedies guarantee forbids legislative limitations "so unreasonable as to deny meaningful access to judicial process."[107] Thus, consistent with both the ancient notions of Blackstone and the modern realities of legislative and judicial roles, a right to a remedy along these lines could be a narrow but potent protection for basic rights.

VI. Conclusion

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

[1]GORDON WOOD, FOREWARD: STATE CONSTITUTION-MAKING IN THE AMERICAN REVOLUTION, 24 RUTGERS L.J. 911, 920 (1993) (quoting The Crisis, No. XI, 81-87 (New York, 1775). The initial American Constitutional initiative was chaotic, not systematic. Some states kept their royal charters throughout the Revolution or beyond, while others were unsure about whether or to what extent their constitutions actually constrained legislative behavior. Some states tried to ensure the primacy of the new documents by declaring some or all parts of the new constitutions to be unchangeable (as in Virginia and Delaware) or by requiring extraordinary legislative majorities to change (as in Delaware, Maryland and New Jersey). Vermont, unsure whether a constitutional convention was legal, went so far as to have its legislature re-enact its 1777 constitution. Id. at 920-24.

[2]Section 12 of the Declaration of Rights and Fundamental Rules of the Delaware State, passed September 11, 1776, borrowed language from Lord Coke to provide:

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

Section 26 of the Plan or Frame of Government for the Commonwealth or State of Pennsylvania provided: "All courts shall be open, and justice shall be impartially administered without corruption or were simply unnecessary delay." PA. CONST. of 1776, Plan or Frame of Government for the Commonwealth or State of Pennsylvania, § 26, available at http://avalon.law.yale.edu/18th_century/ratnc.asp (The Avalon Project at Yale Law School) (last visited 7/01/02) (citing THE FEDERAL AND

STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA (compiled and edited under the Act of Congress of June 30, 1906 by Francis Newton Thorpe, Washington, D.C.: Government Printing Office, 1909)).

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

[3]Maryland, Massachusetts, New Hampshire, and North Carolina all followed the Delaware model, although North Carolina's constitutional provision applied only to persons restrained of their liberty. MD. CONST. of 1776, A Declaration of Rights, and the Constitution and Form of Government agreed to by the Delegates of Maryland, in Free and Full Convention Assembled, art. 17, available at http://avalon.law.yale.edu/subject_menus/statech.asp (The Avalon Project at Yale Law School) (last visited 7/03/02); MASS. CONST. of 1780, Part 1: A Declaration of Rights of the Inhabitants of the Commonwealth of Massachusetts, art. 11, available at http://www.nhinet.org/ccs/docs/ma-1780.htm (National Humanities Institute 1999) (last visited 7/05/02); NEW HAMPSHIRE CONST. of 1784, Part 1: Bill of Rights, art. 14, in 4 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA 2455 (compiled and edited under the Act of Congress of June 30, 1906 by Francis Newton Thorpe, Washington, D.C.: Government Printing Office, 1909); N.C. CONST. of 1776, A Declaration of Rights, art. 13, available at http://avalon.law.yale.edu/subject_menus/statech.asp (The Avalon Project at Yale Law School) (last visited 7/03/02) (citing THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA (compiled and edited under the Act of Congress of June 30, 1906 by Francis Newton Thorpe, Washington, D.C.: Government Printing Office, 1909)).

[4]Kentucky, Tennessee, and Vermont, all of which followed the Pennsylvania model. KY. CONST. of 1792, art. 12, § 13, in 3 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA 1275 (compiled and edited under the Act of Congress of June 30, 1906 by Francis Newton Thorpe, Washington, D.C.: Government Printing Office, 1909); TENN. CONST. of 1796, art. 11, § 17, available at http://vi.uh.edu/pages/alhmat/tenncon.html (University of Houston History Department) (last visited 7/03/02); VT.

CONST. of 1777, Ch. 2: Plan or Frame of Government, § 23, available at http://avalon.law.yale.edu/subject_menus/statech.asp (The Avalon Project at Yale Law School) (last visited 7/03/02) (citing THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA (compiled and edited under the Act of Congress of June 30, 1906 by Francis Newton Thorpe, Washington, D.C.: Government Printing Office, 1909)).
Delaware itself switched to the Pennsylvania model in 1792, with Art. I, Section 9 of its new constitution providing:

All courts shall be open; and every man for an injury done him in his reputation, person, moveable or immoveable possessions, shall have remedy by the due course of law, and justice administered according to
the very right of the cause, and the law of the land, without sale, denial,
or unreasonable delay or expense;¼

1 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA 569 (compiled and edited under the Act of Congress of June 30, 1906 by Francis Newton Thorpe, Washington, D.C.: Government Printing Office, 1909).
Today, twenty-eight states use something resembling the original Pennsylvania formulation; only ten states still adhere to Coke's language. See John H. Bauman, Remedies Provisions in State Constitutions and the Proper Role of the State Courts, 26 WAKE FOREST L. REV. 237, 244, 284-88 (1991) (providing a complete list of state-constitution remedies provisions).
[5]Of the eight states which accompanied their ratification of the federal Constitution with suggestions for additional amendments, three included a remedies provision. The Virginia Ratification Convention proposed:

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 and without sale, completely and without denial, promptly and without delay, and that all establishments or regulations, contravening these rights, are oppressive and
unjust.

10 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION: RATIFICATION OF THE CONSTITUTION: VIRGINIA 1552 (Kaminski and Saladino eds., Madison: State Historical Society of Wisconsin, 1993); 18 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION: COMMENTARIES ON THE CONSTITUTION 202, 315 (Kaminski and Saladino eds., Madison: State Historical Society of Wisconsin, 1995). North Carolina submitted a proposed amendment identical to Virginia's. Compare Ratification of the Constitution by the State of North Carolina; November 21, 1789, available at <http://avalon.law.yale.edu/18th_century/ratnc.asp> (The Avalon Project at Yale Law School) (last visited 11/13/02), with Ratification of the Constitution by the State of Virginia; June 26, 1788, available at < http://avalon.law.yale.edu/18th_century/ratva.asp > . Rhode Island's statement of ratification included this proposal:

That every freeman ought to obtain right and justice freely and without sale; completely, and without denial; promptly, and without delay; and that all establishments and regulations contravening these rights are oppressive and unjust.

William R. Staples, RHODE ISLAND IN THE CONTINENTAL CONGRESS, WITH THE JOURNAL OF THE CONVENTION THAT ADOPTED THE CONSTITUTION, 1765-1790, 652, 676 (Reuben Aldridge Guild ed., Providence, Providence Press Co., Printers to the State, 1870), available at http://quod.lib.umich.edu/cgi/t/text/text-idx?c=moa;idno=AQJ4219 .
The Virginia proposals were submitted to ratifiers in New York, Letter, George Mason to John Lamb, June 9, 1788, 9 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION: RATIFICATION OF THE CONSTITUTION BY THE STATES: VIRGINIA 818 (Kaminski and Saladino eds., Madison: State Historical Society of Wisconsin, 1990), but the New Yorkers did not include a remedies guarantee in their own proposals. Ratification of the Constitution by the State of New York; July 26, 1788, available at <http://avalon.law.yale.edu/18th_century/ratnc.asp > (The Avalon Project at Yale Law School) (last visited 11/13/02). Of the six states with a remedies provision in their own constitution, only North Carolina recommended that the federal constitution follow suit.
Despite the Virginia recommendation, Congressman James Madison from that state, who led the effort to adopt a federal bill of rights, did not propose a remedies clause for the Bill of Rights. Moreover, there is no record that any member of the House of Representatives urged its inclusion. But in the Senate, an amendment to guarantee a remedy for all injuries or wrongs was offered and rejected on September 8. Koch, Jr., supra note 31, at 374-75.

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

For many years, it appeared that the federal constitution might still protect the right to a remedy under the due process clause. For a discussion of that development, see supra note 41 above.

[6]Stowell v. Flagg, 11 Mass. 364, 1814 WL 1038, at *2 (1814).

[7]See, e.g., Von Baumbach v. Bade, 9 Wis. 559, 1859 WL 2864, at *10 (1859) ("All the authorities agree that it is within the power of the legislature to repeal, amend, change, or modify the laws governing proceedings in courts¼so that they leave the parties a substantial remedy.").

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

[9]Townsend v. Townsend, 7 Tenn. 1, 1821 WL 393, at *10 (Tenn.Err. & App. 1821).

[10]Id. at *11.

[11]Id.

[12]Id.

[13]E.g., Commercial Bank of Natchez v. Chambers, 16 Miss. 9, 1847 WL 1741 (Miss.Err. & App. 1847); Riggs, Peabody, & Co. v. Martin, 5 Ark. 506, 1844 WL 432 (1844); Townsend v. Townsend, 7 Tenn. 1 (Tenn.Err. & App. 1821); Von Baumbach v. Bade, 9 Wis. 559, 1859 WL 2864 (1859).

[14]When reading early cases with a modern eye, it is often difficult to find precisely on what authority a court purports to act. Unlike today's courts, which generally resolve cases on a single ground and which dismiss as dicta any statement not directly necessary to that holding, courts in the 1800s routinely struck down laws on every applicable

ground and without any indication that only one of the alternative holdings was law. E.g., Davis v. Pierse, 7 Minn. 13 (1862) (striking down stay law under five constitutional provisions, including the remedies clause, contracts clause, prohibition on ex post facto laws, privileges and immunities clause and the guarantee of a grand jury in criminal matters); see also Commercial Bank of Natchez v. Chambers, 16 Miss. 9, 1847 WL 1741 (Miss.Err. & App. 1847); Von Baumbach v. Bade, 9 Wis. 559, 1859 WL 2864 (1859).
In other cases of that period, the court would fail to identify any particular authority for a judicial outcome. As late as 1871, the Chief Justice of Wisconsin said in what may have been a remedies case:

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

Durkee v. City of Janesville, 28 Wis. 464, 1871 WL 2939 *2; see Judith S. Kaye, Forward: The Common Law and State Constitutional Law as Full Partners in the Protection of Individual Rights, 23 RUTGERS L.J. 727, 730-32 (1992) (observing that the common law and constitutional law often embody the same principles, and commenting that "the mere fact that a common law right received constitutional recognition did not signify that it was thereby extinguished as a common law right").
[15]Pawley v. McGimpsey, 15 Tenn. 502, 1835 WL 883 (Tenn.Err. & App. 1835).
[16]Id. at *2.
[17]Thus, early decisions upheld a five dollar tax on losing litigants, Harrison, Pepper & Co. v. Willis, 54 Tenn. 35, 1871 WL 3911, at *6 (1871) (tax does not violate the "letter or spirit" of the open courts clause), and a three dollar fee to obtain a jury trial. Adams v. Corriston, 7 Minn. 456, 1862 WL 1291, at *5 (1862) ("[t]he constitution does not guarantee to the citizen the right to litigate without expense, but simply protects him from the imposition of such terms as unreasonably and injuriously interfere with his right to a remedy"). See also State ex. rel Davidson v. Gorman, 41 N.W. 948, 950 (Minn. 1889); Flood v. State, 117 So. 385, 387 (Fla. 1928). But at least one court struck down a law requiring a tax or assessment to be paid before it could be challenged in court. Weller v. City of St. Paul, 5 Minn. 95, 1860 WL 2892, at *6 (1860) (construing the "unconscionable and unjust" tax requirement as potentially "amount[ing] to an entire denial of justice"); see also Wilson v. McKenna, 52 Ill. 43, 1869 WL 5382 (Ill. 1869) (striking down revenue law requiring a party to show he has paid all the taxes due on land before challenging a tax title set

up against him); Bennet v. Davis, 37 A. 864 (Me. 1897) (striking down statute requiring party to pay the amount claimed against him, including costs and interest, before beginning his defense).
[18]Davis v. Pierse, 7 Minn. 13, 1862 WL 1242, *6-7 (1862) (declaring that "the legislature cannot, directly or indirectly¼deprive [a citizen] of his constitutional right to commence, maintain, or defend any action or other judicial proceeding").
[19]Von Baumbach v. Bade, 9 Wis. 559, 1859 WL 2864, at *16 (Paine, J., dissenting).
[20]Johnson v. Higgins, 60 Ky. 566, 1862 WL 4825, at *5 (1862).
[21]Kirby v. Pa. R.R. Co., 76 Pa. 506, 1874 WL 13229 (1874).
[22]Id. at *3.
[23]Id.
[24]Central R.R. of N.J. v. Cook, 1 W.N.C. 319 (Pa. 1875).
[25]Id.
[26] Thirteenth and Fifteenth St. Passenger Rail Co. v. Boudrou, 8 W.N.C. 241, 92 Pa. 475, 1880 WL 13607, at *6 (1880).
[27]Eastman v. County of Clackamas, 32 F. 24 (D.Or. 1887).
[28]Id. at 25.
[29]Id.
[30]Id. at 32.
[31]Id. But see Templeton v. Linn County, 29 P. 795 (Or. 1892) (refusing to strike down statute based on the remedies guarantee).
[32]Mattson v. Astoria, 65 P. 1066 (Or. 1901).
[33]Id. at 1066.
[34]Id. at 1067.
[35]See Mayor and Council of Wilmington, v. Ewing, 43 A. 305 (Del. 1899); Edwards v. Johnson, 5 N.E. 716 (Ind. 1886); Templeton v. Linn County, 29 P. 795, 797, 22 Or. 313, 318 (1892); Schuman, supra note 42, at 46.
[36] Lochner v. New York, 198 U.S. 45 (1905).
[37]Id. at 74 (Holmes, J., dissenting); HERBERT SPENCER, THE MAN VERSUS THE STATE 19 (John Offer ed., Cambridge University Press 1994) (man's liberty "is to be measured, not by the government machinery he lives under, but by the relative paucity of the restraints it imposes on him").
[38] 99 C.J.S. Workman's Compensation §§17-19 (1958). Decisions to uphold the statute were decided frequently on the basis that the employee or employer, or both, had the ability to opt out of the scheme. See, e.g., Shade v. Ash Grove Lime & Portland Cement Co., 144 P. 248, 250 (Kan. 1914) (because the compensation system rests on the consent of the employer and employee, all remedies under common and statutory law remain intact); Matheson v. Minneapolis St. Ry. Co., 148 N.W. 71, 75 (Minn. 1914) (same); Shea v. North-Butte Mining Co., 179 P. 499 (Mont. 1919); Evanhoff v. State Indus. Acc. Comm'n, 154 P. 106, 111 (Or. 1915) (same); Scott v.

Nashville Bridge Co., 223 S.W. 844, 852 (Tenn. 1920) (no deprivation because the act is optional and not compulsory).
[39]See Rotwein v. Gersten, 36 So. 2d 419 (Fla. 1948) (in the public interest to abolish alienation of affections). But see Heck v. Schupp, 68 N.E.2d 464 (Ill. 1946) (striking down repeal).
[40]10 N.E.2d 619, 621 (Ind. 1937).
[41]Id.
[42]441 N.E.2d 842, 844 (Ohio Ct. App. 1981).
[43]Id.
[44]John H. Bauman, Remedies Provisions in State Constitutions and the Proper Role of State Courts, 26 WAKE FOREST L. REV. 237, 278 (1991)
[45]See, e.g., Carter v. Hartenstein, 455 S.W.2d 918, 921 (Ark. 1970); Yarbro v. Hilton Hotels Corp., 655 P.2d 822, 827 (Colo. 1983); Zapata v. Burns, 542 A.2d 700, 709-11 (Conn. 1988); Cheswold Vol. Fire Co. v. Lambertson Const., 489 A.2d 413, 417 (Del. 1984); Twin Falls Clinic & Hospital Bldg. v. Hamill, 644 P.2d 341, 346 (Idaho 1982); Beecher v. White, 447 N.E.2d 622, 628 (Ind. App. 1983); Burmaster v. Gravity Drainage Dist. No. 2, 366 So.2d 1381, 1387-88 (La. 1978); Whiting-Turner Contracting Co. v. Coupard, 499 A.2d 178, 188-89 (Md. 1985); Klein v. Catalano, 437 N.E.2d 514, 522 (Mass. 1982); Anderson v. Fred Wagner and Roy Anderson, Jr., Inc., 402 So.2d 320, 324 (Miss. 1981); Blaske v. Smith & Entzeroth, Inc., 821 S.W.2d 822, 832-33 (Mo. 1991) (en banc); Reeves v. Ille Electric Co., 551 P.2d 647, 650-51 (Mont. 1976); Williams v. Kingery Const. Co., 404 N.W.2d 32, 34 (Neb. 1987); Lamb v. Wedgewood South Corp., 302 S.E.2d 868, 880-82 (N.C. 1983); Loyal Order of Moose, Lodge 1785 v. Cavaness, 563 P.2d 143, 146 (Okl. 1977) (holding that the statute is nevertheless an unconstitutional violation of the federal equal protection provision); Josephs v. Burns, 491 P.2d 203, 207 (Or. 1971), abrogated by Smothers v. Gresham Transfer, Inc., 23 P.3d 333, 356 (Or. 2001); Freezer Storage, Inc. v. Armstrong Cork Co., 382 A.2d 715, 720-21 (Pa. 1978); Walsh v. Gowing, 494 A.2d 543, 547-48 (R.I. 1985); Harmon v. Angus R. Jessup Associates, Inc., 619 S.W.2d 522, 524 (Tenn. 1981); Trinity River Auth. v. URS Consultants, 889 S.W.2d 259, 261-63 (Tex. 1994).
[46]See Jackson v. Mannesmann Demag Corp., 435 So.2d 725, 727-28 (Ala. 1983); Overland Const. Co., Inc. v. Sirmons, 369 So.2d 572, 575 (Fla. 1979); Saylor v. Hall, 497 S.W.2d 218, 222-25 (Ky. 1973); Perkins v. Northeastern Log Homes, 808 S.W.2d 809 (Ky. 1991); Brennaman v. R.M.I. Co., 639 N.E.2d 425, 430 (Ohio 1994), overruling Sedar v. Knowlton Const. Co., 551 N.E.2d 938, 947 (Ohio 1990); Daugaard v. Baltic Co-op. Bldg. Supply Ass'n, 349 N.W.2d 419, 424-427 (S.D. 1984); Horton v. Goldminer's Daughter, 785 P.2d 1087, 1096 (Utah 1989); Kallas Millwork Corp. v. Square D Co., 225 N.W.2d 454, 460 (Wis. 1975); Phillips v. ABC Builders, Inc., 611 P.2d 821, 831

(Wyo. 1980).
[47]Austin v. Litvak, 682 P.2d 41 (Colo. 1984) (three-year statute of repose for medical malpractice actions violated state equal protection guarantee as to one class of claims, and not others); Shessel v. Stroup, 253 Ga. 56, 316 S.E.2d 155 (1984) (medical malpractice statute of limitations violated equal protection); Farley v. Engelken, 241 Kan. 663, 740 P.2d 1058 (1987) (abrogation of collateral source rule violates federal and state equal protection clauses); Wentling v. Medical Anesthesia Servs., 237 Kan. 503, 701 P.2d 939 (1985) (abrogation of collateral source rule violates equal protection); Schwan v. Riverside Methodist Hosp., 6 Ohio St. 3d, 452 N.E.2d 1337 (1983) (one year statute of limitations as applied to minors over ten years of age violates equal protection--no rational basis); White v. State, 283 Mont. 363, 661 P.2d 1272 (1983) ($300,000 damage cap on non-economic damages violates equal protection); Coffey v. Bresnahan, 127 N.H. 687, 506 A.2d 310 (1986) (statute of limitations violates equal protection by barring suits of tort plaintiffs in survival actions after two years, when other tort plaintiffs could recover for six years); Carson v. Maurer, 126 N.H. 925, 424 A.2d 825 (1980) (virtually all features of malpractice act held unconstitutional remaining provisions non-severable, and therefore, invalid); Jiron v. Mahlab, 99 N.M. 425, 659 P.2d 311 (1983) (review panel violates right of access to courts); Arneson v. Olson, 270 N.W.2d 125 (N.D. 1978) (modification of collateral source rule and cap on damages violates equal protection); Duren v. Suburban Community Hosp., 24 Ohio Misc. 2d 25, 482 N.E.2d 1358 (1985) ($200,000 damage cap violates equal protection); Graley v. Satayatham, 74 Ohio Op. 2d 316, 343 N.E.2d 832 (1976) (modification of collateral source rule violates equal protection); Boucher v. Sayeed, 459 A.2d 87 (R.I. 1983) (pre- trial screening panel violates equal protection); Baptist Hosp. of S.E. Tex., Inc. v. Baber, 672 S.W.3d 296 (Tex. App. 1984) aff'd, 714 S.W.2d 310 (Tex. 1986) ($500,000 damage cap violates equal protection).
[48]Simon v. Saint Elizabeth Medical Center, 3 Ohio Op. 3d 164, 355 N.E.2d 903 (1976) (admission of review panel finding at trial violates right to jury trial and equal protection); Heller v. Frankston, 504 Pa. 528, 475 A.2d 1291 (1984) (limitation on attorneys' fees held unconstitutional violation of right to jury trial); Mattos v. Thompson, 491 Pa. 385, 421 A.2d 190 (1980) (delay in pre-screening panel requirement violates right to trial by jury); Boyd v. Bulala, 647 F. Supp. 781 (W.D. Va. 1986) (damage cap violates Virginia's right to jury trial).
[49]Eastin v. Broomfield, 116 Ariz. 576, 570 P.2d 744 (1977) (requirement that party not prevailing before panel post $2000 bond before proceeding to trial violated state privileges and immunities clause).
[50]Arneson v. Olson, 270 N.W.2d 125 (N.D. 1978) (invalidating

statute limiting total damages recoverable in a medical malpractice action on substantive due process grounds); Gaines v. Preterm-Cleveland, Inc., 514 N.E.2d 709 (Ohio 1987) (statute of repose unconstitutionally applied to medical malpractice victim who discovered injury during period of repose but had an unreasonably short amount of time to file suit); Duren v. Suburban Community Hosp., 24 N.E. 51, 56 (Ohio 1985) (invalidating $200,000 limitation on general damages recoverable in medical malpractice action); Flippin v. Jarrell, 270 S.E.2d 482 (N.C. 1980) (statute of limitations in medical malpractice action violated due process rights by providing unreasonable tim