

THE RIGHT TO A REMEDY

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INTRODUCTION

State constitutional law, even as it moves from the margins toward the mainstream of American legal culture,¹ remains for the most part a collection of variations on federal constitutional themes. Although many state appellate courts now recognize that their own state charters may provide citizens with different or additional constitutional guarantees,² these courts almost never recognize their liberation not only from Supreme Court outcomes, but from Supreme Court methods of analysis as well.³ Even when a court adjudicating a state constitutional guarantee does not reach an answer that matches federal law, it is almost certain to rely on federal jurisprudence to define the question. In deciding whether gender discrimination violates a state's equality guarantee,

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1. Scholars traditionally identify Justice William J. Brennan's 1977 law review article, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977), as the starting point of the modern re-emphasis on state constitutions, although at least one influential commentator, Hans A. Linde, *Without "Due Process": Unconstitutional Law in Oregon*, 49 OR. L. REV. 125 (1970), had laid the groundwork almost a decade earlier. Because United States Supreme Court opinions since then have become more hostile to individual rights claims, fragmented, contentious, impermanent, and methodologically simplistic, litigants and courts have turned increasingly to state constitutions. Currently, state constitutional law has acquired most of the indicia of a mainstream legal subject: one-time and annual symposium issues of prestigious law reviews, inclusion in many law schools' curricula, case books and treatises, scholarship so copious it requires a book-length bibliography, TIM J. WATTS, *STATE CONSTITUTIONAL LAW DEVELOPMENTS: A BIBLIOGRAPHY* (1991), and even a nutshell, THOMAS C. MARKS, JR. & JOHN F. COOPER, *STATE CONSTITUTIONAL LAW IN A NUTSHELL* (1988). For a recent thorough review of these developments, see Robert F. Williams, *State Constitutional Law: Teaching and Scholarship*, 41 J. LEGAL EDUC. 243 (1991) (recent emphasis on state constitutional law discussed).

2. The cases are now so numerous that no accurate count is possible. A 1986 article reported over 300 such cases existed. Ronald K.L. Collins & Peter J. Galie, *Models of Post-Incorporation Judicial Review: 1985 Survey of State Constitutional Individual Rights Decisions*, 55 U. CIN. L. REV. 317, 317 & n.1 (1986). Since then the cases have proliferated so quickly that tracking them now requires a regular monthly publication — the *State Constitutional Law Bulletin* published by the National Association of Attorneys General.

3. James A. Gardner, in *The Failed Discourse of State Constitutionalism*, 90 MICH. L. REV. 761 (1992), argues that most state constitutional law is unoriginal and impoverished. He states that this is because of unavoidable, inherent theoretical inconsistencies in state constitutionalism itself. Professor Gardner draws his conclusions from a 1990 survey of state constitutional law cases from seven states. These cases in fact support his conclusion that state constitutional law is frequently grudging, unoriginal, and incoherent. *Id.* at 781-804. However, cases from other jurisdictions, such as Oregon, and cases developing state constitutional provisions with no federal analogue, such as remedy guarantees, make Gardner's conclusions about the impossibility of rich, thick state constitutional discourse untenable. See David Schuman, *A Failed Critique of State Constitutionalism*, 91 MICH. L. REV. (forthcoming Nov. 1992) (refuting Gardner).

for example, a state court may or may not reach the same conclusion that the federal courts have reached in similar cases under the Fourteenth Amendment; however, the state court will almost certainly follow the federal courts in deciding that the central question is whether gender classifications are "suspect," thereby triggering "strict judicial scrutiny." Seldom do state courts stop to examine whether these terms of art inhere in the state guarantee and can usefully define for state lawmakers and other public actors what kinds of discrimination are impermissible.⁴

As long as state constitutional law takes its analytical framework from federal law, it will remain an echo and not a choice. And although developing a state constitutional law that provides a significant alternative to federal law — instead of merely a means of circumventing or avoiding it — appears to be a daunting task, it can be done. State constitutional "remedy guarantees"⁵ provide concrete proof. These guarantees, requiring that the law furnish a remedy for specified types of injuries, have no federal counterpart,⁶ thus forcing courts

4. *E.g.*, *Crawford v. Board of Educ.*, 551 P.2d 28 (Cal. 1976) (school desegregation analyzed through federal terms of art and tests).

5. Because these guarantees frequently appear in the same constitutional provision as guarantees that courts shall be "open," some courts and commentators refer to them as "open courts" or "access to courts" clauses. *See infra* note 25 for a list of states having remedy guarantees.

6. Although the Federal Bill of Rights contains no explicit guarantee of a remedy for injury, the United States Supreme Court suggested in some early cases that a state's attempt to eliminate an existing common law cause of action without providing a substitute remedy would violate the Due Process Clause of the Fourteenth Amendment. In *Wilson v. Iseminger*, 185 U.S. 55 (1902), the Court sustained a Pennsylvania statute extinguishing certain debts if payments had been neither made nor demanded for a period of 21 years. In *dicta*, the Court commented:

It may be properly conceded that all statutes of limitation must proceed on the idea that the party has full opportunity afforded him to try his right in the courts. A statute could not bar the existing right of claimants without affording this opportunity; if it should attempt to do so, it would not be a statute of limitations, but an unlawful attempt to extinguish rights arbitrarily, whatever might be the purport of its provisions.

Id. at 62-63. In *New York Cent. R.R. v. White*, 243 U.S. 188 (1917), the Court sustained New York's workers' compensation statute, noting: "[I]t perhaps may be doubted whether the state could abolish all rights of action on the one hand, or all defenses on the other, without setting up something adequate in their stead." *Id.* at 201. However, in *Silver v. Silver*, 280 U.S. 117 (1929), the Court directly confronted a due process challenge to a state's guest passenger statute that eliminated one type of negligence suit but did not provide an alternative remedy. *Id.* at 122. The Court sustained the Connecticut law, holding: "[T]he Constitution does not forbid the creation of new rights, or the abolition of old ones recognized by the common law, to obtain a permissible legislative object." *Id.* More recently, in response to the argument that the Due Process Clause prohibited the federal government from limiting the liability of federally-licensed nuclear power facilities, and thereby limiting the remedy of potential victims, the Court, again in *dicta*, reaffirmed the holding of *Silver*. *Duke Power Co. v. Carolina Envtl. Study Group*, 438 U.S. 59, 88 (1978). In *Fein v. Permanente Medical Group*, 474 U.S. 892 (1985), the Court dismissed an appeal from a California case upholding a statute capping medical malpractice damages; Justice White dissented, arguing in favor of allowing the appeal in order to pronounce definitively on the issue of the federal constitutionality of damage caps. *Id.* at 892-95 (White, J., dissenting). It therefore appears safe to conclude that despite some early rumblings to the contrary, a state legislature might modify or eliminate common law and statutory causes of action without running afoul of the Federal Constitution. *See Ferguson v. Garmon*, 643 F. Supp. 335, 340 (D. Kan. 1986) (dismissal of *Fein* indicates no federal constitutional impediment to damage caps).

and advocates to rely on their own skills of research, analysis, and creativity. Part I of this Article will cover the sources, texts, and contemporary uses of remedy guarantees. Part II will survey and classify the interpretations developed around the country. Using one state's treatment of its remedy guarantee as an example, Part III will demonstrate how state courts can generate coherent, useful, legitimate, and truly independent constitutional law.

PART I: BACKGROUND

A. History and Sources

Modern remedy clause litigation centers around such relatively recent innovations as workers' compensation schemes,⁷ no-fault insurance plans,⁸ medical malpractice damage caps,⁹ and product liability statutes of repose¹⁰ — issues distant indeed from the clause's origins. Yet because these origins sometimes provide the materials from which judges fashion decisions, they merit a brief review.¹¹

The remedy clause derives ultimately from Magna Carta, where it took the form of a promise extracted from King John to reform his courts. These institutions had fallen into disrepute for their practice of selling writs — the most powerful and efficient writs fetching the highest prices.¹² Hence, King John's promise: "To no one will we sell, to no one will we refuse or delay, right or justice."¹³ In the hands of Lord Coke, whose influential commentary on Magna Carta was among the most frequently read legal texts in colonial America, the King's promise underwent a radical change and emerged in pertinent part as follows: "[E]very Subject of this Realm, for injury done to him in [goods, land 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."¹⁴ In this form, the remedy clause was urged upon the

7. *E.g.*, *Estabrook v. American Hoist & Derrick, Inc.*, 498 A.2d 741, 747 (N.H. 1985) (court reviewed amendment to Worker's Compensation law), *overruled by* *Young v. Prevue Prods. Inc.*, 534 A.2d 714 (N.H. 1987). *See infra* notes 71-75 and accompanying text for a discussion of this case.

8. *E.g.*, *Gentile v. Altermatt*, 363 A.2d 1, 11-15 (Conn. 1975) (challenge to no-fault auto insurance), *appeal dismissed*, 423 U.S. 1041 (1976). *See infra* notes 76-79 and accompanying text for a discussion of this case.

9. *E.g.*, *Lucas v. United States*, 757 S.W.2d 687, 687 (Tex. 1988) (medical malpractice damage cap struck down). *See infra* note 98 for a discussion of this case.

10. *E.g.*, *Lankford v. Sullivan, Long & Hagarty*, 416 So. 2d 996, 1003 (Ala. 1982) (court struck down products liability statute of repose). *See infra* note 106 and accompanying text for a discussion of this case.

11. For a more comprehensive review of the historical background, see David Schuman, *Oregon's Remedy Guarantee: Article I, Section 10 of the Oregon Constitution*, 65 OR. L. REV. 35, 37-41 (1986).

12. *See* WILLIAM MCKECHNIE, *MAGNA CARTA: A COMMENTARY ON THE GREAT CHARTER OF KING JOHN* 395 (2d ed. 1914) (describing system of selling writs).

13. *Id.*; SAMUEL E. THORNE ET AL., *THE GREAT CHARTER* 132 (1965).

14. FAITH THOMPSON, *MAGNA CARTA: ITS ROLE IN MAKING OF THE ENGLISH CONSTITUTION, 1300-1629*, at 365 (1948) (quoting SIR EDWARD COKE, *SECOND INSTITUTE* 55-56 (4th ed. 1671)); MAX RADIN, *HANDBOOK OF ANGLO-AMERICAN LEGAL HISTORY* 286 (1936).

Framers of the Federal Bill of Rights, but to no avail.¹⁵ The right did, however, appear in several of the original state constitutions, and from there was copied into the constitutions of many states later admitted.

Courts have on occasion looked to the remedy clause's origins for help in interpreting its current meaning. In *Meech v. Hillhaven West, Inc.*,¹⁶ for example, the Supreme Court of Montana used an historical analysis to sustain a statute precluding general and punitive damages in most actions for wrongful discharge. Reviewing scholarship on the remedy clause, the court concluded that the purpose of the guarantee was to prevent judicial abuse, not legislative abuse: the remedy clause "is addressed exclusively to the courts. It means no more nor less than that, under the provisions of the Constitution and laws constituting them, the courts must be accessible to all persons alike, without discrimination, . . . and afford a speedy remedy for every wrong recognized by law as being remedial." ¹⁷ In other words, "[t]he guarantee tells those who *apply* the law when and how they must do so. It says nothing to *lawmakers*, except insofar as they attempt to interfere with the administration of justice." ¹⁸ Legislatures are absolutely free, then, to declare what is or is not a legally cognizable injury; once they do, then the remedy clause guarantees that persons suffering the injury have equal access to the state's judicial system.¹⁹

This holding demonstrates one of the dangers of historical analysis. The *Meech* majority relied on the history of the remedy guarantee as a response to corrupt English courts at the time of Magna Carta — approximately 550 years before the first American state constitutions. By the last quarter of the eighteenth century, during which the American remedy guarantees first appeared, the focus of popular distrust had shifted from the King's courts to the people's representatives. After an unsuccessful early period during which state constitutions contained expansive grants of authority to the legislative branch, the people, disillusioned by what they perceived as legislative corruption (capture by private interest), enacted a "second wave" of state constitutions stripping legislatures of many of their prerogatives and vesting increased power in the judiciary.²⁰ Looking to the history of the remedy guarantee to determine what "evils" it was intended to "cure" thus leads to diametrically opposite interpretations, depending on which "history" is relevant. At the time of Magna Carta, the evil was corrupt courts, supporting the *Meech* majority's theory that legislatures remain free to define what "injuries" are "legal" and thereby must be afforded a remedy;

15. BERNARD SCHWARTZ, *THE BILL OF RIGHTS: A DOCUMENTARY HISTORY* 967-68 (1971).

16. 776 P.2d 488 (Mont. 1989).

17. *Id.* at 493 (quoting *Shea v. North Butte Mining Co.*, 179 P. 499, 502 (Mont. 1919)).

18. *Id.* (quoting Schuman, *supra* note 11, at 67) (emphasis in original).

19. One justice dissented:

This is the blackest judicial day in the eleven years that I have sat on this Court. Indeed it may be the blackest judicial day in the history of the state. . . . The decision today cleans the scalpel for the legislature to cut away unrestrainedly at the whole field of tort redress.

Id. at 507 (Sheehy, J., dissenting).

20. WILLI ADAMS, *THE FIRST AMERICAN CONSTITUTIONS: REPUBLICAN IDEOLOGY AND THE MAKING OF THE STATE CONSTITUTIONS IN THE REVOLUTIONARY ERA* *passim* (1980); GORDON WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787* *passim* (1969).

the object of the constitutional provision is merely to see to it that the judicial system operates fairly. But at the time that many modern American remedy guarantees themselves, or their direct predecessors, were brought into existence, the evil was renegade legislatures that had, for example, deprived injured creditors of their judicial remedies against debtors by passing legislation impairing existing contractual obligations. This history supports the *Meech* dissenter's contention that the clause empowers appellate courts to correct the occasional excesses of overzealous legislatures, a position in fact adopted by the Supreme Court of Kentucky in construing that state's remedy guarantee as giving expression to the Kentucky framers' desire to restrict "the almost unlimited power of the General Assembly."²¹ The issue is complicated even further in the case of a state like Montana. In that state, the original 1889 constitution dates from a populist era during which distrust of elitist courts ran high, and the remedy guarantee was amended in 1972 to counteract supposedly high-handed judicial interference with legislative innovation.²² And what about a state like Oregon, where the constitutional bill of individual rights was taken in toto and verbatim from Indiana, without any significant discussion or debate?²³ Thus, the origins and history of the remedy guarantee may play some role in a contemporary interpretation, but the precise nature of that role is not clear and may, in fact, vary from state to state.²⁴

B. Texts

Today, the citizens of thirty-nine states can claim a constitutional "right to a remedy."²⁵ The language granting this right differs from constitution to constitution,²⁶ but it typically guarantees that for *injuries* of a certain type, a person

21. *Perkins v. Northeastern Log Homes*, 808 S.W.2d 809, 813 (Ky. 1991).

22. *Meech*, 776 P.2d at 498. The amendment was supposed to correct perceived judicial misinterpretation of the Workmen's Compensation statute. *Id.*

23. THE OREGON CONSTITUTION AND PROCEEDINGS AND DEBATES OF THE CONSTITUTIONAL CONVENTION OF 1857, at 468-69 (Charles H. Carly ed., 1926).

24. See *infra* notes 107-16 and accompanying text for a discussion of various theories of constitutional interpretation.

25. ALA. CONST. art. I, § 13; ARIZ. CONST. art. 18, § 6 (held to be a remedy guarantee in *Boswell v. Phoenix Newspapers*, 730 P.2d 186 (Ariz. 1986), *cert. denied*, 481 U.S. 1029 (1987)); ARK. CONST. art. II, § 13; COLO. CONST. art. II, § 6; CONN. CONST. art. I, § 10; DEL. CONST. art. I, § 9; FLA. CONST. art. I, § 21; 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; MD. CONST. art. 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. The New Mexico Supreme Court has recognized a right to a remedy implicit in the state's constitution despite the lack of a specific textual source. *Richardson v. Carnegie Library Restaurant, Inc.*, 763 P.2d 1153, 1161 (N.M. 1988).

26. The texts of the states' remedy guarantees are conveniently compiled in John H. Bauman, *Remedies Provisions in State Constitutions and the Proper Role of the State Courts*, 26 WAKE FOREST L. REV. 237, 284-87 (1991).

shall have access to a *remedy* through the state's *legal apparatus*. Connecticut's clause 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, . . ." ²⁷

Some constitutions vary the injuries for which a remedy is guaranteed: Florida and South Carolina include general entitlement to a remedy for "any injury" or "wrongs sustained" without limitation,²⁸ and Illinois guarantees a remedy for injuries to privacy.²⁹ Further, whereas in most states the provision is phrased as a command (a person "shall" have remedy), in Maryland, Rhode Island, and Vermont, it is a suggestion (every person "ought" to have a remedy for injury).³⁰ Frequently additional rights accompany or modify the remedy guarantee: the right to a *speedy* and *complete* remedy,³¹ freely and without sale,³² in *open court*;³³ or the right to sue the state.³⁴ Judicial opinions, however, rarely account for textual or contextual particularities, despite the fact that, for example, a guarantee like Louisiana's specifying an "adequate" remedy³⁵ may, as a matter of plain meaning, require a different interpretation than a guarantee like Illinois's specifying a "certain" remedy.³⁶ A statute replacing traditional workplace personal injury torts with a no-fault workers' compensation scheme provides injured employees a degree of "certainty" at the occasional expense of "adequacy," and is therefore less problematic under the latter constitution than the former.

C. Scope of Usage

"Right to remedy" arguments appear in a variety of contexts. Most commonly, litigants use the guarantee to attack an adversary's immunity from legal action. Some of these immunities such as spousal, intra-familial and sovereign, derive from the common law, but more often they are statutory. While most immunities attacked as violations of the remedy guarantee confer complete immunity, some are partial, as in limits or caps on damages obtainable in medical malpractice actions, or in sovereign immunity statutes that set an upper limit on recoveries against the state.

All of the immunities listed thus far eliminate or limit some subset of a larger cause of action; for example, they affect negligence claims brought by employees against employers, but not all negligence claims. The remedy clause is also used, however, against immunities that result from legislative elimination of an entire traditional cause of action. Thus, plaintiffs have used remedy guar-

27. CONN. CONST. art. I, § 10.

28. FLA. CONST. art. I, § 21; S.C. CONST. art. I, § 9.

29. ILL. CONST. art. I, § 12.

30. MD. CONST. art. 19; R.I. CONST. art. I, § 5; VT. CONST. ch. I, art. 4.

31. MASS. CONST. art. 1, § 11, pt. 1.

32. VT. CONST. ch. I, art. 4.

33. OR. CONST. art. I, § 10.

34. WYO. CONST. art. 1, § 8.

35. LA. CONST. art. I, § 22.

36. ILL. CONST. art. I, § 12.

antees to attack statutes eliminating "alienation of affection" or so-called "heart balm" suits.³⁷

In all these cases, injured parties invoked the remedy guarantee to attack *substantive* legislative policy choices. An example of a substantive remedy clause attack would be a suit challenging a legislatively revised workers' compensation scheme in which certain *events* (on-the-job injuries) will no longer be remediable in tort. Likewise, an automobile guest passenger statute could offend the remedy guarantee if it barred recovery for certain legislatively identified victims; a damage cap could also be called a violation of the remedy clause if it set limits on the extent of the remediable injury. All of these challenges deploy the remedy clause against legislation that defines certain types of events as non-injuries.

In *procedural* remedy clause cases, on the other hand, plaintiffs attack legislation that is aimed at some characteristic of the litigation process itself, regardless of its substantive content. Examples include attacks on statutes of limitations or statutes of repose.³⁸ The two types of attack — substantive and procedural — frequently overlap, for example when the attack focuses on a medical malpractice statute of repose. Insofar as the challenge alleges that the legislature cannot immunize medical malpractice, the challenge is substantive; insofar as the challenge alleges that the legislature cannot set time limits on litigation, the challenge is procedural. Again, the cases rarely focus on whether the statute under attack is substantive, procedural or both. This oversight seems particularly unfortunate in jurisdictions which infer from the remedy clause's history as a guarantee of fair judicial process that it does not constrain legislatures. The more logical inference would be that the remedy clause applies against all impediments to fair judicial process, be they legislative or judicial in origin. In other words, history more logically supports a "substantive/procedural" distinction than a "legislative/judicial" one.³⁹

PART II: INTERPRETATIONS

In responding to this variety of claims, courts have adopted an equally daunting variety of remedy guarantee interpretations. Commentators⁴⁰ have at-

37. *E.g.*, *Heck v. Schupp*, 68 N.E.2d 464, 466 (Ill. 1946) (Heart Balm Act, which restricted filing and pleadings of civil actions, struck down).

38. Statutes of limitations extinguish, after a period of time, the right to pursue a cause of action. BLACK'S LAW DICTIONARY 1411 (6th ed. 1990). Statutes of repose, on the other hand, limit potential liability by putting a time limit on when a cause of action can arise. *Id.* "[A statute of repose] is distinguishable from statute of limitations, in that statute of repose cuts off right of action after specified time measured from delivery of product or completion of work, regardless of time of accrual of cause of action or of notice of invasion of legal rights." *Id.*

39. *See infra* text accompanying note 137 for a discussion of the effect of procedural laws.

40. The law review literature on remedy guarantees, although mostly specific to particular state constitutions, is quite large. It includes: John Bauman, *supra* note 26; Thomas J. Dennis, *Product Liability Statutes of Repose as Conflicting with State Constitutions: The Plaintiffs are Winning*, 26 ARIZ. L. REV. 363 (1984); Gary D. Jensen, *Legislative Larceny: The Legislature Acts Unconstitutionally When It Arbitrarily Abolishes or Limits Common Law Redress for Injury*, 31 S.D. L. REV. 82 (1984); Kathryn Kase, *Constitutional Law — Open Courts — \$500,000 Cap on Non-Economic Dam-*

tempted to classify the states' approaches. One such commentator finds three categories: 1) "no restriction" jurisdictions, in which the remedy guarantee applies only to judicial procedures, not to substantive legislation; 2) "due process" jurisdictions, in which only "fundamental" remedies are immune from legislative extinction; and 3) "constitutional incorporation" jurisdictions, in which the remedy clause bars elimination of remedies in existence at the time the constitution was adopted unless an alternative remedy is provided.⁴¹ Another typology uses federal "level of scrutiny" terminology to describe different treatments of the remedy guarantee.⁴² "Strict scrutiny" jurisdictions protect existing tort remedies unless there is an overpowering public need to eliminate them, and the need can be met in no way less harmful to the legal status quo; "no restriction" or "rationality review" models afford mere "rational review" to substantive changes in existing legal remedies; and "intermediate scrutiny" courts sustain legislative elimination of remedies unless the challenger can demonstrate that the change is unreasonable or arbitrary when balanced against the purpose of the new law.⁴³

Precisely because these classification schemes use federal terminology such as "fundamental rights" and "levels of scrutiny," each is a Procrustean bed into which remedy jurisprudence cannot be forced without distortion. More helpful distinctions emerge from analyzing the cases in their own or in neutral terms.

ages for Medical Malpractice Inconsistent with Open Courts Guarantee in Texas Constitution, 20 ST. MARY'S L. J. 397 (1989); Linde, *supra* note 1; Francis E. McGovern, *The Variety, Policy and Constitutionality of Product Liability Statutes of Repose*, 30 AM. U. L. REV. 579 (1981); Ruth A. Mickelsen, *The Use of and Interpretation of Article I, Section 8 of the Minnesota Constitution, 1861-1984*, 10 WM. MITCHELL L. REV. 667 (1984); Jana J. Olive, *Constitutional Reform — Tort Reform — Judicial Responses to Damage Cap Legislation and Their Potential Influence on the Alabama Tort Reform Package*, 19 CUMB. L. REV. 759 (1988); Donna B. Powers, *State Constitutions' Remedy Guarantees Provide More Than "Lip Service" to Rendering Justice*, 16 TOLEDO L. REV. 585 (1985); Schuman, *supra* note 11; David R. Smith, *Battling a Receding Tort Frontier: Constitutional Attacks on Medical Malpractice Laws*, 38 OKLA. L. REV. 195 (1985); Charles K. Wiggins et al., *Washington's 1986 Tort Legislation and the State Constitution: Testing the Limits*, 22 GONZ. L. REV. 193 (1986/87); Note, *Constitutional Guarantees of a Certain Remedy*, 49 IOWA L. REV. 1202 (1964); Judith A. Bass, Comment, *Article I, Section 21: Access to Courts in Florida*, 5 FLA. ST. U. L. REV. 871 (1977); Donald B. Brenner, 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 (1982); Carrie L. Fleisher, Comment, *Article I, Section 19 of the Maine Constitution: The Forgotten Mandate*, 21 ME. L. REV. 83 (1969); W. A. Heindl, Note, *A Remedy for All Injuries?*, 25 CHI.-KENT L. REV. 90 (1947); Josephine H. Hicks, Note, *The Constitutionality of Statutes of Repose: Federalism Reigns*, 38 VAND. L. REV. 627 (1985); Daniel W. Lewis, Note, *Utah's Emerging Constitutional Weapon — The Open Courts Provision*, 1990 B.Y.U. L. REV. 1107; Martin M. Loring, Note, *Constitutional Law: Statutorily Required Mediation as a Precondition to Lawsuit Denies Access to the Courts*, 45 MO. L. REV. 316 (1980); Patrick E. Sullivan, Note, *Medical Malpractice Statute of Repose: An Unconstitutional Denial of Access to the Courts*, 63 NEB. L. REV. 150 (1983); Janice Sue Wang, Note, *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*, 62 WASH. L. REV. 203 (1989); Note, *The Fairness and Constitutionality of Statutes of Limitations for Toxic Tort Suits*, 96 HARV. L. REV. 1683 (1983).

41. Sullivan, *supra* note 40, at 170-78.

42. Wang, *supra* note 40, at 208-11.

43. *Id.*

These cases fall into two basic groups. In the first group are interpretations resulting in judicially derived *rules* — that is, interpretations that translate the remedy guarantee into statements of general applicability transcending the particulars of any given case.⁴⁴ A typical example is the rule proclaiming that the remedy clause means that no legislature can modify or eliminate a right unless it provides a quid pro quo.⁴⁵ The second basic group consists of interpretations using *balancing* — that is, interpretations that tell a court to adjudicate remedy guarantee cases based on its evaluation of the costs and benefits of the challenged statute.⁴⁶ Included in this category are interpretations allowing courts to strike down, in the name of the remedy guarantee, statutes that are “unreasonable” or “arbitrary;” these epithets, after all, are nothing more than distilled cost-benefit analyses.

Each of these basic groups contains subgroups and variations. Courts have devised a variety of rules, and judges may conduct balancing with a thumb on one or another side of the scales — “strict scrutiny” being a heavy thumb on the side of a statute’s attacker, “rational review” on the side of its defender. Further, examples of pure rules or balancing are less common than combinations of the two analyses. One example of such a combination is an analysis that proclaims the remedy clause prohibits legislatures from eliminating causes of action without providing a substitute, unless the elimination serves a compelling governmental interest.⁴⁷

A. Rule-based Interpretations

1. The Rule Imposing No Substantive Limitations

A number of state courts flatly declare that the remedy clause does not serve as a constraint on legislation; the Montana court, as already noted, uses an historical analysis to arrive at this result.⁴⁸ History, however, is not the only possible basis for this deferential stance. For example, in *Harrison v. Schrader*,⁴⁹ the Tennessee Supreme Court sustained a conventional statute of limitations, explaining that the legislature “simply provides that after 3 years no cause of

44. See *infra* notes 48-84 and accompanying text for a discussion of these types of interpretations.

45. E.g., *Estabrook v. American Hoist & Derrick, Inc.*, 498 A.2d 741, 746-52 (N.H. 1985) (provision of workers’ compensation law unconstitutional because it deprived claimants of recovery while providing no adequate quid pro quo), *overruled by* *Young v. Prevue Prods., Inc.*, 534 A.2d 714 (N.H. 1987).

46. See *infra* notes 85-91 and accompanying text.

47. E.g., *Berry v. Beech Aircraft*, 717 P.2d 670, 680-81 (Utah 1985) (absent substitute remedy, existing remedy may be abrogated if there is “a clear social or economic evil to be eliminated and the elimination of an existing legal remedy is not an arbitrary or unreasonable means for achieving the objective”).

48. See *Meech v. Hillhaven West, Inc.*, 776 P.2d 488, 491-93 (Mont. 1989) (Montana’s remedy clause is no obstacle to legislature’s authority to pass Montana Wrongful Discharge from Employment Act, which bars recovery of non-economic and punitive damages). See *supra* notes 12-15 and accompanying text for a discussion of the history of remedy clauses.

49. 569 S.W.2d 822 (Tenn. 1978).

action can arise."⁵⁰ The *Harrison* decision was based on the theory that in enacting the statute, the legislature did not eliminate a remedy for injury. It simply defined the universe of legally acknowledged "injuries" so as to exclude those acts of medical negligence that were more than three years old. Thus, the rule is identical to that of the *Meech* court: the remedy clause tells courts they must provide remedies for legally defined injuries, but does not limit a legislature's power to define what is and is not an "injury." The *Harrison* court, however, relied on political theory (or perhaps semantics) instead of history: it decided the issue based on its belief that courts adjudicate disputes while legislatures make social policy choices.⁵¹ The approach is not uncommon. The North Carolina Supreme Court, for example, declared that a legislature can "define the circumstances under which a remedy is legally cognizable and those under which it is not."⁵² These courts, then, have found that their state constitutions' remedy clause does not impose any substantive limitations on the legislature.

2. The "Vested" or "Accrued" Interest Rule

Regardless of their underlying rationales, cases such as *Meech* and *Harrison* represent the extreme of judicial deference to legislatures. Yet even these courts reject unconditional absolutism. As the *Harrison* court acknowledged, "[t]he General Assembly has the power to create new rights and abolish old ones so long as they are not vested."⁵³ This exception protecting a plaintiff's vested interest in a particular remedy appears nearly universal,⁵⁴ and it can prove confus-

50. *Id.* at 827 (quoting *Dunn v. Felt*, 379 A.2d 1140, 1141 (Del. Super. Ct. 1977), *aff'd*, 401 A.2d 77 (Del. 1979)); *accord* *Coulton v. Dewey*, 321 N.W.2d 913, 916 (Neb. 1982) (Nebraska's remedy guarantee clause "does not mean that limits may not be imposed upon the time within which one must ask courts to act").

51. If the "no restriction" approach to remedy guarantee cases derives from the premise (either historical, textual or political) that the guarantee addresses courts, not legislatures, a corollary to that theory might suggest that the guarantee authorizes, or even requires, courts to fashion remedies if the legislature or the constitution has in fact defined something as a legal injury, but not provided for redress. This approach would support expansive judicial recognition of "statutory" or "constitutional" torts. *See generally* Caroline Forrell, *The Interrelationship of Statutes and Tort Actions*, 66 OR. L. REV. 219 (1987); *see also* Schuman, *supra* note 11, at 69-75 (although judicial power to fashion remedies under article I, § 10 of Oregon Constitution generally accepted, no one has persuaded court that legislature "created a remedy-less injury that court must rectify; however, where the purpose of a statute or a regulation . . . is to prevent injury, then . . . injury resulting from its breach is a legal injury, and the injured party has a constitutional right to a remedy in due course of law."); John H. Bauman, Comment, *Implied Causes of Action in State Courts*, 30 STAN. L. REV. 1243, 1254-56 (1978) (if law creates rights but no remedy, court may create remedy). Such claims have occasionally prevailed. *See Williams v. Marion Rapid Transit, Inc.*, 87 N.E.2d 334, 340 (Ohio 1949) (court authorized to create remedy for otherwise remedy-less injured fetus). Other courts have rejected such claims. *E.g.*, *Doe v. State*, 579 A.2d 37, 48 (Conn. 1990) (rejecting argument that remedy guarantee requires court to provide attorney fees to prevailing party in constitutional litigation because failure to do so denies plaintiff remedy).

52. *See Lamb v. Wedgewood South Corp.*, 302 S.E.2d 868, 882 (N.C. 1983) (builders' and architects' statute of repose).

53. *Harrison v. Schrader*, 569 S.W. 822, 827 (Tenn. 1978) (emphasis added); *accord* *Reeves v. Ille Elec. Co.*, 551 P.2d 647, 650-53 (Mont. 1976); *Lamb*, 302 S.E.2d at 882-83.

54. If vested interests are not protected under a remedy guarantee, then they are protected

ing in situations involving statutes of limitations and of repose. For example, presume a physician negligently operates on a patient in 1975. At that time, the statute of limitations for torts, including medical malpractice, is three years from the date that the injury caused by the malpractice is or should be discovered. In 1985, the patient finally discovers the injury proximately caused by the physician's 1975 negligence, and no earlier discovery was possible. She files a malpractice action against the physician in 1987 and wins a judgment, which becomes final in 1991. In 1992, the legislature passes a three-year statute of ultimate repose in medical malpractice cases, with no discovery rule: no recovery may be had unless the action is filed within three years of the doctor's alleged negligent act.

Two facts are clear. First, the 1992 legislation, enacted after the patient's judgment is final, cannot serve to deprive her of the remedy. At that point, she unambiguously has a vested property right to it, and any deprivation requires either just compensation or due process. Thus, the new statute cannot be applied retroactively against our hypothetical victim-plaintiff.⁵⁵ Second, however, as the Supreme Court has often held, "[a] person has no property, no vested interest, in any rule of the common law. . . . The law itself, as a rule of conduct, may be changed at the will, or even at the whim, of the legislature."⁵⁶ Thus, a person who has not yet experienced medical malpractice may have had a hope or an expectation that the law would remain forever the same, but that hope or expectation has no constitutional protection. The new 1992 statute is not unconstitutional with respect to that person.

Between these extremes, the situation is less clear. At some moment, a person's expectation that she will receive a given remedy if she can establish certain facts, becomes a vested right to receive that remedy if she can establish those facts. In other words, at some moment the legislature can no longer tell the plaintiff that what happened to her will not be considered a legally cognizable injury. What is the critical moment? Possibilities include (1) when the patient receives the injury, (2) when she discovers the injury, (3) when she begins legal proceedings to recover for the injury, and (4) when the legal proceedings end.

The correct answer is: none of the above. A person acquires a vested right to a remedy for a cause of action when that cause of action "accrues."⁵⁷ Unfortunately, "accrual" has no consistent, universal, or precise definition. For ex-

under the Fourteenth Amendment. *Gibbs v. Zimmerman*, 290 U.S. 326, 332 (1933); *Ettor v. Tacoma*, 228 U.S. 148, 156 (1913); *Wilson v. Iseminger*, 185 U.S. 55, 63 (1902). Exceptions to the exception — situations in which the legislatures seemingly *can* eliminate vested interests — include "curative" acts and "emergency" legislation. See *Lichter v. United States*, 334 U.S. 742, 753-93 (1948) (Act allowing U.S. to recover excessive contractors' profits made during war applied to contracts made before enactment).

55. *But see supra* note 54 (legislature can pass retroactive "curative" or "emergency" legislation).

56. *Munn v. Illinois*, 94 U.S. 113, 134 (1876), *abrogated on other grounds by* *Nebbia v. New York*, 291 U.S. 502 (1934).

57. *Thorp v. Casey's Gen. Stores, Inc.*, 446 N.W.2d 457, 461 (Iowa 1989) (citing other cases with same holding).

ample, the Oregon Supreme Court somewhat circularly indicated that a cause of action accrues "*when an action may be maintained thereon.*"⁵⁸ In Oklahoma, an "accrued" right is "a matured cause of action or legal authority to demand redress."⁵⁹ In Michigan, tort actions accrue "when all of the elements of the cause of action have occurred,"⁶⁰ while in Iowa, a "cause of action accrues when an aggrieved party has a right to institute and maintain a suit."⁶¹ Although these definitions do not provide much clarity, they do clarify application of the "vested rights" rule in remedy guarantee cases. Under that rule, when an action accrues, the individual to whom it accrues acquires a vested right not only in pursuing that action, but, if successful, in the *remedies available under that action at the time of accrual*. Thus, the validity under the "vested right" rule of a new statute as applied to a particular plaintiff depends on the existing law at the time the plaintiff's cause of action accrues, and time of accrual, in turn, differs from state to state and from cause of action to cause of action. In other words, to determine if the "vested right" rule applies, it is necessary to determine when, under applicable local law, the cause of action accrued. If, at that moment in a particular case, the law would provide the plaintiff access to a remedy, no subsequent law can take it away.

Thus, no court has adopted a rule of absolute deference to legislatures; even the most radical courts recognize that lawmakers cannot deprive plaintiffs of vested rights. Further, no court has taken an absolute approach at the other end of the spectrum, holding that the remedy guarantee prohibits any and all legislative elimination or modification of remedies. That approach would work radical changes on well settled doctrines such as statutes of limitation, workers' compensation, and sovereign immunity. Most courts find some middle ground: they interpret the remedy guarantee to proscribe some legislation affecting remedies without completely constraining lawmakers.

3. The Rule Preserving Pre-Constitutional Remedies

One of the more common rules employed by courts declares that the remedy guarantee applies only to those causes of action in existence at the time the guarantee became part of the constitution. The remedy guarantee, in other words, freezes into permanence the law of the framers' time, but has no effect on subsequently created causes of action. Thus, a legislature cannot eliminate remedies for trespass or breach of contract. It has a free hand, however, with respect to remedies for such modern inventions as invasion of privacy or negligent infliction of emotional distress.

Even this apparently simple rule, however, has variations and complications. One variation, instead of dividing remedies into protected pre-constitutional ones and expendable post-constitutional ones, draws the line between common law remedies and statutory ones, and affords protection to only the

58. *Berry v. Branner*, 421 P.2d 996, 998 (Or. 1966) (emphasis in original).

59. *Blacketer v. State*, 485 P.2d 1069, 1070 (Okla. Crim. App. 1971).

60. *Connelly v. Paul Ruddy's Equip. Repair & Serv. Co.*, 200 N.W.2d 70, 72 (Mich. 1972).

61. *Thorp*, 446 N.W.2d at 460 (citations omitted).

former; presumably, the rationale is that what legislatures create, they can destroy.⁶²

By way of complication, suppose the legislature or the courts first develop or expand a venerable pre-constitutional common law tort such as trespass on the case or negligence by "creating" the tort of products liability; or they "extend" a tort such as battery to include intentional infliction of emotional distress; or enlarge the remedy for breach of contract by eliminating the common law privity requirement. If the legislature subsequently eliminates or modifies the newly created cause of action by returning to the original rule — thus depriving some plaintiffs of a remedy — has it violated the constitution? In other words, does the constitutional guarantee grow to cover and preserve evolutionary post-constitutional growth in the law? If so, how might a court distinguish evolutionary "growth" from outright innovation? Should a court examine the facts of the case before it, putting itself in a mental time capsule, and declare the remedy "pre-constitutional" only if the plaintiff would have had a successful cause of action on the present facts, had they arisen at the time the remedy guarantee entered the state's constitution? Conversely, should the court ask whether the plaintiff's claim falls within the old tort as it has developed in modern times?

The Kentucky Supreme Court wrestled with this issue in a series of cases challenging the constitutionality — under Kentucky's three remedy guarantees⁶³ — of a builders,' architects,' and engineers' statute of repose. The law provided that no action could be brought against these professionals after five years had elapsed from the time the building was substantially completed — regardless of when an injury caused by their negligence was discovered. In the first challenge, *Saylor v. Hall*,⁶⁴ the court announced its rule:

The legislature's power to enact statutes of limitation governing the time in which a cause of action must be asserted by suit is, of course, unquestioned. In this state, however, it is equally well settled that the legislature may not abolish an existing common-law right of action for personal injuries or wrongful death caused by negligence.⁶⁵

Under that rule, the statute of repose was unconstitutional, because it eliminated a pre-constitutional remedy as that remedy had developed through time. Ten years later, in *Carney v. Moody*,⁶⁶ the Kentucky Supreme Court refined its rule and narrowed the class of protected remedies by employing the "time capsule"

62. *E.g.*, *Moreno v. Sterling Drug, Inc.*, 787 S.W.2d 348, 355-57 (Tex. 1990) (legislature may limit recovery in wrongful death claims because wrongful death actions were created by legislation).

63. KY. CONST. Bill of Rights, § 14 ("All courts shall be open, and every person for an injury done him in his lands, goods, person or reputation, shall have remedy by due course of law, and right and justice administered without sale, denial or delay"); *id.*, Legislative Department, § 54 ("The General Assembly shall have no power to limit the amount to be recovered for injuries resulting in death, or for injuries to person or property"); *id.*, General Provisions, § 241 ("Whenever the death of a person shall result from an injury inflicted by negligence or wrongful act, then, in every such case, damages may be recovered for such death, from the corporations and persons so causing the same").

64. 497 S.W.2d 218 (Ky. 1973).

65. *Id.* at 224.

66. 646 S.W.2d 40 (Ky. 1983), *overruled by* *Perkins v. Northeastern Log Homes*, 808 S.W.2d 809 (Ky. 1991).

approach, allowing the statute to operate against the plaintiff because the 1983 facts would not have amounted to a recognized cause of action in 1891, the date the last remedy guarantee entered the Kentucky Constitution.⁶⁷ Finally, in *Perkins v. Northeastern Log Homes*,⁶⁸ the court abandoned the "time capsule" approach and returned to the more expansive interpretation of remedy protections articulated in *Saylor*. The plaintiff in *Perkins* claimed she had developed cancer from fumes the builder had used to treat the log components of her home. In response to the defendants' argument that *Carney* disposed of the plaintiff's claim because she would have had no cause of action on the present facts had they been alleged in 1891, the court held:

The protection afforded to jural rights is not limited definitively to fact situations existing in the year 1891. . . . [W]e do not agree that anything as fundamental as the cause of action for personal injury or wrongful death based on negligence, or, indeed, at this point in time, as the cause of action against a manufacturer based on liability in tort for a defective product, can be abolished at will by the General Assembly. Liability in tort for a defective product . . . is simply liability for negligent conduct as that concept has evolved over the last forty years. . . . Product liability law is nothing more than the continuing historic evolution of the ancient cause of action for trespass on the case as that principle now applies in products liability cases.⁶⁹

Interestingly, the court justified its activism by citing the history of the Kentucky Constitutional Convention, quoting a delegate to the effect that "the real root of Kentucky's governmental problems was the almost unlimited power of the General Assembly, [and that] 'the principal, if not the sole purpose of the constitution which we are here to frame, is to restrain its will and restrict its authority.' "⁷⁰

4. The "Quid Pro Quo" Rule

Another rule frequently used to strike down legislative elimination of remedies is the so-called quid pro quo rule, which allows the legislature to eliminate one remedy or cause of action only if it provides a replacement. Even in its purest form — that is, not complicated by combination with some other rule — the quid pro quo rule raises numerous questions: must the replacement be "sufficient," and if so, who determines sufficiency, courts or legislatures? When a remedy-eliminating statute does provide a quid pro quo, must a subsequent amendment to that statute that further reduces available remedies provide an additional quid pro quo, in a sort of analogue to the "pre-existing duty" rule of common law contracts? Must the replacement remedy benefit the particular individual whose original remedy has been eliminated? Or is a general, societal quid pro quo acceptable, as might happen when one worker's tort claim suffers

67. *Id.* at 41.

68. 808 S.W.2d 809 (Ky. 1991).

69. *Id.* at 816.

70. *Id.* at 812 (quoting Legislative Research Commission, RESEARCH REPORT NO. 137 (January 1987) (quoting 4 DEBATES OF THE KENTUCKY CONSTITUTIONAL CONVENTION OF 1890)).

elimination under a workers' compensation law, but other workers, who would not have had a tort claim, receive compensation under the same law?

The New Hampshire Supreme Court confronted some of these problems in a 1985 case, *Estabrook v. American Hoist & Derrick, Inc.*,⁷¹ in which plaintiffs argued that a 1978 amendment to the state workers' compensation scheme violated the remedy guarantee by depriving workers of their right to sue fellow-employee tortfeasors. That right had existed under a prior workers' compensation law since its inception in 1911; the original statute only disallowed tort claims by employees against employers. Plaintiffs conceded that, in general, "workers' compensation schemes satisfy due process requirements if they provide a quid pro quo or an adequate substitute for common law rights," but argued that "[b]ecause the provision barring fellow employee suits was added by amendment, . . . there must be an additional substitute remedy given in exchange for the abrogation of that right."⁷²

The court sided with the plaintiffs, holding that when an amendment to existing legislation deprived claimants of a right that was not "fundamentally and substantially" related to the right originally affected by the legislation, then the legislature had to provide a new quid pro quo — some additional benefit to the claimant.⁷³ The right to sue a fellow employee pre-existed the original workers' compensation statute, and remained in existence with that statute for nearly seven decades.⁷⁴ The court had first evaluated workers' compensation in the early part of the century, and approved it because it took away some rights from employees but provided them with some benefits in return. That trade-off, however, did not include the employee's loss of the right to sue fellow employees; thus, the new statute could not survive without offsetting the newly-lost right to sue fellow employees with some new quid pro quo.

The court then turned to defendants' fall-back argument that, in fact, the amendment provided an adequate quid pro quo: in return for relinquishing a tort claim against a fellow employee, an injured plaintiff-employee acquired immunity from suit if she ever injured a co-worker and became a defendant-employee. This argument also proved unconvincing to the court:

71. 498 A.2d 741 (N.H. 1985), *overruled by* *Young v. Prevue Prods., Inc.*, 534 A.2d 714 (N.H. 1987).

72. *Id.* at 746-47.

73. *Id.*

74. *Id.* at 748. Then-New Hampshire Supreme Court Justice David Souter dissented from this holding, and his opinion later achieved majority status. See *Young*, 534 A.2d at 716-17 (legislative amendment to workers' compensation statute eliminating consortium actions against employer by spouse of injured worker requires no additional quid pro quo); see also *Thone v. Liberty Mut. Ins. Co.*, 549 A.2d 778, 780 (N.H. 1988) (elimination of right to sue employer's workers' compensation carrier does not violate due process because workers' compensation law, in general, provides adequate quid pro quo). For an opinion agreeing with *Estabrook*, see *Grantham v. Denke*, 359 So. 2d 785, 787-89 (Ala. 1978) (legislative extension of immunity to additional parties must be supported by corresponding commensurate extension of obligation from those parties). *Contra* *Jadosh v. Goe-ringer*, 275 A.2d 58, 60-61 (Pa. 1971) (quid pro quo for new limitation of remedy determined by examination of general benefits conferred by entire workers' compensation scheme; no new benefits required).

Although employees as a class are granted immunity from common law negligence actions under the 1978 amendment, this immunity benefits employees only as potential defendants, not as potential plaintiffs. It is the injured employee whose rights are abolished under the amendment; consequently, it is the injured employee who is entitled to a satisfactory substitute for his rights.⁷⁵

Thus, in quid pro quo jurisdictions, courts must decide if a new law can simply eliminate or modify a remedy and then call some pre-existing remedy the "substitute" or "alternative." They must also decide whether to permit the legislature to justify one person's loss of a remedy with another person's gain — or with a gain by the same person in a different role.

5. Complex Rules

Frequently, the two principal analytical rules are combined into a two-step analysis, stated by the Connecticut Supreme Court as follows: "The adoption of article first, section 10, recognized all existing rights and removed from the power of the legislature the authority to abolish those rights in their entirety. Rather, the legislature retains the power to provide reasonable alternatives to the enforcement of such rights."⁷⁶ A statute will survive remedy clause scrutiny, then, unless it purports to eliminate a common-law remedy without providing an adequate substitute. Phrased positively, this complex rule allows legislatures total discretion with respect to post-constitutional remedies, while it allows elimination or modification of pre-constitutional remedies only if a quid pro quo is provided.

While this two-step analysis can be more precise than either of its component parts, it can also be more problematical because each component brings with it its own complexities, as the Connecticut case quoted above demonstrates. That case — a challenge to a no-fault automobile insurance statute — required the court first to determine that the common law at the date of the founding envisioned a cause of action for negligent operation of an automobile.⁷⁷ Then, the court examined whether the no-fault scheme, in replacing that tort with a scheme that spread costs and benefits across a general population, had provided an adequate quid pro quo.⁷⁸ The court concluded that the legislature had provided an adequate quid pro quo.⁷⁹

By contrast, the Kansas Supreme Court, using the same rule to adjudicate a challenge to a similar statute, reached the opposite result.⁸⁰ In *Kansas Malpractice Victims v. Bell*,⁸¹ plaintiffs challenged a statute that limited recovery in med-

75. *Estabrook*, 498 A.2d at 750.

76. *Gentile v. Alermatt*, 363 A.2d 1, 12 (Conn. 1975), *appeal dismissed*, 423 U.S. 1041 (1976).

77. *Id.* at 11 (constitutional framers envisioned courts redressing these type of injuries).

78. *Id.* at 15 ("the law requires a reasonable alternative and not an exact equation of remedies").

79. *Id.* at 11, 15.

80. *Kansas Malpractice Victims v. Bell*, 757 P.2d 251, 264 (Kan. 1988) (recovery cap and delay in payment of future losses until later years unconstitutional because they provided no quid pro quo).

81. 757 P.2d 251 (Kan. 1988).

ical malpractice cases. The court declared the rule in such cases to be: "The legislature can modify the common law so long as it provides an adequate substitute remedy for the right infringed or abolished."⁸² The court continued:

There can be little doubt that [the challenged statute] infringes on [various common law remedies]. . . . [W]e must then decide if the plaintiff has received a *quid pro quo*, or an adequate substitute remedy. [D]efendant and intervenors argue that the plaintiff receives a guaranteed recovery because doctors will have available, affordable insurance coverage. . . . The argument . . . ignores the fact that health care providers have been required to carry malpractice insurance since 1976. Thus a plaintiff's source of recovery is already provided by [Kansas law]. . . . The "substitute" they propose here is nothing new in the law. [The new statute] removes a substantial right of the plaintiff and gives him *nothing* in return.⁸³

Gentile, *Kansas Malpractice Victims*, and *Estabrook* all deal either directly or indirectly with the question of whether a general social benefit can serve as an adequate quid pro quo for an *individual's* loss of remedy, particularly when the losing individual has not benefitted personally from the general substitute. That issue calls attention to the argument that a quid pro quo rule allowing general social benefits to compensate for individuals' particular loss of remedy, is not a rule at all but a call for ad hoc balancing. The "rule" reduces to this: a state can eliminate a cause of action when doing so benefits society in general. This is precisely the rationale the *Gentile* court offered: "Individual rights and remedies must at times and of necessity give way to the interests and needs of society."⁸⁴ Many other courts incorporate an explicit balancing approach into their analysis of remedy guarantees.

B. Balancing Tests

The remedy clause cases encountered thus far interpret the general rule embodied in the remedy guarantee ("The state must provide a remedy for every injury") by translating it into a more qualified and precise rule — for example, "Legislators may eliminate remedies that are not vested," "Legislators may not eliminate pre-constitutional remedies," or "Legislators must provide equivalent substitutes when eliminating a remedy." Although these rules give direction to those who would determine the constitutionality of a government policy choice, application of the rules does not require or permit any evaluation of whether or not the policy choice is substantively correct, wise, or rational. Thus, in deciding that Montana's legislature could validly enact its wrongful discharge statute, the Montana Supreme Court in *Meech v. Hillhaven West, Inc.*⁸⁵ did not take a position on the statute's social utility or the hardship it might inflict; the court simply declared that in making its policy choice the legislature followed the con-

82. *Id.* at 263.

83. *Id.* at 263-64.

84. *Gentile v. Alermatt*, 363 A.2d 1, 21 (Conn. 1975), *appeal dismissed*, 423 U.S. 1041 (1976).

85. 776 P.2d 488 (Mont. 1989).

stitutional rule allowing denial of all but vested rights.⁸⁶

Although courts articulate these rules in response to challenges of particular statutes, the rules are stated in general terms so that the court can apply them to different statutes in the future. For instance, if Montana legislators contemplate a medical malpractice statute of repose, they can know with certainty that it will not violate the remedy guarantee. Thus, rules provide relatively clear pre-enactment guidance to legislators who take seriously their vow to uphold the constitution. The rules also serve as post-enactment guidance to courts and citizens who are trying to determine whether a particular legislative pronouncement is valid. This clarity, however, comes at the cost of sensitivity. A *per se* rule, by its nature, allows no flexibility for the nuances, particularities, or policy implications of particular cases.

In constitutional balancing, a court identifies, evaluates and then compares the costs and benefits of a policy embodied in a statute or other form of government action. The judges, in other words, interpret a constitutional command to the state — for example, “The state must provide a remedy for all injuries” — by translating it into a command calling for a judicial weighing process — for example, “The state may deny a remedy for injuries only when judges decide that the benefits from such a denial outweigh the costs.” In constitutional balancing, the benefits are usually some sort of “state interest” allegedly advanced by the statute under challenge, and the cost is a loss in individual rights.⁸⁷ A court engaged in constitutional balancing, then, reviews the legislature’s substantive policy choice. The special function of this judicial review is not to apply a *per se* constitutional command about what categories of statutes might be passed; rather, it is to ensure that when the legislature formulates a policy choice, it gives adequate consideration to some constitutionally privileged factor such as an individual’s right to a remedy for injury.

Balancing allows the court to avoid highly abstracted, over-general, formalistic solutions to the conflicts presented in case-sensitive situations. In other words, it lets courts decide particular conflicts. But because each statute advances a different state interest and burdens a different individual right, a balancing decision in one case is not applicable to others, except by rough analogy or “fact-matching.” For example, suppose that a state court holds that the legislature’s decision to limit medical malpractice remedies passes constitutional scrutiny because the social utility of reducing physicians’ insurance premiums outweighs plaintiffs’ right to large judgments. That decision tells legislators almost nothing about the possible constitutionality of a builders’ and architects’ statute of repose. Further, such an interpretation turns one kind of utterance (a rule telling government how it must act) into something else entirely (a process telling courts how to judge government action). Thus, constitutional balancing is not always a satisfactory analysis. Although it has been frequently and strenu-

86. *Id.* at 496.

87. See generally Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943 (1987).

ously criticized by scholars⁸⁸ and by at least one sitting Supreme Court Justice,⁸⁹ balancing in one form or another⁹⁰ is nevertheless the jurisprudence of choice in federal constitutional law.⁹¹

A different situation prevails in the states, at least with respect to remedy guarantees. Pure balancing occurs rarely.⁹² Yet because it has certain advantages, state courts fashioning interpretations of remedy guarantees frequently combine some form of balance with *per se* rules. In such cases, the courts first formulate and apply a rule, which provides precision, predictability, and prospective guidance. Then, however, these courts add a balancing step in those situations in which blind application of the rule produces an absurd or otherwise intolerable result. Balancing, in other words, lurks in the background as a safety mechanism if the rule misfires.⁹³

A good example of this complex methodology occurred in a 1985 Utah case, *Berry v. Beech Aircraft Corp.*,⁹⁴ in which a plane crash victim's estate challenged a products liability statute of repose that cut off the remedy against the plane's manufacturer.⁹⁵ The court rejected the "semantic argument" that the legislature could define what was and was not a legally cognizable injury, while it simultaneously recognized that "[t]o hold every statute of repose unconstitutional without regard to the legislative purpose could result in a legislative inability to cope with widespread social or economic evils."⁹⁶ The court developed a two-part analysis:

First, [the constitution] is satisfied if the law provides an injured person an effective and reasonable alternative remedy 'by due course of law'

88. *E.g., id.*

89. Justice Scalia, concurring in *Bendix Autolite Corp. v. Midwesco Enters., Inc.*, 486 U.S. 888 (1988), likened balancing to "judging whether a particular line is longer than a particular rock is heavy," and noted that to the extent such weighing was possible, it was "squarely within the responsibility of Congress," not the courts. *Id.* at 897 (Scalia, J., concurring). He elaborated on his opinion in *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989).

90. "Levels of scrutiny" is merely a form of balancing with a more or less heavy thumb applied to one side of the scales.

91. *E.g., City of Renton v. Playtime Theaters, Inc.*, 475 U.S. 41 (1986) (freedom of expression); *Mathews v. Eldridge*, 424 U.S. 319 (1976) (procedural due process); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973) (equal protection clause); *Roe v. Wade*, 410 U.S. 113 (1973) (substantive due process); *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970) (dormant commerce clause); *Terry v. Ohio*, 392 U.S. 1 (1968) (search and seizure).

92. Occasionally a court will decide on the constitutionality of a remedy-denying statute *exclusively* by balancing. *E.g., Strahler v. St. Luke's Hosp.*, 706 S.W.2d 7, 11-12 (Mo. 1986) (en banc) (striking down medical malpractice statute of repose because cost to people in plaintiff's position outweighs state's interest in alleviating perceived medical malpractice crisis).

93. For a United States Supreme Court "test" involving analytical rules in combination with a fall-back balancing component, see *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 287-93 (1981) (three-step test plus balancing methodology used to determine if congressional action under Commerce Clause violates Tenth Amendment restrictions). This test was rendered obsolete in *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 531, 546-57 (1985) (Tenth Amendment imposes no restrictions on congressional action under Commerce Clause).

94. 717 P.2d 670 (Utah 1985).

95. *Id.* at 672.

96. *Id.* at 680.

for vindication of his constitutional interest. The benefit provided by the substitute must be substantially equal in value or other benefit to the remedy abrogated in providing essentially comparable substantive protection to one's person, property, or reputation, although the form of the substitute remedy may be different. . . .

Second, if there is no substitute or alternative remedy provided, abrogation of the remedy or cause of action may be justified only if there is a clear social or economic evil to be eliminated and the elimination of an existing legal remedy is not an arbitrary or unreasonable means for achieving the objective.⁹⁷

The quid pro quo rule in the court's analysis provides a first or rough cut; balancing serves to refine or fine tune the outcome.⁹⁸ The products liability statute failed under this test. It provided no alternative remedy, thus triggering the balance — a form of intermediate scrutiny requiring the state to prove the statute was a rational means of eliminating a "clear social or economic evil."⁹⁹ The court conducted its own independent inquiry into the so-called "tort crisis" relied upon by the legislature, and concluded that, first, it didn't exist (thus no "clear evil"), and second, even if it did, a ten-year statute of repose wouldn't resolve it because cases that old were rarely litigated (thus no rational relationship).¹⁰⁰

Perhaps the most complex — and popular — interpretation of the remedy guarantee involves a three-step combination of rules and balances. The *locus classicus* for this method is a 1973 Florida case, *Kluger v. White*.¹⁰¹ At issue in that case was a statute eliminating a plaintiff's right to sue for minor property damage to her automobile. The court rejected absolute approaches, refusing to permit legislative destruction of "a traditional and long-standing cause of action upon mere legislative whim,"¹⁰² while also refusing to "adopt a complete prohibition against . . . legislative change."¹⁰³ Instead, guided by neither text nor history, the court adopted the following rule:

[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 of Florida, the Legislature is without power to abolish such a right with-

97. *Id.*

98. In *Lucas v. United States*, 757 S.W.2d 687 (Tex. 1988), the court, in determining that a cap on damages obtainable in medical malpractice cases violated the Texas Constitution, held that the statute provided no alternative remedies and *therefore* was unreasonable and arbitrary. *Id.* at 690-91. This analysis seems to merge the first step of the *Berry* analysis into the second: the existence of an alternative remedy, and its adequacy, become part of an overall "reasonableness" test. *Accord*, *Nelson v. Krusen*, 678 S.W.2d 918, 921-23 (Tex. 1984) (existence of alternative remedies contributes to statute's reasonableness).

99. *Berry*, 717 P.2d at 680.

100. Four years later, Utah's builders' and architects' statute of repose suffered a similar fate. *Sun Valley Water Beds of Utah, Inc. v. Hughes & Son Inc.*, 782 P.2d 188, 192-94 (Utah 1989).

101. 281 So. 2d 1 (Fla. 1973).

102. *Id.* at 4.

103. *Id.*

out providing a reasonable alternative . . . unless the Legislature can show an overpowering public necessity for the abolishment of such a right, and no alternative method of meeting such public necessity can be shown.¹⁰⁴

Step one is a variation on the "common-law preservation" rule, allowing the legislature free reign to modify, reduce or eliminate post-constitutional causes of action that the legislature itself created. Step two, the quid pro quo rule, tells the legislature that it can modify or eliminate even common-law and pre-constitutional statutory causes of action if it provides a reasonable alternative. Step three, the balance, announces that even if the cause of action is a pre-constitutional or common law one, and even if there is no adequate quid pro quo, the legislature can still alter or eliminate the cause of action if it finds "an overpowering public necessity for the abolishment of such right, and no alternative method of meeting such public necessity can be shown" — a form of strict scrutiny balancing.¹⁰⁵ This three-step test sometimes appears as a two-tier test, thus: new legislative rights exist at some lower tier, and can be eliminated for any rational reason; old or common-law rights, occupying a higher tier, can be eliminated only if the legislature either provides a sufficient substitute, or can demonstrate that the elimination is necessary to achieve a pressing public necessity. The Alabama court, applying this method, struck down a products liability statute of repose because it found the statute did not, in fact, alleviate any demonstrable social evil.¹⁰⁶ Again, as the sensitivity of the analysis increases, so too does its complexity. Under the three-step test, courts must decide, among other things: (1) how narrowly or liberally to define the universe of pre-constitutional or "common-law" causes of action; (2) what types of substitute remedies are adequate; and (3) how to identify and then quantify opposing and incommensurable "interests."

PART III: TEXT, CONTEXT, AND INTERPRETATION

None of the existing solutions to the remedy clause problem is completely satisfactory. The various rule approaches¹⁰⁷ are all, to some extent, blunt instruments. Allowing a legislature to eliminate remedies at will seems to fly in the face of the guarantee's plain language, and runs the risk of majoritarian abuse. To distinguish between common law and legislative causes of action is to elevate form over substance. Moreover, to protect pre-constitutional remedies and not modern ones is to prevent modern courts and legislatures from purging anachronisms such as heart-balm statutes. To allow elimination contingent upon some adequate quid pro quo is not a solution to the remedy clause problem, but a restatement of it, because the determination of the quid pro quo's

104. *Id.*

105. *Id.*

106. *Lankford v. Sullivan, Long & Hagerty*, 416 So. 2d 996, 1001-03 (Ala. 1982). The Texas courts have also used this methodology. *E.g.*, *Sax v. Votteler*, 648 S.W.2d 661, 667 (Tex. 1983) (striking down statute that removed tolling of two-year period of limitations in medical malpractice claims as applied to minors).

107. *See supra* notes 48-84 and accompanying text for a discussion of rules approaches.

adequacy is little more than a determination of whether or not a remedy has in fact been lost. And the problems with various balancing tests¹⁰⁸ are well-known. They permit courts to act like legislatures, accommodating competing policy claims; they provide no guidance to legislators or litigants; and they call for the comparison of incommensurables.

The various interpretations, then, are flawed. Further, they are imperfect constitutional law. Before discussing a better alternative, however, it is necessary to determine the applicable evaluative criteria. These are not self-evident.

A. *Criteria of Constitutional Interpretation*

Effective legislation is rational, clear, precise, and consistent with other legislation on the same subject within the same jurisdiction. These requirements are easily stated and relatively uncontroversial.¹⁰⁹ The same cannot be said for standards used to evaluate law made by judges. The difference is that judge-made law is always an *interpretation*.

Legislation is entirely prospective: it announces a new principle for future application. Although it may have a history, it owes allegiance to no past, and while it may have a predecessor, it owes allegiance to no prior text. It does not embody an attempt to *interpret*, to translate one utterance into another one. Its value as well-crafted law does not depend on the accuracy with which it represents any pre-existing text.

Judge-made law, on the other hand, always looks backward as well as forward. This is true whether the judge is making common law, interpreting statutes, or applying constitutional judicial review.

A common law judge announcing the outcome of what Ronald Dworkin calls a "hard case"¹¹⁰ has, according to the accepted practices of the legal profession, some obligation to explain how the new rule grew organically from relevant precedent. In that sense, the outcome is an interpretation of the past, and is constrained by it.¹¹¹

Cases construing and applying ambiguous or disputed statutes, although colored by such extra-textual matters as legislative history, intention, maxims of construction, or even general political principles,¹¹² always acknowledge that the task at hand is statutory *interpretation*. The court's rule, in other words, must show some fidelity to an existing text. The court operates under an obliga-

108. See *supra* notes 85-91 and accompanying text for a discussion of balancing tests.

109. There is more room for disagreement and complexity when the question is not one of merit (is this a well-made and effective law?) but one of competence (is this a law that the legislature is allowed to make?). Thus, the questions whether a law is unconstitutionally overbroad or vague, or so irrational that it violates the Due Process Clause can be complex and controversial. *E.g.*, *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). Whether the law is so vague, imprecise, or silly as to be a bad law usually is not. *E.g.*, *Williamson v. Lee Optical*, 348 U.S. 483, 486-88 (1955).

110. RONALD DWORKIN, *LAW'S EMPIRE* 225-312 (1986).

111. *Id.*

112. See generally WILLIAM N. ESKRIDGE, JR. & PHILIP P. FRICKEY, *CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY* 569-828 (1988).

tion to demonstrate an equivalency relationship between the statute as written by the legislature, and the statute as re-presented by the court.

A court's constitutional law is also both backward-looking and forward-looking. Even the most enthusiastic "non-interpretivist"¹¹³ would concede that, at least when the court is called upon to decide if a statute violates some specified constitutional provision like a remedy guarantee,¹¹⁴ the court's task is to interpret an existing text (and perhaps an existing body of canonical precedent as well) in such a way as to regulate future action. For this reason, constitutional interpretation must meet the criteria of good legislation — it must be sensible, clear, precise and consistent — and more: it must also demonstrate fidelity to the constitution itself.

This is not a naive call for literalism or narrow originalism.¹¹⁵ The requirement of "fidelity" does not mean one-to-one correspondence; it means faith and respect, as one means when speaking of a person's fidelity to a leader, a cause, or a principle. And "the constitution" toward which this fidelity is owed is not just the text; it is that much larger complex of principles, aspirations, and political theories the document embodies. The requirement of "fidelity to the text," in this context, is the relatively obvious and uncontroversial requirement that a court's explanation of the meaning of a given constitutional provision should demonstrate some logical connection to the words it purports to interpret, including their source, history, and position in the overall document. Further, "fidelity" requires that the court be sensitive to the political culture of the constitutionally-defined community and reflect the community's most deeply held constitutive traditions.¹¹⁶ Finally, like other types of prospective law, constitutional interpretation should be logical enough to avoid producing absurd out-

113. Thomas Grey, in *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703 (1975), distinguishes between "non-interpretivist" and "interpretivist" theories of judicial review. The former allow judges to strike down legislation because it runs counter to principles that are foundational and fundamental, even though they might not be found in the text, history or sources of the Constitution; "interpretivist" theories require judges to rely on the document itself and inferences that can be directly drawn from it. The relation between judicial pronouncements of constitutional law and the constitution is, of course, a matter of intense, passionate and endless debate. For a convenient summary, see generally SOTIRIOS A. BARBER, ON WHAT THE CONSTITUTION MEANS (1984); PHILIP BOBBITT, CONSTITUTIONAL INTERPRETATION (1991); PHILIP BOBBITT, CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION (1982). Several of the more influential theories are presented in edited versions in MODERN CONSTITUTIONAL THEORY: A READER 1-113 (John H. Garvey & T. Alexander Aleinikoff eds., 2d ed. 1991); A CONSTITUTIONAL LAW ANTHOLOGY 1-56 (Michael J. Glennon ed. 1992).

114. Much of the current scholarship focuses on the legitimacy of judicial review itself, or on the extent to which judges exercising it can or cannot "create" or "discover" rights not explicitly named in the Constitution. See *supra* note 113. Because the problem examined in this Article is the meaning to be given a particular text, issues of judicial review and non-textualism are not implicated.

115. For discussion of the merits and drawbacks of originalism in its various forms, see Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204 (1980) (describing and criticizing types of originalism); Richard S. Kay, *Adherence to the Original Intentions in Constitutional Adjudication: Three Objections and Responses*, 82 NW. U. L. REV. 226 (1988).

116. Hanna Pitkin, in *The Idea of a Constitution*, 37 J. LEGAL EDUC. 167, 167-68 (1987), makes the often-forgotten point that a constitution, after all, *constitutes*: "it is a people's fundamental make-up . . . a product of their particular history and social conditions." *Id.*

comes, clear enough to guide ordinary citizens, and precise enough to have some meaning beyond unfocused exhortation.

B. Interpreting the Remedy Guarantees

According to these criteria, the best interpretation of the remedy guarantee in one state may differ radically from the best interpretation in another state, even when the wording of the two provisions is identical. That is because, as legal scholars have belatedly discovered, a text's meaning cannot be separated from its speaker, its audience, its genre — from its context.¹¹⁷ Thus, the command to provide a remedy for injuries means one thing if the words occur in the charter of a people noted for distrust of renegade legislatures¹¹⁸ and something quite different in the charter of a populist community with an historical anti-judicial bias.¹¹⁹ Thus, the appropriate inquiry is not, "What does the remedy guarantee mean?" but "What does the remedy guarantee mean in the constitution of State X?" To demonstrate how this inquiry might be answered reflecting the general criteria described above¹²⁰ in the particularities of one context, let X equal Oregon.

1. The Proposed Rule

Oregon's remedy guarantee provides that "every man shall have remedy by due course of law for injury done him in his person, property or reputation."¹²¹ Oregon courts should adopt the following interpretation of this text: *Although the state may decide what events constitute legally cognizable injuries, the state may not deny any person the opportunity to seek a legal remedy for such injuries, unless the denial is a well-settled and traditional constraint or a contemporary version of one.* This rule is textually, historically, and culturally appropriate; further, it provides precision, clarity, and predictability without sacrificing flexibility.

2. The Proposed Rule and Precedent

The Oregon Supreme Court "has written many individually tenable but inconsistent opinions" about the remedy clause.¹²² Further, the opinions "have given little attention to the clause itself."¹²³ The two most recent cases capture this inconsistency and non-textualism.

117. See generally Stanley Fish, *Working on the Chain Gang: Interpretation in Law and Literature*, 60 TEX. L. REV. 551 (1982).

118. See *supra* notes 63-70 and accompanying text for a discussion of such a charter.

119. See *supra* notes 16-19, 22 and accompanying text for a discussion of an anti-judicial charter.

120. See *supra* notes 109-19 and accompanying text for a list of factors that should guide constitutional interpretation.

121. OR. CONST. art. I, § 10.

122. *Hale v. Port of Portland*, 783 P.2d 506, 518 (Or. 1989) (Linde, J., concurring); see also Schuman, *supra* note 11, at 50 (cases "indicate a judicial inability to formulate a consistent rule for applying the constitutional mandate").

123. *Hale*, 783 P.2d at 518 (Linde, J., concurring).

In *Hale v. Port of Portland*,¹²⁴ the Oregon Supreme Court considered a challenge to a statute that limited damages a plaintiff might recover against a port district and a city.¹²⁵ In rejecting that challenge, the court cited earlier cases to the effect that the remedy clause “is not violated when the legislature alters (or even abolishes) a cause of action, so long as the party injured is not left entirely without a remedy.”¹²⁶ This is a quid pro quo interpretation of the remedy clause. Within the next year, the court sustained the constitutionality of a products liability statute of repose, citing an earlier case to the effect that

it has always been considered a proper function of legislatures to limit the availability of causes of action by the use of statutes of limitation so long as it is done for the purpose of protecting a recognized public interest. It is in the interest of the public that there be a definite end to the possibility of future litigation resulting from past actions.¹²⁷

This approving citation seemed to imply that the court would strike down remedy limitations if they were not in the public interest — a classic example of the balancing approach. Later in the opinion, however, the court declared that “[t]he legislature has the authority to determine what constitutes a legally cognizable injury. It has chosen to declare that injuries resulting from defective products are not legally cognizable if they occur more ‘than 8 years after the date on which the product was first purchased. . . .’ ”¹²⁸ The court then distinguished a New Hampshire case in which that state’s court required remedy limitations to be “reasonable,” stating that the Oregon court is “not empowered to strike down a duly enacted law simply because we believe it is unwise, unnecessary, or unsuccessful. Apparently, the Supreme Court of New Hampshire is so empowered.”¹²⁹ This is a straightforward enunciation of the “no restriction” approach exemplified by *Meech* and *Harrison*. Thus, the cases reveal no consistent established interpretation of the remedy guarantee. Precedent would not prevent Oregon courts from adopting the proposed rule.

Further, because the rule does not authorize judicial balancing, it is in harmony with the judicial culture developed by the Oregon Supreme Court in recent decades. In subjects as diverse as home rule,¹³⁰ free speech,¹³¹ religious freedom,¹³² and criminal procedure,¹³³ the court has explicitly eschewed balancing because it “give[s] no guidance to government and leave[s] every policy dispute to judicial decision,” to be resolved according to “the court’s own view of competing public policies.”¹³⁴ Instead, the court prefers that “judicial interpre-

124. 783 P.2d 506 (Or. 1989).

125. *Id.* at 507.

126. *Id.* at 514.

127. *Sealey v. Hicks*, 788 P.2d 435, 438 (Or.) (quoting *Josephs v. Burns & Bear*, 491 P.2d 203, 207-08 (Or. 1971)), *cert. denied*, 111 S. Ct. 65 (1990).

128. *Id.* at 439 (quoting *Burns*, 491 P.2d 203 (1971)).

129. *Id.*

130. *City of LaGrande v. Public Employee Retirement Bd.*, 576 P.2d 1204 (Or. 1978).

131. *State v. Robertson*, 649 P.2d 569 (Or. 1982).

132. *Salem College & Academy v. Employment Div.*, 695 P.2d 25 (Or. 1985).

133. *State v. Brown*, 721 P.2d 1357 (Or. 1986).

134. *LaGrande*, 576 P.2d at 1210.

tations . . . strive to articulate . . . directives" that are "derived from a constitutional standard. . . ." ¹³⁵

3. The Proposed Rule and the Constitutional Text

The proposed rule meets this preference for fidelity to the constitutional text. Most of the analyses from state courts either treat the text superficially or not at all. Those that refer to it focus on the concepts of "injury" and "remedy," raising questions about who may define what acts are legally injurious and what remedial compensation is adequate. These courts pass over a phrase that colors the entire guarantee. For that guarantee promises not only some kind of remedy for certain types of injuries, but a remedy that is available in "due course of law."¹³⁶ Parties alleging an injury receive no guaranteed remedy; rather, they receive guaranteed access to a "due course" of legal procedures. Plaintiffs only gain entitlement to a remedy if they can make a sufficiently convincing case. The procedures, in other words, are logically prior to the remedy.

The words of the remedy guarantee, therefore, indicate that it addresses the procedures available to acquire remedies for injuries, not the substantive content of laws that define those injuries. Typically, courts adopting this interpretation also hold that the guarantee is addressed to courts, not to legislatures.¹³⁷ The two distinctions — procedure/substance, on the one hand, and courts/legislatures on the other hand — are not fungible, because legislators occasionally pass statutes that regulate judicial or quasi-judicial procedures rather than substance. Rules of civil and criminal procedure, statutes of limitations, and statutes of repose do not define what historical events qualify in a given polity as "injuries;" rather, they govern the litigation process available to a person who wants to acquire the available remedy for an injury as defined elsewhere, either in legislation or common law. For this reason, the text supports a rule based not on what branch of government is addressed, but on the content of the challenged government action — regardless of its author.

4. The Proposed Rule and its Context

Oregonians value public discourse and discussion of policy issues, as demonstrated by their insistence on citizen-legislators,¹³⁸ their devotion to initiative and referendum,¹³⁹ and their constitutional guarantee that the people may freely assemble "together in a peaceable manner to consult for the common

135. *Id.*

136. OR. CONST. art. I, § 10.

137. *E.g.*, *Meech v. Hillhaven*, 776 P.2d 488, 493 (Mont. 1989).

138. Article IV, § 10 of the Oregon Constitution provides for biennial legislative sessions. The effect of this provision is to inhibit the emergence of a class of professional legislators.

139. OR. CONST. art. IV, § 1. The populist legislative innovations of initiative and referendum entered Oregon politics at an early stage, and were known throughout the country as "The Oregon Plan;" see generally JOSEPH LAPALOMBARA, *THE INITIATIVE AND REFERENDUM IN OREGON, 1938-1948* passim (1950); DAVID D. SCHMIDT, *CITIZEN LAWMAKERS: THE BALLOT INITIATIVE REVOLUTION* (1989); LAURA TALLIAN, *DIRECT DEMOCRACY* (1977).

good.”¹⁴⁰ The people distrust their judiciary and fear its usurpation of power, as evidenced by the requirement that judges stand for election¹⁴¹ and that they refrain from re-examining any issue of fact tried by a jury.¹⁴² At the same time, Oregon provides judges with a degree of political insulation by allowing appellate judges six-year terms,¹⁴³ and by perpetuating a tradition that all judicial elections are non-partisan.

Therefore, as might be expected, constitutional rights in Oregon have a more majoritarian cast than elsewhere; Oregonians look first to themselves and their legislators for definitions of rights, and to the judiciary only reluctantly, as a last resort. The state’s search and seizure jurisprudence, for example, acknowledges that the majority, through its elected representatives, has a considerable role in determining what is and is not a constitutionally “unreasonable” search.¹⁴⁴ Oregon’s free speech jurisprudence acknowledges that the majority might, through an administrative or legislative process, limit expression that causes harm, so long as it does not punish it.¹⁴⁵ The state’s equality jurisprudence historically derives not from an impulse to protect the weak few from the powerful many, as is the case with federal equal protection jurisprudence, but from the majority’s wish to curb individual privilege.¹⁴⁶

The proposed remedy clause interpretation respects this existing culture. It elevates the popular and the legislative over the judicial. The judiciary retains the self-protective power of judicial review over most legislative attempts to interfere with well established judicial procedures, but is powerless to undo the decisions of popularly elected representatives, or of the people themselves, regarding what substantive events trigger the right to a remedy in due course of law. Under this interpretation, the guarantee is not a weapon to be used by the lone individual whose otherwise legitimate claim has been eliminated or modified by a tyrannical majority. Rather, it sees the guarantee in harmony with its earliest history and with its surrounding context, as a weapon to be used by an individual standing with the force of the community behind him before an unjust or dysfunctional tribunal, insisting on fair and open access, in due course, to a popularly created remedy.

5. The Proposed Rule and Logic

Thus, a good basic rule would permit laws defining which historical events constitute legally cognizable injuries, and prohibit government action — be it

140. OR. CONST. art. I, § 26.

141. OR. CONST. art. VII, § 1, § 3.

142. *Id.*

143. *Id.*

144. *E.g.*, *State v. Campbell*, 759 P.2d 1040, 1047-48 (Or. 1988) (in determining what constitutes “search,” court will attend to statutes, common law); *State v. Bridewell*, 759 P.2d 1054, 1057 (Or. 1988) (legislature may authorize warrantless administrative searches); *see generally* David Schuman, *Taking Law Seriously: Communitarian Search and Seizure*, 27 AM. CRIM. L. REV. 583, 607-10 (1990) (describing popular participation in determining boundaries of state search and seizure law).

145. *City of Portland v. Tidyman*, 759 P.2d 242, 251 (Or. 1988).

146. *State v. Clark*, 630 P.2d 810, 814 (Or.), *cert. denied*, 454 U.S. 1084 (1981).

legislative, administrative, or judicial — that interferes with an injured person's pursuit of a remedy. Yet this rule, unqualified, would respect neither history, precedent, nor logic. For example, it would require courts to strike down existing statutes of limitations and filing deadlines; these are, after all, procedural impediments between an injured person and her access to a remedy. Such limitations on litigation must survive not merely because they are traditional, but also because they promote the logical and practical goal of eliminating endless vulnerability for inflictions of injury when witnesses and parties to the injury may have since died or disappeared. Therefore, to promote logic, and to respect tradition and precedent, the proposed rule contains a qualification: procedural impediments that were well-established at the time the remedy clause became part of the state's constitutional law, as well as their modern counterparts, are permissible.

6. The Proposed Rule and Practical Applicability: Clarity and Precision

An interpretation of constitutional text may be methodologically, textually, culturally, historically, and logically irreproachable, but in order to be an improvement over the text itself, it must also be clear and precise. The proposed rule, although it calls for two discriminations that are less than mechanical, nonetheless provides guidance to those who would apply the constitutional limitation in an actual situation. The two discriminations are: 1) is the challenged government action essentially a definition of what substantive historical events constitute an "injury," or rather a governmental regulation of the procedures used to vindicate such an injury?; and 2) if the challenged governmental action focuses on a procedure, is it an altogether novel one, or a traditional pre-constitutional impediment?

a. *Substance or procedure*

Most government action clearly falls into either the "injury-defining" or "process-addressing" category. Obvious examples of statutes defining what historical events constitute "injuries" include workers' compensation statutes, or statutes eliminating "heart-balm" suits — statutes declaring in straightforward terms that particular types of occurrences (on-the-job injuries, alienations of affections) no longer qualify as injuries for which the state provides traditional remedies. Obvious examples of process-oriented government action are rules such as filing deadlines or statutes of limitations that have the effect of closing off access to judicial or quasi-judicial remedies for events that would otherwise qualify as remediable "injuries." These statutes or rules deny access based not on what kind of event produced the damage, but on *when the injured person began the litigation process*. The lawmakers, in other words, allow or disallow access to a remedy depending not on what happened, but on when litigation begins.

Harder cases would include statutes completely or partially immunizing particular classes of injury-inflictors such as state actors or architects. For example, guest-passenger statutes completely immunizing a class of potential defendants (host drivers) have been challenged under remedy guarantees as

allegedly abolishing the injured passenger's access to a remedy.¹⁴⁷ These challenges should fail because the statutes amount to a legislative distinction between two types of events based on an aspect of the events themselves: the actors. One type of event, in which a guest is damaged by her host, is not a legally cognizable injury; another type, in which a business passenger sues a professional driver, remains cognizable. Or again, a statute declaring a \$100,000 cap on tort damages against the state might be challenged because such a statute declares in essence that a state employee's infliction of injury is not legally cognizable beyond \$100,000.¹⁴⁸ This challenge, too, should fail, because the statute addresses the injury-causing event itself (who did what damage to whom) and not some aspect of an ensuing litigation process (when did the plaintiff file suit). Statutes focus on substance, and therefore survive remedy clause scrutiny, if they define who does or does not have access to court *on the basis of what events gave rise to the litigation and not on the basis of some aspect of the litigation process itself*.

Another complexity involves statutes that appear both substantive and procedural. For example, a law establishing a statute of repose for suits against builders¹⁴⁹ refers first to the nature of the injury-causing event (a structure fails, due to some action by the builder, causing damage to an owner or inhabitant); and, second, to the procedure employed in pursuit of the remedy (damaged plaintiff does not commence litigation within a specified period of time). Thus, the law denies remedies in cases when both the substantive aspect (suit against a builder) and the procedural aspect (filed after X years) are present. How should such statutes be treated under the proposed rule? To treat them substantively as injury-defining and thus permit them to stand would be to approve statutes that, in some circumstances, condition access to a remedy on the basis of a procedural distinction: suits against builders filed within the time limitation survive while those filed later do not. This is precisely what the rule prevents. The existence of a novel procedural impediment contaminates the law, whether or not the law would be constitutional without it. Thus, these combined statutes should survive only if the procedural limitation survives. We turn now to that inquiry.

b. *Traditional or novel*

The distinction between legislative innovation and legislative development of tradition is, if not simple, at least not unfamiliar to the law. In fact, as noted above,¹⁵⁰ one of the more popular forms of remedy clause jurisprudence requires courts to distinguish between novel causes of action and evolutionary developments of pre-constitutional ones. The proposed rule simply examines impediments to remedies, instead of remedies themselves. And the same difficulty arises: how can a legislator, a lawyer, or a judge draw a line between evolution-

147. *Perozzi v. Ganiere*, 40 P.2d 1009 (Or. 1935).

148. *Hale v. Port of Portland*, 783 P.2d 506, 507 (Or. 1989).

149. *Saylor v. Hall*, 497 S.W.2d 218, 220 (Ky. 1973); see *supra* notes 64-65 and accompanying text for a discussion of this case.

150. See *supra* notes 63-70 and accompanying text for a discussion of the constitutional treatment of evolving causes of action.

ary growth or development, on the one hand, and outright innovation on the other?

The Oregon court might look to other states' remedy clause cases,¹⁵¹ but perhaps more relevant guidance would derive from existing Oregon judicial culture. Recent cases under Oregon's free speech guarantee¹⁵² indicate how the court performs the task of identifying modern forms of older concepts. Under existing case law, the legislature may regulate speech when such regulation was "well established when the first American guarantees of freedom of expression were adopted. . . . Examples are perjury, solicitation or verbal assistance in crime, some forms of theft, forgery and fraud *and their contemporary variants*."¹⁵³ In amplifying on the concept of "contemporary variants," the court noted:

The legislature, of course, may revise . . . crimes and *extend their principles* to contemporary circumstances or sensibilities. If it was unlawful to defraud people by crude face-to-face lies, for instance, free speech allows the legislature some leeway to extend the fraud principle to sophisticated lies communicated by contemporary means. Constitutional interpretation of broad clauses locks neither the powers of lawmakers nor the guarantees of civil liberties into their exact historic forms in the 18th and 19th centuries, *as long as the extension remains true to the initial principle*.¹⁵⁴

Thus, the interpretative task is to identify the principle underlying a venerable procedural impediment, and decide whether the challenged impediment is a modern attempt to "extend" its "principles."

Again, the task is not automatic or mechanical; it will require some sensitivity. Judges and legislators may differ from each other and among themselves. For example, some may see a products liability statute of repose that forecloses suits after a specified period — regardless of whether the damage provoking the suit was or should have been discovered within that period — as different in kind, not merely degree, from a conventional and traditional statute of limitations. According to this reasoning, the principle underlying traditional statutes of limitations is to promote settled expectations, while simultaneously allowing a party fair opportunity to litigate her claim. In contrast, the principle underlying a statute of repose is simply to benefit potential defendants. Others, however, would argue that the statute of repose is a necessary contemporary development, reflecting the same concerns for justice and closure — changed only to accommodate the modern context with its increased litigiousness, its impersonality, and its advanced technology making possible the widespread diffusion of products. But merely because the outcome of the inquiry is not always clear does not indicate that it is so elastic as to be worthless. Even where parties disagree about

151. *E.g.*, Perkins v. Northeastern Log Homes, 808 S.W.2d 809, 816 (Ky. 1991) ("product liability law is nothing more than the continuing historic evolution of the ancient cause of action for trespass on the case as that principle now applies. . . .").

152. OR. CONST. art. I, § 8.

153. State v. Robertson, 649 P.2d 569, 576 (Or. 1982) (emphasis added).

154. *Id.* at 588 (emphasis added).

the outcome, the rule provides them with a common language in which to frame their discourse.

CONCLUSION

Movements, like individuals, begin to attract thoughtful criticism only when they pass from youth into maturity; being criticized is, after all, a form of being taken seriously. The "New Judicial Federalism" is no exception. Recent commentary has accused state constitutional law of being result-oriented,¹⁵⁵ poorly reasoned,¹⁵⁶ and derivative.¹⁵⁷ Many of these attacks contain disturbing amounts of truth; yet that must not diminish the movement's momentum. The fact that much state constitutional law is flawed indicates that it should be practiced better, not less. By exploring what courts have done, and suggesting specifically what a court might do in interpreting a constitutional provision that has no federal analogue — a provision whose interpretation compels independence from federal models — this Article has attempted to indicate how a better state constitutional law might come into being.

155. Earl M. Maltz, *The Political Dynamic of the "New Judicial Federalism,"* 2 EMERGING ISSUES IN ST. CONST. L. 233, 233 (1989) ("judicial federalism" disguises result-oriented jurisprudence).

156. James A. Gardner, *The Failed Discourse of State Constitutionalism*, 90 MICH. L. REV. 761, 763 (1991) (state constitutional law is "a vast wasteland of confusing, conflicting and essentially unintelligible pronouncements.").

157. Todd F. Simon, *Independent But Inadequate: State Constitutions and Protection of Freedom of Expression*, 33 KAN. L. REV. 305, 305-06 (1985) (state constitutional provisions have been independently interpreted without considering whether that has produced more rational results).

