RESULTS FROM THE LABORATORIES OF DEMOCRACY: EVALUATING THE SUBSTANTIVE OPEN COURTS CLAUSE AS FOUND IN STATE CONSTITUTIONS

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INTRODUCTION

Scholars continue to debate how well state courts answer the call to be laboratories of democracy by interpreting their state constitutions as a source of novel and greater civil rights and liberties.[1] The "laboratory of democracy" is a call to state courts to

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[1] *Compare* Caroline Davidson, *State Constitutions and the Humane Treatment of Arrestees and Pretrial Detainees*, 19 BERKELEY J. CRIM. L. 1, 5 (2014) ("The neglect of explicit state constitutional protections for people arrested or in jail is a prime example of the divergence between the promise and the reality of state constitutions."), *with* Lawrence Friedman, *Path Dependence and the External Constraints on Independent State Constitutionalism*, 115 PENN ST. L. REV. 783, 783 (2011) ("The promise of 'the New Judicial Federalism'—of the independent interpretation by state courts of state constitutional corollaries to the federal Bill of Rights—has gone largely unfulfilled. . . . [I]ndependent state constitutionalism, launched in earnest decades ago with the publication of United States Supreme Court Justice William Brennan's call to arms in the pages of the Harvard Law Review, is today more an aspiration than a practice."), James A. Gardner, *The Positivist Revolution That Wasn't: Constitutional Universalism in the States*, 4 ROGER WILLIAMS U. L. REV. 109, 110 (1998) [hereinafter Gardner, *Constitutional Universalism*] ("Although some courts have occasionally heeded the call, most have not . . . ."), James A. Gardner, *The Failed Discourse of State Constitutionalism*, 90 MICH. L. REV. 761, 766 (1992) [hereinafter Gardner, *Failed Discourse*] ("[T]he poverty of state constitutional discourse, by which I mean the lack of a language in which participants in the legal system can debate the meaning of the state constitution. . . . [T]o the extent that such a state constitutional discourse exists, its terms and conventions are often borrowed wholesale from federal constitutional discourse . . . ."), David Schuman, *A Failed Critique of State Constitutionalism*, 91 MICH. L. REV. 274, 275 (1992) [hereinafter Schuman, *Failed Critique*] ("[A] richly textured, locally rooted state constitutional discourse."), *and* David Schuman, *The Right to a Remedy*, 65 TEMP. L. REV. 1197, 1197 (1992) [hereinafter Schuman, *Right to Remedy*] ("Although many state appellate courts now recognize that their own state charters may provide citizens with different or additional constitutional guarantees, these courts almost never recognize their liberation not only from Supreme Court outcomes, but from Supreme Court methods of analysis as well.").

honor the full panoply of federal rights[2] that all states must observe under the U.S. Constitution's Supremacy Clause,[3] yet simultaneously, to expand rights beyond federal minimums,[4] using an adequate and independent state law basis.[5]

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[2] *See* U.S. CONST. art. VI, cl. 3 ("Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution [of the United States]."); *see also* Edgar v. Mite Corp., 457 U.S. 624, 631 (1982) ("[A] state statute is void to the extent that it actually conflicts with a valid federal statute; and 'a conflict will be found "where compliance with both federal and state regulations is a physical impossibility," or where the state "law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."'") (quoting Ray v. Atl. Richfield Co., 435 U.S. 151, 158 (1978) (internal citations omitted); Cooper v. Aaron, 358 U.S. 1, 19 (1958) (holding that state statutes and state officials may not contradict or nullify federal law).

[3] *See* U.S. CONST. art. VI, cl. 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.").

[4] Kenneth P. Miller, *Defining Rights in the States: Judicial Activism and Popular Response*, 76 ALB. L. REV. 2061, 2062 (2013) ("Starting in the 1970s—with great intentionality—several state courts began invoking formerly dormant state constitutional rights provisions in ways that broadened rights beyond federal constitutional minimums."); *see also* Robert F. Williams, *Rights*, *in* 3 STATE CONSTITUTIONS FOR THE TWENTY-FIRST CENTURY 14 (G. Alan Tarr & Robert F. Williams eds., 2006) ("[F]ederal constitutional rights merely provide the *minimum* of enforceable rights. The states, and their state constitutional rights guarantees, provide an additional source of rights beyond the federal minimum."); Vincent Martin Bonventre, *Changing Roles: The Supreme Court and the State High Courts in Safeguarding Rights*, 70 ALB. L. REV. 841, 846–47 (2007) ("No longer are the cases from the state courts predominantly, or even typically, those where the Supreme Court determines that the states have failed to protect rights and liberties sufficiently. By contrast, the cases today are regularly those where the Court finds fault with the state courts for protecting rights and liberties too much."); James G. Exum, Jr., *Rediscovering State Constitutions*, 70 N.C. L. REV. 1741, 1748 (1992) ("So long as a state court interpreting its state constitution does not give individual rights less protection than the Federal Constitution requires, the state court can employ a unique method of constitutional analysis.").

[5] Michigan v. Long, 463 U.S. 1032, 1040–41 (1983).

> Respect for the independence of state courts, as well as avoidance of rendering advisory opinions, have been the cornerstones of this Court's refusal to decide cases where there is an adequate and independent state ground. . . . If a state court chooses merely to rely on federal precedents as it would on the precedents of all other jurisdictions, then it need only make clear by a plain statement in its judgment or opinion that the federal cases are being used only for the purpose of guidance, and do not themselves compel the result that the court has reached. In this way, both justice and judicial administration will be greatly improved. If the state court decision indicates clearly and expressly that it is alternatively based on bona fide separate, adequate, and independent grounds, we, of course, will not undertake to review the decision.

Id.; *accord* Oregon v. Hass, 420 U.S. 714, 728 (1975) (Marshall, J., dissenting) ("It is peculiarly within the competence of the highest court of a State to determine that in its jurisdiction the [state] should be subject to more stringent rules than are required as a federal constitutional minimum."); Abie State Bank v. Bryan, 282 U.S. 765, 773 (1931) ("[I]t is incumbent upon this Court . . . to ascertain for itself . . . whether the asserted non-federal ground independently and

The call is not new. In the 1930's, scholars published books, and the *Yale Law Journal* and *Harvard Law Review* both commented upon these books, proclaiming "an emerging pattern of . . . a new federalism in which the central government becomes something like the guardian of standards in areas of activity in large part administered by local governments."[6] Then in 1948, Justice Brandeis that "[i]t is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."[7] In 1970, the arguments for the primacy of state constitutional law by Oregon Supreme Court Justice Hans Linde, who some call the "'intellectual godfather' of state constitutional law,"[8] took hold upon the Oregon state courts.[9] In Oregon, and in just a few other states, independent state constitutional law jurisprudence bloomed.[10]

Then in 1977, William Joseph Brennan, Jr., who was an Associate Justice of the United States Supreme Court from 1956 to 1990, made perhaps the most famous call for the growth of independent state constitutional law jurisprudence.[11] To encourage each state to become a "laboratory of democracy," Justice Brennan wrote the

adequately supports the judgment.").

[6] Harold J. Laski, *The Rise of a New Federalism*, 48 YALE L.J. 931, 931 (1939) (book review); *see also* David Riesman, Jr., *The Rise of a New Federalism*, 52 HARV. L. REV. 175, 176 (1938) (book review) ("Cooperative federalism finds support in our constitutional tradition (as well as in our constitutional law); it is democratic in giving reign to autonomic forces not uniformly efficient or benign.").

[7] New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

[8] Richard S. Price, *Linde's Legacy: The Triumph of Oregon State Constitutional Law*, *1970-2000*, 80 ALB. L. REV. 1541, 1542 (2017) [hereinafter Price, *Linde's Legacy*] ("Justice Hans Linde, the 'intellectual godfather' of state constitutional law, developed a powerful theory of state constitutional law.").

[9] *Id.* at 1574–75 ("As [Justice Hans] Linde's arguments in favor of primacy took hold on the Oregon court, state constitutional law became a normalized element of rights litigation. Lawyers turned to state constitutional law in a wide variety of cases—from 1986-2000, 125 (51%) of 247 arguments were based on state law—and demonstrated little discomfort with this new branch of law.").

[10] Richard S. Price, *Lawyers Need Law: Judicial Federalism, State Courts, and Lawyers in Search and Seizure Cases*, 78 ALB. L. REV. 1393, 1398, 1452–53 (2015) [hereinafter Price, *Lawyers Need Law*] ("In the 1970s, the degree of expansionism was actually quite high but was concentrated in a handful of prominent decisions from only a few early [state] adopters of active judicial federalism."); *see also* ROBERT F. WILLIAMS, THE LAW OF AMERICAN STATE CONSTITUTIONS 352 (2009) (discussing "horizontal federalism" and how states can look to other states for guidance in interpreting state constitutions).

[11] *See* William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 501 (1977); Richard A. Posner, *In Memoriam: William J. Brennan, Jr.*, 111 HARV. L. REV. 9, 12 (1997); Brian P. Smentkowski, *William Brennan: United States Jurist*, BRITANNICA, https://www.britannica.com/biography/William-Joseph-Brennan-Jr (last visited Mar. 31, 2019).

following in a 1977 issue of the *Harvard Law Review*:

> [S]tate courts no less than federal are and ought to be the guardians of our liberties.
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> But the point I want to stress here is that state courts cannot rest when they have afforded their citizens the full protections of the federal Constitution. State constitutions, too, are a font of individual liberties, their protections often extending beyond those required by the [United States] Supreme Court's interpretation of federal law. . . .
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> . . . [S]tate courts that rest their decisions wholly or even partly on state law need not apply federal principles . . . .
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> . . . Prior to the adoption of the federal Constitution, each of the rights eventually recognized in the federal Bill of Rights had previously been protected in one or more state constitutions. And prior to the adoption of the fourteenth amendment [to the United States Constitution], these state bills of rights, independently interpreted, were the primary restraints on state action since the federal Bill of Rights had been held inapplicable.
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> The essential point I am making . . . is simply that the decisions of the [United States Supreme] Court are not, and should not be, dispositive of questions regarding rights guaranteed by counterpart provisions of state law.[12]

More than forty years has passed since Justice Brennan reissued the call to each state to interpret its state constitution as a laboratory

[12] Brennan, *supra* note 11, at 491, 501–02. "Scholars traditionally identify Justice William J. Brennan's 1977 law review article . . . as the starting point of the modern re-emphasis on state constitutions . . . ." Schuman, *Right to Remedy, supra* note 1, at 1197 n.1 (internal citation omitted).

of democracy.[13] So the call is old enough[14] and renowned enough.[15] A sufficient number of states have answered the call,[16] and sufficient time has passed[17] for us to check in on the progress of our "laboratories of democracy."

One experiment in the laboratories of democracy finds substantive rights established by the states' constitutions' "open courts" or "remedies" clauses.[18] Unlike the Federal Constitution, many state

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[13] *See* Brennan, *supra* note 11; *see also* William J. Brennan, Jr., *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights*, 61 N.Y.U. L. REV. 535, 550 (1986) ("This rebirth of interest in state constitutional law should be greeted with equal enthusiasm . . . . The development and protection of individual rights pursuant to state constitutions presents no threat to enforcement of national standards . . . . Nor should these developments be greeted with dismay by conservatives; the state laboratories are once again open for business.").

[14] *But see* Robert F. Williams, *Foreword: Continuing Sophistication in Subnational Constitutionalism*, *in* 6 PERSPECTIVES ON FEDERALISM, RE-EXPLORING SUBNATIONAL CONSTITUTIONALISM E-I, E-III (Giacomo Delledonne et al. eds., 2014) ("The comparative study of subnational constitutions in federal systems is still a relatively new undertaking.").

[15] *See* Price, *supra* note 8, at 1553 ("Justice William Brennan's famous call or [sic] lawyers and state courts to remember state Constitutions as a method to evade this federal shift, clearly led some to expect a revolution in state constitutional law.").

[16] *See* Stewart G. Pollock, *Adequate and Independent State Grounds as a Means of Balancing the Relationship Between State and Federal Courts*, 63 TEX. L. REV. 977, 979 (1985). As first described by former New Jersey Supreme Court Justice Stewart G. Pollock, state constitutional law evolved three different state court methods of analyzing constitutional claims: dual reliance, primacy and supplemental:

> [D]ual reliance creates a body of unreviewable interpretations of the federal constitution. The difficulty, however, is not so serious as may first appear. Diverse declarations of federal law by state courts necessarily must yield to interpretations of that law by the United States Supreme Court.
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> . . . Under the primacy approach, a court looks first to its state constitution in cases involving such matters as fundamental liberties. Only if the alleged infringement is permissible under state constitutional standards would a court consult the federal constitution. This model avoids entanglement with federal law and also avoids United States Supreme Court review because of the failure to state an adequate and independent state ground.
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> The primacy model is faithful to historical sequence when a state's constitution predated the federal constitution. It also is consistent with the proposition that state constitutions are the basic charters of individual liberties. Because it avoids unnecessary appeals to the United States Supreme Court, the primacy approach is consistent with efficient judicial management.
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> Under the 'supplemental' approach, however, a court looks first to the federal constitution when deciding whether state action is valid.

Id. at 983–94.

[17] *See* Robert F. Williams, *In the Glare of the Supreme Court: Continuing Methodology and Legitimacy Problems in Independent State Constitutional Rights Adjudication*, 72 NOTRE DAME L. REV. 1015, 1016–17 (1997) (stating that it has now become accepted that state courts may interpret state constitutions to provide broader rights than contained in the Federal Constitution).

[18] *See* Jonathan M. Hoffman, *Questions Before Answers: The Ongoing Search to Understand the Origins of the Open Courts Clause*, 32 RUTGERS L.J. 1005, 1005, 1008–09 (2001) (explaining

constitutions contain such a clause.[19] Generally, these Open Courts Clauses require state courts to be open to every person for the redress of any injury.[20] One of the longest-tenured chief justices of the Supreme Court of Texas once opined that "[o]f all the rights guaranteed by state constitutions but absent from the federal Bill of Rights, the right to a remedy through open access to the courts may be the most important."[21]

Nearly all states interpret their Open Courts Clause to require reasonable physical court access and basic due process of law.[22] We label this aspect of the Open Courts Clause as the Procedural Open Courts Clause. Other states expand the interpretation of the Open Courts Clause to create a Right to a Remedy.[23] That interpretation alters the classic separation of powers between the branches of state government by protecting existing causes of action from encroachment or abolishment.[24] We might call this the Substantive Open Courts Clause.

The Substantive Open Courts Clause can be an obstacle to state legislatures seeking to eliminate a right to sue, limit damage awards, repeal existing remedies, or reform their laws of torts or workers' compensation. "The Clause is often at the epicenter of . . . the historic power struggle between legislatures and courts."[25] Because the Substantive Open Courts Clause empowers a state's judiciary to strike down legislative attempts to abolish existing causes of action, the Substantive Open Courts Clause interferes with the separation of powers between the state's legislative branch on the one hand, and the state judiciary on the other.[26]

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that such clauses grant state citizens the right to relief).

[19] *See id.* at 1038–39.

[20] *See, e.g.*, TENN. CONST. art. I, § 17.

[21] Thomas R. Phillips, *The Constitutional Right to a Remedy*, 78 N.Y.U. L. REV. 1309, 1309 (2003); *Chronological Index of Texas Supreme Court Justices*, U. TEX.: TARLTON LAW LIBRARY, http://tarltonapps.law.utexas.edu/justices/index/supreme_court_chrono (last visited Mar. 31, 2019); *Thomas R. Phillips*, BAKER BOTTS, http://www.bakerbotts.com/people/p/phillips-thomas-r (last visited Mar. 31, 2019).

[22] *See* discussion *infra* Section I.D.

[23] *See* discussion *infra* Sections I.D, III.A.

[24] Phillips, *supra* note 21, at 1340.

[25] Hoffman, *supra* note 18, at 1005. *But see* Michael C. Dorf, *The Relevance of Federal Norms for State Separation of Powers*, 4 ROGER WILLIAMS U. L. REV. 51, 72 (1998) ("[T]he text of [a state] Constitution [can] contain[] an express separation-of-powers (or to be more precise, distribution of powers) principle. . . . By contrast, the federal principle of separation of powers must be inferred from the Constitution's structure."); Gardner, *Constitutional Universalism*, *supra* note 1, at 111 ("[T]he equally pronounced tendency toward doctrinal convergence [of federal and state constitutional law] in other substantive areas of constitutional law, including structural areas such as the separation of powers.").

[26] *See* Hoffman, *supra* note 18, at 1005; *see also* Phillips, *supra* note 21, at 1340–41

This Article seeks to answer the question: Is the Substantive Open Court Clause experiment a success? Stated somewhat differently, have the laboratories of democracy shown that the Substantive Open Courts Clause is worthy of adoption on a national level?

Part I analyzes the Open Courts Clause in state constitutions. We look at the historical origin of the clause and explain what rights the clause protects.

Part II compares and contrasts the Open Courts Clause with analogous rights in the U.S. Constitution. We examine whether these federal sources yield now, or could yield in the future, rights identical to those provided by state Open Courts Clauses.

Part Three weighs the benefits and detriments of the Substantive Open Courts Clause. In the conclusion, we opine whether the laboratories of democracy created a right that is worthy of advancement to the national stage, or whether the experiment failed.

I. HOW THE LABORATORIES OF DEMOCRACY CREATED AND INTERPRET THEIR OPEN COURTS CLAUSES

Forty states include an Open Courts Clause within their state constitutions.[27] Many commentators conclude that these clauses have a single historical origin.[28] The consensus is that the forty Open Court Clauses "derive[] ultimately from Magna Carta, where it took the form of a promise extracted from King John to reform his

(discussing the Open Courts Clause and the judiciary).

[27] ALA. CONST. art. I, § 14; ARIZ. CONST. art. II, § 11; 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; GA. CONST. art. I, § 1, para. 12; 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. XIX; MASS. CONST. pt. I, art. XI; MINN. CONST. art. 1, § 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. XIV; 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. IV; WASH. CONST. art. I, § 10; W. VA. CONST. art. III, § 17; WIS. CONST. art. I, § 9; WYO. CONST. art. I, § 8. Additionally, one commentator suggests that "[t]he 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." Schuman, *Right to Remedy, supra* note 1, at 1201 n.25 (citing Richardson v. Carnegie Library Rest., Inc., 763 P.2d 1153, 1161 (N.M. 1988) (an equal protection challenge to a state dram shop law limiting a class of plaintiff's damages)).

[28] *See, e.g.*, Jonathan M. Hoffman, *By the Course of the Law: The Origins of the Open Courts Clause of State Constitutions*, 74 OR. L. REV. 1279, 1281 (1995) ("[T]he provision comes from Magna Carta Chapter 40, as viewed through the lens of Sir Edward Coke's Second Institute."); Shannon M. Roesler, Comment, *The Kansas Remedy by Due Course of Law Provision: Defining a Right to a Remedy*, 47 KAN. L. REV. 655, 656 (1999) ("The history of the remedy provision in state constitutions begins with King John in the thirteenth century.").

courts."[29] But as it happened before in the context of stating the historical origins of state constitutions,[30] the consensus view is an oversimplification of the historical record. A closer look at history reveals that, although both the Procedural Open Courts Clause and the Substantive Open Courts Clause derive from Magna Carta,[31] the Procedural Open Courts Clause is the result of the plain text of the original Magna Carta,[32] whereas the Substantive Open Courts Clause arises from an interpretation of Magna Carta made 400 years later by an influential English commentator.[33]

A. Ancient Origin of the Procedural Open Courts Clause

The year is 1215, and in King John's England, justice is for sale.[34] Barons have grown weary of buying justice from the king's courts.[35] To resolve the dispute between the king and the barons, and at the same time provide civil law protections for the Church, the Archbishop of Canterbury drafts the Magna Carta Libertatum, which is now commonly called the Magna Carta.[36] A commentator explains that

> King John's courts administered justice for a fee; those

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[29] Schuman, *Right to Remedy, supra* note 1, at 1199. *But see* RANDY J. HOLLAND ET AL., STATE CONSTITUTIONAL LAW: THE MODERN EXPERIENCE 623 (2010).

> Right to a remedy, or open court, provisions have a long historical pedigree. In fact, they predate the U.S. Constitution by centuries, with their roots in the English Magna Carta. Furthermore, even though the right to a remedy principle is explicitly enshrined only in the State constitutions (and not the federal constitution), Chief Justice John Marshall recognized the principle's pedigree more than 200 years ago. In *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 162–63 (1803), he quoted Blackstone's *Commentaries* for the proposition that "'it is a general and indisputable rule, that where there is a legal right there is also a legal remedy by suit or action at law, whenever that right is invaded.'"

Id.

[30] *See* Hoffman, *supra* note 28, at 1281 ("[C]ourts which undertake to decide cases based upon distinct state constitutional provisions must first overcome an inconvenient and too-often overlooked impediment: the absence of serious historical research into the origins of these provisions.").

[31] *See* Hoffman, *supra* note 18, at 1006.

[32] *See infra* Section I.A.

[33] *See infra* Section I.B.

[34] *See* Thomas J. McSweeney, *Magna Carta, Civil Law, and Canon Law, in* MAGNA CARTA AND THE RULE OF LAW 281, 281 (Daniel Barstow Magraw et al. eds., 2014) ("In the spring of 1215, as King John (r. 1199–1216) and the barons were negotiating the terms of Magna Carta . . . .").

[35] *See id.* at 294–95.

[36] *See id.* at 291; *Magna Carta Libertatum Summary*, SUPER SUMMARY, http://www.supersummary.com/magna-carta-libertatum/summary/ (last visited Mar. 6, 2019).

> seeking access to the courts had to purchase writs, and the more costly writs guaranteed speedier and more successful claims. In response to the Crown's corrupting influence, Chapter 40 of the Magna Carta was written to restore the integrity of the courts by specifically prohibiting the selling of writs . . . .[37]

In the official English translation, Magna Carta Chapter 40 reads: "To no one will we sell, to no one deny or delay right or justice."[38] This shows that Chapter 40's chief purpose was to stop payments to the king and his officers to expedite or delay lawsuits.[39] Chapter 40's purpose was not to restrict the legislature, but instead, to restrict King John and his courts.[40] It appears that "the preservation of judicial integrity [was] the essential purpose of Magna Carta Chapter 40."[41] Perhaps this is the reason why the text of Chapter 40 does not make an explicit reference to a right to a remedy.

B. Ancient Origin of the Substantive Open Courts Clause

Approximately four hundred years after the drafting of Magna Carta, England's Sir Edward Coke restated Magna Carta's Chapter 40 in chapter 29 of his *Second Institute* as follows:

> And therefore every Subject of this Realm, for injury done to him in *bonis*, *terris*, *vel persona* [i.e., goods, lands, or person], by any other Subject, be he Ecclesiastical, or Temporal[], Free or Bond, Man or Woman, Old or Young, or be he outlawed, excommunicated, or any other without exception, may take his remedy by the course of the Law, and have justice, and right for the injury done him, freely without sale, fully without

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[37] Roesler, *supra* note 28, at 656–57.

[38] Magna Carta ch. 40 (1215), *reprinted in English Translation of Magna Carta*, BRITISH LIB.(July 28, 2014), https://www.bl.uk/magna-carta/articles/magna-carta-english-translation.

[39] Swann & Billups v. Kidd, 79 Ala. 431, 432 (1885) ("This [Open Courts C]lause is known to have been taken in substance from Magna Charta [sic]; and history shows that its chief purpose was to assail the existing evil of anciently holding courts in clandestine sessions, and of paying fines to the king and his officers, for delaying or expediting law-suits, and for obtaining justice.").

[40] Meech v. Hillhaven W., 776 P.2d 488, 492 (Mont. 1989) ("Legal history demonstrates that . . . [the Open Courts Clause was not] a directive to the legislature. Rather, the guarantee was directed at the courts, and it was framed to provide for equality in the administration of justice."). *Contra* Davidson v. Rogers, 574 P.2d 624, 625–26 (1978) (Linde, J., concurring) ("[The Open Courts Clause] is concerned with securing a remedy from those who administer the law, through courts or otherwise.").

[41] Hoffman, *supra* note 28, at 1286.

any denial[], and speedily without delay.[42]

Although some scholars call this language from Sir Edward Coke's *Second Institute* a misstatement of Magna Carta Chapter 40,[43] it is more apt to say it was an expansion of the language of the original Magna Carta Chapter 40, expanded to make mention of a right to a remedy.[44] The original text of Magna Carta Chapter 40 makes no mention of remedies.[45] The Substantive Open Courts Clause, which protects the right to a remedy, harkens back not to the original Chapter 40, but instead to the language of the *Second Institute*.

Sir Coke's expansive reading influenced Colonial America and the drafters of state constitutions.[46] Today's Open Courts Clauses "come[] from Magna Carta Chapter 40, as viewed through the lens of Sir Edward Coke's Second Institute."[47] Through that lens, Open Courts Clauses become a restriction upon the state legislature.[48]

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[42] EDWARD COKE, THE SECOND PART OF THE INSTITUTES OF THE LAWES OF ENGLAND 55–56 (1671), *reprinted in* 2 THE SELECTED WRITINGS AND SPEECHES OF EDWARD COKE 870 (2003) [hereinafter COKE, SECOND INSTITUTE]. *See also Meech*, 776 P.2d at 492 ("Coke's interpretation of the Magna Carta is, in a broad sense, faithful to its origins. The English feudal nobility sought through Chapter 40 to eliminate abuses in the writ system which governed King's courts. The abuses in the system made the price of the writ obtained by a would-be litigant a determinant of the quality of justice received.").

[43] *See, e.g.*, William C. Koch, Jr., *Reopening Tennessee's Open Courts Clause: A Historical Reconsideration of Article I, Section 17 of the Tennessee Constitution*, 27 U. MEM. L. REV. 333, 360–61 (1997) (1997) ("Without question, Lord Coke used his commentaries on Magna Carta to expound on the law as it stood in the early seventeenth century rather than to explain the law as it stood in the early thirteenth century. Notwithstanding the Second Institute's shortcomings, all agree that it stands as a bridge from the ancient to the modern law."); David Schuman, *Oregon's Remedy Guarantee: Article I, Section 10 of the Oregon Constitution,* 65 OR. L. REV. 35, 39 (1986) ("Coke's interpretation of the Magna Carta is more enthusiastic than accurate . . . .").

[44] *Compare* Magna Carta, *supra* note 38 (not mentioning a right to remedy), *with* COKE, SECOND INSTITUTE, *supra* note 42, at 870 ("[E]very subject . . . may take his remedy by the course of the law.").

[45] *See* Magna Carta, *supra* note 38.

[46] *See* Schuman, *Right to Remedy, supra* note 1, at 1199 ("In the hands of Lord Coke, whose influential commentary on Magna Carta was among the most frequently read legal texts in colonial America, [and] the King's promise underwent a radical change . . . .").

[47] Hoffman, *supra* note 28, at 1281; *see also* John Vail, *A Common Lawyer Looks at State Constitutions*, 32 RUTGERS L.J. 977, 981 (2001) ("Coke might have embellished Chapter 40, but Coke's interpretation is undoubtedly the one that influenced the framers of American constitutions.").

[48] *See generally* John Dinan, *Foreword: Court-Constraining Amendments and the State Constitutional Tradition*, 38 RUTGERS L.J. 983, 983 (2007) ("State constitutions differ from the United States Constitution in various ways. . . . They also tend to impose more substantive and procedural limits on legislatures."); G. ALAN TARR, UNDERSTANDING STATE CONSTITUTIONS 16 (1998) ("In determining the distribution of powers among the branches of state government, the underlying premise must be that the powers of the executive and judicial branches are defined by the constitution, whereas the legislature's are not, so all powers not clearly granted to those branches are reserved to the legislature.").

C. Colonial America's Interest in Open Court Clauses

In Colonial America, the disheartening fact "that the Crown was seeking to corrupt the courts through improper meddling of the King and his ministries was the unifying thread connecting the drafters of the state constitutions with both Magna Carta Chapter 40 and Coke's reformulation of it."[49] In the American Colonies prior to the Revolution, "judges continued to serve at the pleasure of the King [of England] or his appointed governors."[50] "Colonists feared that if the [judiciary] were 'occupied by "men who depended upon the smiles of the crown for their daily bread," the possibility of having an independent judiciary as an effective check upon executive power would be wholly lost.'"[51]

The Colonists' dismay with the Crown's interference with the independence of the judiciary was compounded by the Crown's physical closure of Colonial courts that adjudicated civil claims.[52]

> In Massachusetts, John Adams appeared before the Governor's Council to urge, albeit unsuccessfully, that the courts should be reopened . . . . Adams cited Magna Carta Chapter 40, contending: "The King's Writs are ex debita Justitia, and cannot be denied the Subject. And in Magna Charta [sic], it is said, We deny no Man Justice, we delay no Man Justice."[53]

Despite John Adams' best efforts,

> the fear that the Crown threatened to undermine the administration of justice by interfering with the colonial common-law courts persisted from 1760 until the Revolution. Jefferson even highlighted it as a grievance in the Declaration of Independence, stating that the King had obstructed the administration of justice by refusing to assent to laws establishing judiciary powers and that the King had "made judges dependent on his will alone, for the tenure of their

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[49] Hoffman, *supra* note 28, at 1287.

[50] *Id.* at 1300.

[51] *Id.* at 1301–02.

[52] *See id.* at 1303 ("Under the Stamp Act, judicial decisions on unstamped papers were invalid; the effect was to close the courts to civil litigation altogether.").

[53] *Id.* at 1304–05 ("The Stamp Act was repealed, only to be replaced in 1767 by the Townshend Act.").

> offices, and the amount and payment of their salaries."
>
> . . . .
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> In September 1776, only a few months after the signing of the Declaration of Independence, Delaware adopted the Declaration of Rights and Fundamental Rules of Delaware State. Article XII of the Delaware Declaration appears to be the first open courts clause in any state constitution.[54]

So, the motivation for including Open Courts Clauses in the state constitutions drafted in colonial times was to protect the independence of the judiciary and keep the courts open for adjudicating civil law claims.[55] As to why post-colonial constitutions contain Open Courts Clauses: "[s]tates admitted later into the Union evidently borrowed [Open Courts Clauses] wholesale from earlier state constitutions."[56] This reasoning does not explain why the text of some state constitutions more closely track the text of Magna Carta Chapter 40 while the text of others more closely reflect the influence of Lord Coke's *Second Institute*. Scholars lament that "explicit statements explaining why they incorporated the open courts clause into their constitutions are absent."[57]

D. Modern Interpretations of the Open Court Clauses

Despite the forty state Open Courts Clauses having the same or similar historical origins, states have not adopted a unified interpretation of their Open Courts Clauses:

> Professor Jennifer Friesen has counted [twenty-seven] state constitutions that require courts to be open, [thirty-six] that require justice to be administered promptly, [twenty-seven] that require justice to be administered without purchase or sale, [thirty-four] that require justice to be granted completely and/or without denial, and [eleven] that require justice to be delivered freely. Additionally, [thirty-five] states provide a right to a remedy, of which [twenty-one] require the remedy to be by due process or due course of law.[58]

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[54] *Id.* at 1307.
[55] *See id.* at 1301–02, 1303.
[56] *Id.* at 1284.
[57] *Id.*
[58] Phillips, *supra* note 21, at 1310 n.7.

More than one commentator suggests that the state courts "are in total disarray" over how to interpret their Open Courts Clauses.[59] Perhaps the more accurate description, however, is to say that states are at one of two steps of the development of their Open Courts Clause jurisprudence: first finding procedural protections, and then finding substantive protections.[60]

The more nascent interpretation of the Open Courts Clause establishes a procedural right.[61] This Procedural Open Courts Clause can be likened to a physical access right. The courts, in their physical sense, stand open and accessible to the state's citizens. States embracing the Procedural Open Courts Clause strike down legislation transferring traditional lawsuits to less traditional venues such as arbitration, binding mediation, or administrative law tribunals.[62] Five of the forty states with an Open Courts Clause interpret it to contain only a Procedural Open Courts Clause.[63]

A more advanced interpretation of the Open Courts Clause protects existing causes of action from being abolished by state legislatures.[64] This Substantive Open Courts Clause protects certain causes of action from being eliminated unless a replacement is offered.[65] "In the last few decades, for example, injured parties have used state remedy provisions to challenge tort reform legislation, such as workers' compensation acts and statutory caps on medical malpractice damages."[66] Using a Substantive Open Courts Clause in a state constitution, "[p]laintiffs have challenged, sometimes successfully, statutes of repose, statutory caps on damages, governmental immunity, the Wrongful Life Act, the Good Samaritan Act, and the abrogation of the cause of action for loss-of-

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[59] Hoffman, *supra* note 28, at 1282; *see* Schuman, *Right to Remedy*, *supra* note 1, at 1203.

[60] *See* Jarom R. Jones, *Mormonism, Originalism, and Utah's Open Courts Clause*, 2015 BYU L. REV. 811, 811–12 (2015) ("State high courts interpret this clause differently, however, generally falling into one of two camps. Some courts interpret the clause to provide only procedural protections similar to those found in the due process clause of the United States Constitution. But others interpret the clause to also provide substantive protections, limiting the legislature's power to abrogate causes of action and remedies existing at the time of the state constitution's adoption.").

[61] *See* Hoffman, *supra* note 28, at 1287 ("Some courts have simply treated it as a 'state due process clause,' perhaps because of the superficial similarity between the language 'due course of law' and 'due process of law.'").

[62] *See* Blumberg v. Bergh, No. 2-04-138-CV, 2005 Tex. App. LEXIS 3459, *21–22 (Tex. Ct. App. May 5, 2005).

[63] *See* Phillips, *supra* note 21, at 1310 n.7 ("[Thirty-five] states provide a right to a remedy, of which 21 require the remedy to be by due process or due course of law.").

[64] *See* Jones, *supra* note 60, at 811–12.

[65] Roesler, *supra* note 28, at 655–56.

[66] *See id.* at 655.

consortium."[67] Thirty-five of the forty states with Open Courts Clauses interpret them to include a Substantive Open Courts Clause.[68]

When we view the Open Courts Clauses as incorporating a Procedural Open Courts Clause and a Substantive Open Courts Clause, our view is consistent with the clause's historical origins.[69] The interpretation we call the Procedural Open Courts Clause is consistent with Magna Carta Chapter 40.[70] The interpretation we call the Substantive Open Courts Clause is consistent with Sir Coke's *Second Institute*.[71]

II. COMPARING AND CONTRASTING THE OPEN COURTS CLAUSE WITH ANALOGOUS FEDERAL CONSTITUTIONAL RIGHTS

Clearly, the language of the Open Court Clause is absent from the text of the Federal Constitution. Most commentators opine that the state constitutions' Open Courts Clauses do not have a counterpart in federal constitutional law jurisprudence.[72] This leads most commentators to conclude that the rights provided by state Open Courts Clauses are the "types of rights and limitations on government not even contemplated by the federal constitution."[73] Some case law precedent lends support to that conclusion, but other cases suggest it is an unresolved question.[74]

A. Federal Case Law Addressing the Legislature's Right to Abolish a Cause of Action

As early as 1907, the Supreme Court of the United States

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[67] Jones, *supra* note 60, at 812–13.

[68] *See* Phillips, *supra* note 21, at 1310 n.7.

[69] Anecdotal evidence suggests that, if the "intellectual godfather of state constitutional law" Hal Linde were alive today, he would agree with this conclusion. *See* Hoffman, *supra* note 28, at 1289 ("Professor/Justice Linde . . . assumed that the provision contains two distinct subparts: an 'open courts' clause and a 'remedies' clause.").

[70] *See supra* Sections I.A, I.D.

[71] *See supra* Sections I.B, I.D.

[72] *See* Williams, *supra* note 4, at 14 ("A good example of provisions that have no federal counterpart is the 'open courts' or 'right to a remedy' provisions (which can be traced back to the Magna Carta) that are contained in about forty states' constitutions."); Schuman, *Right to Remedy*, *supra* note 1, at 1198 ("State constitutional 'remedy guarantees' provide concrete proof. These guarantees, requiring that the law furnish a remedy for specified types of injuries, have no federal counterpart . . . .").

[73] ROBERT F. WILLIAMS, STATE CONSTITUTIONAL LAW: CASES AND MATERIALS 489 (3d ed. 1999).

[74] *See, e.g.*, Lewis v. Casey, 518 U.S. 343, 354 (1996); N.Y. Cent. R.R. Co. v. White, 243 U.S. 188, 201 (1917).

considered whether a state legislature could abolish a cause of action without running afoul of the constitution.[75] The context was a state law abolishing a common law cause of action against mine managers and mine examiners, and the case was *Wilmington Star Mining Co. v. Fulton*.[76] The Court did not find the mining law to be unconstitutional, holding instead that it is proper and "competent for the State to change and modify those principles in accord with its conceptions of public policy."[77]

Then in 1929, the U.S. Supreme Court in *Silver v. Silver*[78] considered a Connecticut statute stating that "no person carried gratuitously as a guest in an automobile may recover from the owner or operator for injuries caused by its negligent operation."[79] This statute "eliminated one type of negligence suit but did not provide an alternative remedy."[80] The Court did not find the law to be unconstitutional, holding "that the Constitution does not forbid the creation of new rights, or the abolition of old ones recognized by the common law, to attain a permissible legislative object."[81]

But case law precedent also exists that arguably leaves the door open to find within federal constitutional law jurisprudence some or all of the rights protected by state Open Courts Clauses. For example, in 1917, in *New York Central Railroad Company v. White*, the Supreme Court of the United States upheld New York's workers' compensation law despite various allegations of constitutional infirmity.[82] But while so doing, the Court made note of certain issues it left undecided when it stated,

> Nor is it necessary, for the purposes of the present case, to say that a State might, without violence to the constitutional guarantee of 'due process of law,' suddenly set aside all

[75] *See* Wilmington Star Mining Co. v. Fulton, 205 U.S. 60, 74 (1907). Arguably, the Supreme Court of the United States may have addressed the issue a century earlier. *See* Munn v. Illinois, 94 U.S. 113, 134 (1876) ("A person has no property, no vested interest, in any rule of the common law. . . . [T]he law itself, as a rule of conduct, may be changed at the will, or even at the whim, of the legislature, unless prevented by constitutional limitations."); Marbury v. Madison, 5 U.S. 137, 163 (1803) ("[I]t is a general and indisputable rule, that where there is a legal right, there is also a legal remedy by suit or action at law, whenever that right is invaded.").

[76] *See Wilmington Star Mining Co.*, 205 U.S. at 74.

[77] *Id.*

[78] Silver v. Silver, 280 U.S. 117 (1929).

[79] *Id.* at 122.

[80] Schuman, *Right to Remedy, supra* note 1, at 1198 n.6.

[81] *Silver*, 280 U.S. at 122.

[82] N.Y. Cent. R.R. Co. v. White, 243 U.S. 188, 209 (1917).

> common-law rules respecting liability as between employer and employee, without providing a reasonably just substitute. . . . [I]n reliance upon the probable permanence of an established body of law . . . it 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. No such question is here presented, and we intimate no opinion upon it.[83]

Those unanswered questions from 1917 might still be called unanswered in the modern era. Consider the Supreme Court of the United States' 1978 decision in *Duke Power Company v. Carolina Environmental Study Group, Inc.*[84] That case "present[s] the question of whether Congress may, consistent with the Constitution, impose a limitation on liability for nuclear accidents resulting from the operation of private nuclear power plants licensed by the Federal Government."[85] The opponents of the law argued that a constitutional infirmity exists because "it fails to provide those injured by a nuclear accident with a satisfactory quid pro quo for the common-law rights of recovery which the Act abrogates."[86] The Court held that

> it is not at all clear that the Due Process Clause in fact requires that a legislatively enacted compensation scheme either duplicate the recovery at common law or provide a reasonable substitute remedy. However, we need not resolve this question here since the Price-Anderson Act does, in our view, provide a reasonably just substitute for the common-law or state tort law remedies it replaces.[87]

So arguably, the case law leaves an opening in federal constitutional law jurisprudence for a future finding of federal rights comparable to those embodied in state Open Courts Clauses. Perhaps for this reason, some creative commentators suggest that they have found a federal constitutional law basis to establish the same or similar rights granted by state Open Courts Clauses, as

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[83] *Id.* at 201.
[84] Duke Power Co. v. Carolina Envtl. Study Grp., 438 U.S. 59 (1978).
[85] *Id.* at 62–63.
[86] *Id.* at 87–88.
[87] *Id.* at 88.

shown below.[88]

B. Federal Equivalents to the Procedural Open Courts Clause

The question of whether the rights embodied in state Procedural Open Courts Clauses appear in the Federal Constitution seems superfluous in light of federal statutes that enact those rights into federal law. Statutorily, federal equivalents to the Procedural Open Courts Clause appear plentiful.[89] The Procedural Open Courts Clause can guarantee physical access to the courthouse,[90] and federal statutes like the Americans with Disabilities Act do the same.[91] The Procedural Open Courts Clause can guarantee adequate notice of court proceedings and an opportunity to be heard,[92] and the federal right of Due Process of Law does the same.[93]

The Federal Constitution is interpreted to provide the same rights as the state Procedural Open Courts Clause for at least one class of Americans: criminal law litigants.[94] The Supreme Court of the United States held in *Bounds v. Smith* that "[i]t is now established beyond doubt that prisoners have a constitutional right of access to the courts."[95] This right entitles prisoners to paper and pen to draft legal documents, to notarial services to authenticate them, and to

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[88] *See* Benjamin Plener Cover, *The First Amendment Right to a Remedy*, 50 U.C. DAVIS L. REV. 1741, 1747 (2017); Risa E. Kaufman, *Access to the Courts as a Privilege or Immunity of National Citizenship*, 40 CONN. L. REV. 1477, 1484 (2008); Roesler, *supra* note 28, at 667.

[89] *See, e.g.*, RANDY J. HOLLAND ET AL., TEACHER'S MANUAL TO STATE CONSTITUTIONAL LAW: THE MODERN EXPERIENCE 105 (2d ed. 2016) [hereinafter HOLLAND ET AL., TEACHER'S MANUAL] ("The Supreme Court has, of course, recognized a constitutionally-based right of access to the federal courts, but the federal right seems primarily procedural in nature.") (internal citations omitted).

[90] *See, e.g.*, State v. Ramirez, 871 P.2d 237, 248 (Ariz. 1994) ("The 'open courts' provision essentially commands public judicial proceedings.").

[91] *See* Americans with Disabilities Act, 42 U.S.C. § 12101(3) (2012); Tennessee v. Lane, 541 U.S. 509, 532 (2004) (citing Boddie v. Connecticut, 401 U.S. 371, 379 (1971) ("This duty to accommodate is perfectly consistent with the well-established due process principle that, 'within the limits of practicability, a State must afford to all individuals a meaningful opportunity to be heard' in its courts."); *see also Lane*, 541 U.S. at 531–32 ("Title II does not require States to employ any and all means to make judicial services accessible to persons with disabilities . . . . It requires only 'reasonable modifications' that would not fundamentally alter the nature of the service provided.").

[92] *See* Hoffman, *supra* note 28, at 1287 (explaining some states treat open courts clauses as the state's alternative to the federal due process clause); *see also In re* Gault, 387 U.S. 1, 33 (1967) (holding due process clause includes a right to notice of proceedings); *Lane*, 541 U.S. at 532 (holding due process clause includes the right to be heard).

[93] *See In re Gault*, 387 U.S. at 33; *Lane*, 541 U.S. at 532.

[94] *See* Bounds v. Smith, 430 U.S. 817, 821 (1977).

[95] *Id.*

> stamps to mail them. States must forgo collection of docket fees otherwise payable to the treasury and expend funds for transcripts [for indigent prisoners]. State expenditures are necessary to pay lawyers for indigent defendants at trial, and in appeals as of right . . . . [L]aw libraries or other forms of legal assistance are needed to give prisoners a reasonably adequate opportunity to present claimed violations of fundamental constitutional rights to the courts.[96]

This federal right accrues to criminal law litigants but not to civil law litigants.[97] This right is procedural in nature, not substantive.[98]

So, if we consider the rights of prisoners together with the rights granted to all Americans under various federal statutes, it is difficult to justify the conclusion that the rights provided by state Procedural Open Courts Clauses are rights absent from federal law.

C. Potential Federal Equivalents to the Substantive Open Courts Clause

Determining whether federal constitutional law contains all the rights of state Substantive Open Courts Clauses is made more difficult by recent suggestions coming from academia. Creative scholars suggest that rights comparable to those found in state Substantive Open Court Clauses could be found to emanate from the

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[96] *Id.* at 824–25 (internal citations omitted).

[97] *See e.g.*, Erwin Chemerinsky, Velazquez *and Beyond: Closing the Courthouse Door to Civil Rights Litigants*, 5 U. PA. J. CONST. L. 537, 541–42, 543, 545, 546, 547, 548, 549–50 (2003). *Cf.*, *Bounds*, 430 U.S. at 828 ("We hold, therefore, that the fundamental constitutional right of access to the courts requires prison authorities to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law.").

[98] *Bounds*, 430 U.S. at 821–25 (finding the federal right of prisoners to access courts arising from the right of procedural due process, the right of equal protection, and the right to habeas corpus). To the extent the Court's dicta in *Bounds* suggest substantive rights, the Court rejected such a reading:

> It must be acknowledged that several statements in *Bounds* went beyond the right of access recognized in the earlier cases on which it relied, which was a right to bring to court a grievance that the inmate wished to present . . . . These statements appear to suggest that the State must enable the prisoner to *discover* grievances, and to *litigate effectively* once in court. These elaborations upon the right of access to the courts have no antecedent in our pre-*Bounds* cases, and we now disclaim them.

Lewis v. Casey, 518 U.S. 343, 354 (1996) (emphasis in original) (internal citations omitted) (finding that the federal access to the courts is a fundamental right requiring a reasonably adequate opportunity to raise constitutional claims before impartial judges).

federal right to due process of law,[99] the Privileges and Immunities Clause,[100] or the First Amendment's right to petition the government for a redress of grievances.[101] We examine each of these suggestions in turn.

1. Due Process of Law

Commentator Shannon M. Roesler, writing in the *University of Kansas Law Review*, concludes that "[a]lthough the federal Due Process Clauses do not contain remedy language like the state remedy provision, the United States Supreme Court has not precluded the possibility that they nevertheless guarantee a right to a remedy."[102] She reaches this conclusion after observing that the Supreme Court "has recognized and even tentatively applied the quid pro quo requirement, suggesting the potential need for a substitute remedy when Congress eliminates a cause of action."[103] But she also acknowledges that "[i]n one case, however, the Court concluded that the Constitution did not prohibit the elimination of old rights by the legislature if they are eliminated to achieve a constitutional government end."[104] Ultimately, she concludes that

> the Court has not returned to the issue of a right to a remedy under federal due process [of] law, leaving the issue unresolved. Justice White, however, urged the Court to consider the issue before it creates further confusion and inconsistency among the states. He noted that the Court failed to resolve "[w]hether due process requires a legislatively enacted compensation scheme to be a quid pro quo for the common-law or state-law remedy it replaces, and if so, how adequate it must be." The issue of a right to a remedy under federal due process law, Justice White observed, has divided state courts and threatens to pose even larger problems as legislatures continue to focus on tort reform."[105]

Similarly, some of the scholarly writings of Professor and Associate

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[99] *See infra* Section II.C.1.

[100] *See infra* Section II.C.2.

[101] *See infra* Section II.C.3.

[102] Roesler, *supra* note 28, at 667.

[103] *Id.*

[104] *Id.* (citing Silver v. Silver, 280 U.S. 117, 122 (1929)).

[105] Roesler, *supra* note 28, at 668–69 (footnotes omitted) (citing Fein v. Permanente Med. Grp., 474 U.S. 892, 894–95 (1985) (White, J., dissenting)).

Dean Tracy A. Thomas explore whether the federal Due Process Clauses create a right to a remedy.[106] For example, in a 2004 article in the *San Diego Law Review*, Dean Thomas makes the argument that the right to a remedy was historically recognized within the Due Process Clauses, and that, "even assuming that the right to a remedy has not been historically recognized, it is a fundamental right that should be newly identified."[107] Then Dean Thomas opined,

> The Due Process Clause of the Fourteenth Amendment provides a basis for finding that the right to a remedy is a fundamental right . . . . This notion of a due process right to a meaningful remedy is supported by two strands of United States Supreme Court precedent in the disparate contexts of tax remedies and punitive damages.
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> First, in the tax cases of *Reich v. Collins*, *Harper v. Virginia Department of Taxation*, and *McKesson Corp. v. Division of Alcoholic Beverages*, the Supreme Court has held that the Due Process Clause requires state courts to provide a successful plaintiff with a minimally adequate remedy that provides "meaningful" relief. In these cases, the Court established a constitutional right to a meaningful remedy . . . . In so holding, the Court established a constitutional floor entitling the plaintiff to a minimum of adequate relief.
>
> Second, in the punitive damages cases, the Supreme Court has found that arbitrary and unreasonable state court remedies violate the Due Process Clause. . . . Where state court remedies are arbitrary and unreasonable, the Court has found a violation of Due Process. While the punitive damages cases address excessive remedies, their analytical foundation highlighting the right to a reasonable and non-arbitrary remedy under both substantive and procedural due process implicates deficient remedies as well.
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> The basic fairness guarantees of the Due Process Clause therefore mandate the right to a meaningful remedy. A meaningful remedy is one that is minimally adequate and

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[106] *E.g.*, Tracy A. Thomas, *Ubi Jus, Ibi Remedium: The Fundamental Right to a Remedy Under Due Process*, 41 SAN DIEGO L. REV. 1633, 1634 (2004) [hereinafter Thomas, *Remedy Under Due Process*]; Tracy A. Thomas, *Congress' Section 5 Power and Remedial Rights*, 34 U.C. DAVIS L. REV. 673, 689–90 (2001); Tracy A. Thomas, *Proportionality and the Supreme Court's Jurisprudence of Remedies*, 59 HASTINGS L.J. 73, 92 (2007) ("[T]he notion of proportionality was implicit in due process as the antithesis of arbitrary state action.").

[107] Thomas, *Remedy Under Due Process, supra* note 106, at 1638.

> effective at ensuring the protection of the attendant right. . . . [A] meaningful remedy must be actualized—it must actually work to effectuate the purpose of the right. The remedy must match the purpose of the declared right by returning the plaintiff to her rightful position or keeping the government within the bounds of the law.[108]

One final opinion worthy of note is the writings of Professor John C.P. Goldberg exploring the constitutional status of tort law. Professor Goldberg's 2005 *Yale Law Journal* article:

> [A]rgues for [the] recognition of a right, grounded in the Fourteenth Amendment's Due Process Clause, to a body of law that empowers individuals to seek redress against persons who have wronged them. This right, in turn, generates the prima facie duty . . . of each state to provide a law for the redress of private wrongs.[109]

To make this argument, the professor "review[s] U.S. Supreme Court decisions issued between 1870 and 1920 [and] locate[s] the right to a law of redress in the Fourteenth Amendment's Due Process Clause."[110] This case law review, Professor Goldberg explains, shows that the Due Process decisions of this period "set a ceiling over, and a floor under, state tort law."[111] In this way, "due process provides not just a ceiling but a floor—an affirmative duty grounded in federal law to provide a law of redress."[112]

But Professor Goldberg concludes that this interpretation of due process ended in 1921.[113] That was the year the U.S. Supreme Court decided *Truax v. Corrigan*, a decision Professor Goldberg finds "explicable only in light of the majority's concern over the rise of organized labor and perceived threats of socialism and communism[]" where "[t]he Court clearly overreached . . . ."[114] In *Truax*, the Court found that a state statute barring injunctions against peaceful picketing by employees, and immunizing such behavior from any

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[108] *Id.* at 1640–42.

[109] John C.P. Goldberg, *The Constitutional Status of Tort Law: Due Process and the Right to a Law for the Redress of Wrongs*, 115 YALE L.J. 524, 529 (2005).

[110] *Id.* at 559.

[111] *Id.*

[112] *Id.* at 568.

[113] *Id.* at 575–76; *see* Truax v. Corrigan, 257 U.S. 312 (1921).

[114] Goldberg, *supra* note 109, at 576.

kind of suit, violated both the Due Process Clause and the Equal Protection Clause.[115] Justice Brandeis dissented, arguing,

> Practically every change in the law governing the relation of employer and employee must abridge, in some respect, the liberty or property of one of the parties . . . . [A]lthough the change may involve interference with existing liberty and property of individuals, the statute will not be declared a violation of the due process clause, unless the court finds that the interference is arbitrary or unreasonable or that, considered as a means, the measure has no real or substantial relation of cause to a permissible end.[116]

Stated somewhat differently, Justice Brandeis argued for a rational basis standard of review. Professor Goldberg points out that

> Brandeis's dissent would mark the Court's future course. *Truax*'s overreaching, combined with other notorious decisions, such as *Lochner* [v. *New York*] and *Ives* [*v. South Buffalo Railway Company*], and with brewing changes in prevailing economic, political, and jurisprudential environment, meant that the idea of a right to a law for the redress of wrongs was about to fall victim to the progressive assault on due process and the judiciary.[117]

2. Privileges and Immunities Clause

Professor Risa Kaufman, writing in 2008 in the *Connecticut Law Review*, argues that access to courts is a privilege and immunity of national citizenship under the Federal Constitution.[118] Professor Kaufman acknowledges that "the Privileges or Immunities Clause was considered dormant after the [United States Supreme] Court gave it a narrow construction in *The Slaughter-House Cases*."[119] This changed, according to Professor Kaufman, with the Supreme Court's 1999 decision in *Saenz v. Roe*,[120] where the professor says "the

[115] *Truax*, 257 U.S. at 322, 329–30.
[116] *Id.* at 355 (Brandeis, J., dissenting).
[117] Goldberg, *supra* note 109, at 576.
[118] Kaufman, *supra* note 88, at 1480.
[119] *Id.* at 1483–84.
[120] Saenz v. Roe, 526 U.S. 489 (1999).

Supreme Court appeared to revive the Clause."[121] Professor Kaufman argues that

> "access to the courts," in some form, is included in those rights explicitly recognized by the Court in Slaughter-House and elsewhere as a privilege or immunity of national citizenship, protected by both the Citizenship Clause and the Privileges or Immunities Clause of the Fourteenth Amendment. . . . I acknowledge, too, the significant limitations of articulating the right to court access as one based on United States citizenship.
>
> . . . I investigate the extent to which court access is one of those "uniquely federal" rights protected by the Fourteenth Amendment, consistent even with the constrained reading given to the Privileges or Immunities Clause in The Slaughter-House Cases. I examine both [the] textual and historical support for grounding the right to access the courts as a right of national citizenship.[122]

Ultimately, Professor Kaufman's article "[r]ecogniz[es] that the Citizenship Clause and Privileges or Immunities Clause do not protect unfettered access to the courts . . . ."[123] It appears that the right the professor identifies is procedural, not substantive, in that it protects the right to file at and enter a court, but does not protect the right to a remedy.[124]

3. First Amendment's Right to Petition the Government for Redress

Professor Benjamin Cover, writing in 2017 in the University of California at Davis Law Review, argues that the First Amendment's Right to Petition the Government for Redress creates a right to access to courts.[125] In the professor's own words:

> [T]his article argues that the most compelling basis for a federal remedial right—as a matter of history, text, and

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[121] Kaufman, *supra* note 88, at 1484.

[122] *Id.* at 1484–85.

[123] *Id.* at 1485.

[124] *See id.* at 1484–85; Dominik Steiger, *A Constitutional Theory of Imperative Participation: Delegated Rulemaking, Citizens' Participation and the Separation of Powers Doctrine*, 79 ALB. L. REV. 1, 49 (2016).

[125] *See* Cover, *supra* note 88, at 1805.

> precedent—lies in the final clause of the First Amendment—the Petition Clause—which guarantees the "right of the people . . . to petition the Government for a redress of grievances." Scholars, lower courts, and the Supreme Court have repeatedly recognized lawsuits as petitions. . . . But scholars and jurists have generally assumed that the right to petition is limited in all cases to this purely negative, procedural right: the right to petition means only and always the right to *ask for redress*—never to *obtain it* . . . . I call this assumption the supplicatory interpretation of the Petition Clause. In this article, I present an alternative reading, which I call the remedial interpretation: that the right to petition includes the limited right of a person who suffers legal injury (or a sufficient threat thereof) to obtain a minimally adequate remedy from the courts. In short, I argue that the First Amendment guarantees a right to a remedy.[126]

Certainly, U.S. Supreme Court precedent supports the article's observation that the First Amendment protects some right of access to the courts. Precedent such as *Bill Johnson's Restaurants v. NLRB*[127] holds that "the right of access to the courts is an aspect of the *First Amendment* right to petition the Government for redress of grievances."[128]

D. Assessing the Potential Federal Equivalents to the States' Open Courts Clauses

The consensus view that state Open Courts Clauses embody rights absent from federal constitutional law jurisprudence cannot be called inaccurate, but can be called an oversimplification.[129] With regard to the Procedural Open Courts Clause, federal constitutional law combined with various federal statutes, provide most, if not all, of the same rights.[130] The scholarly opinions summarized above suggest that the rights provided by state Substantive Open Courts Clauses

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[126] *Id.* at 1744–47 (emphasis added).

[127] Bill Johnson's Rests., Inc. v. NLRB, 461 U.S. 731 (1983).

[128] *Id.* at 741 (citing Cal. Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508, 510 (1972)); *accord* Woodford v. Ngo, 548 U.S. 81, 122 (2006) (Stevens, J., dissenting) (italics in original) (quoting *Bill Johnson's Rests.*, 404 U.S. at 741).

[129] *See, e.g.*, Roesler, *supra* note 28, at 667; *supra* Part I.

[130] *See* HOLLAND ET AL., TEACHER'S MANUAL, *supra* note 89, at 105; *supra* note 89 and accompanying text.

could someday be found to exist within federal constitutional law.[131] But even scholarly suggestions fall short of the more advanced interpretations of the Substantive Open Courts Clause. The scholarly suggestions point to a potential federal constitutional right to a remedy, however the more advanced interpretations of the Substantive Open Courts Clauses protect not just the remedy, but the cause of action that yields the remedy.[132] These more advanced Substantive Open Courts Clauses deny state legislatures the right to abolish existing causes of action, absent specific conditions identified in the state constitutional law jurisprudence.[133] In this way, the more advanced Substantive Open Courts Clauses interfere with a state's separation of powers in a way not seen under the Federal Constitution and not suggested by the scholarly works summarized above.

Seen from this point of view, the consensus opinion that state Open Courts Clauses protect rights beyond those in federal jurisprudence is correct only in those states with a sufficiently advanced interpretation of their Substantive Open Courts Clause.[134]

III. WEIGHING THE MERITS OF A SUBSTANTIVE OPEN COURTS CLAUSE

So, a state constitution's Substantive Open Courts Clause empowers the judiciary to protect existing state law causes of action from being abolished by the legislative branch,[135] thereby interfering with a state's separation of powers in a way not seen under the Federal Constitution.[136] The laboratories of democracy have answered the call to create this new and greater right. Did their experiment succeed? Stated somewhat differently, is the Substantive Open Courts Clause ready for national implementation?

In search for the answer to these questions, we turn to one of the forty Open Courts Clause states whose jurisprudence on the matter is well-advanced. We turn to the State of Florida.

A. Florida's Substantive Open Courts Clause as Interpreted by

131 *See supra* Section II.C.
132 *See* Kluger v. White, 281 So. 2d 1, 4 (Fla. 1973); Cover, *supra* note 88, at 1744–47.
133 *See Kluger*, 281 So. 2d at 4.
134 *See* Jones, *supra* note 60, at 811–12.
135 *See* Roesler, *supra* note 28, at 660; *supra* notes 64–65 and accompanying text.
136 *See* WILLIAMS, *supra* note 73, at 489; *supra* Section II.D.

Kluger v. White

The Declaration of Rights of the Constitution of the State of Florida[137] contains an Open Courts Clause that reads: "The courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay."[138] Note that the words more closely track Magna Carta Chapter 40 than Sir Edward Coke's restatement in his *Second Institute*.[139] This is because the plain text of Florida's Open Courts Clause does not make reference to the right to a remedy, making it one of just five states to omit such language.[140] One might suspect this could prompt Florida's courts to interpret their Open Courts Clause to contain only a procedural protection but not a substantive one. Yet the Supreme Court of Florida interpreted it to provide substantive rights in the 1973 case of *Kluger v. White*[141] and its progeny.[142]

Kluger was a challenge to the constitutionality of a Florida Statute abolishing the traditional right of action in tort for property damage arising from an automobile accident.[143] Under this statute, an insured Floridian can make a property damage claim against the Floridian's own insurer but not the tortfeasor or its insurer.[144] An uninsured Floridian may sue the tortfeasor, but only if the plaintiff does not have property damage insurance and the property damage exceeds $550.00.[145] This statute left Floridian Clara Kluger without any recourse against any person or insurer for her property damage claim.[146]

The Supreme Court of Florida found this statute unconstitutional under Florida's Substantive Open Courts Clause.[147] The court set forth this test for determining whether a Florida statute violates Florida's Substantive Open Courts Clause:

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137 FLA. CONST. art. 1.

138 *Id.* § 21.

139 *See* Magna Carta, *supra* note 38; COKE, SECOND INSTITUTE, *supra* note 42, at 870 (revealing language referencing a right to a remedy in the Second Institute that is absent from the Chapter 40 of the Magna Carta).

140 *See* FLA. CONST. art. I, § 21; Phillips, *supra* note 21, at 1310 n.7 (noting that, of the forty state constitutions containing an Open Courts Clause, thirty-five states provide a right to a remedy, with twenty-one requiring "the remedy to be by due process or due course of law").

141 *See* Kluger v. White, 281 So. 2d 1, 4 (Fla. 1973).

142 *See, e.g.*, Smith v. Dep't of Ins., 507 So. 2d 1080, 1088 (Fla. 1987).

143 *Kluger*, 281 So. 2d at 2.

144 *See id.*

145 *Id.*

146 *Id.* at 3.

147 *See id.*

> [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 [1968] Constitution of the State of Florida, or where such right has become a part of the common law of the State pursuant to [section 2.01, Florida Statutes], the Legislature is without power to abolish such a right without providing a reasonable alternative to protect the rights of the people of the State to redress for injuries, unless the Legislature can show an overpowering public necessity for the abolishment of such right, and no alternative method of meeting such public necessity can be shown.[148]

Therefore, under Florida's Substantive Open Courts Clause, if a cause of action predates Florida's 1968 Constitution, then the Florida Legislature may not abolish that cause of action unless it enacts a reasonable alternative or unless abolishment serves an overpowering public necessity for which no alternative method exists to meet that necessity.[149]

1. Identifying the Protected Causes of Action

The first element of Florida's Substantive Open Courts Clause is that it is limited to protecting certain state law causes of action: those that existed on or before November 5, 1968.[150] This is the date of the adoption of the current Declaration of Rights of the Constitution of the State of Florida.[151] The causes of action existing before this date are the protected causes of action; causes of action that did not exist before November 5, 1968 are not protected.[152] For example, prior to (and after) November 5, 1968, Florida did not recognize the tort of a false light invasion of privacy.[153] Therefore, the Florida Supreme

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[148] *Id.* at 4.

[149] *See id.*

[150] *See* PATRICK JOHN MCGINLEY, FLORIDA MUNICIPAL LAW AND PRACTICE § 1:5 (2018).

[151] *Id.* ("When faced with a challenge to the constitutionality of a statute as allegedly violating [Florida's Open Courts Clause], the reviewing court must look to the statutory law in place when this constitutional amendment to Florida's organic law was adopted: November 5, 1968. This means [it protects] a right of access to the courts for redress for a particular injury has been provided by statutory law predating November 5, 1968 (the date of the adoption of the Declaration of Rights of the Constitution of the State of Florida) . . . .").

[152] PATRICK JOHN MCGINLEY, INTERPRETING FLORIDA'S CONSTITUTION 295 (2017) ("Article I Section 21 of the Florida Constitution provides a limitation upon the Florida Legislature's power to abolish causes of action that existed prior to the enactment of the 1968 Constitution of the State of Florida.").

[153] *See* Jews For Jesus, Inc. v. Rapp, 997 So. 2d 1098, 1100 (Fla. 2008) ("Because we conclude

Court's 2008 decision holding that Florida never recognized false light did not affect a protected cause of action and did not run afoul of Florida's Substantive Open Courts Clause.[154]

2. The Clause Protects Against Abolishment Only

The second element prevents abolishing a protected cause of action unless one of the two exceptions are met.[155] Note that abolishment is prohibited, but alterations short of abolishment are permitted.[156] For example, a Florida "Guest Statute" that protected drivers from claims of negligence by their passengers by raising the standard from "ordinary negligence" to "willful and wanton misconduct" did not violate Florida's Substantive Open Courts Clause because the common law action for negligence was altered but not abolished.[157] It "merely changed the degree of negligence necessary for a passenger in an automobile to maintain a tort action against the driver. It did not abolish the right to sue."[158]

3. Abolishment Permitted Upon Creation of a "Reasonable Alternative"

If a protected cause of action is abolished, then the first of two possible exceptions that will permit abolishment under Florida's Substantive Open Courts Clause is enacting a reasonable alternative.[159] The Supreme Court of Florida cites the Florida Workers' Compensation Law as an example of a reasonable alternative.[160] The Florida Workers' Compensation Law is the exclusive remedy for workers injured in the course and scope of their employment whenever the employer secures workers' compensation

that false light is largely duplicative of existing torts, but without the attendant protections of the First Amendment, we decline to recognize the tort [in Florida].").

154 Anderson v. Gannett Co., 994 So. 2d 1048, 1051 (Fla. 2008).

155 *See* Kluger v. White, 281 So. 2d 1, 4 (Fla. 1973).

156 *See* Chapman v. Dillon, 415 So. 2d 12, 17 (Fla. 1982) (holding Open Courts Clause was not violated by imposing threshold limits in a no-fault statute that replaces a tort action); Purdy v. Gulf Breeze Enters., 403 So. 2d 1325, 1329 (Fla. 1981) (holding Open Courts Clause was not violated when statute requires reimbursement of PIP insurer from recovery obtained from a negligent third party tortfeasor); Pinillos v. Cedars of Lebanon Hosp. Corp., 403 So. 2d 365, 367–68 (Fla. 1981); McMillan v. Nelson, 5 So. 2d 867, 869–70 (Fla. 1942) (recognizing that the Open Courts Clause does not prohibit statutes from limiting the right of action without completely barring redress in a judicial forum).

157 *See McMillan*, 5 So. 2d at 869–70.

158 *Kluger,* 281 So. 2d at 4 (citing *McMillan*, 5 So. 2d at 870).

159 *See Kluger*, 281 So. 2d at 4.

160 *See id.*

insurance coverage, except when the employee proves by clear and convincing evidence that the employer deliberately intended to injure the employee or deliberately misrepresented a danger that was virtually certain to injure or kill the employee.[161] All other injured workers are restricted to the Workers' Compensation Law's statutory schedule of benefits that does not allow punitive damages, does not compensate for pain and suffering, and does not compensate for the loss of consortium.[162] The Law pays wage-loss indemnity benefits only for a limited time and capped by a statewide maximum compensation rate.[163] It provides medical care primarily by the employer's choice of doctors and capped by an administrative law fee schedule.[164] It denies state courts jurisdiction to adjudicate disputes over workers' compensation benefits, and restricts the forum for such adjudications to an administrative law Judge of Compensation Claims instead.[165] In this way, the Florida Workers' Compensation Law "abolished the right to sue one's employer in tort for a job-related injury, but provided adequate, sufficient, and even preferable safeguards for an employee who is injured on the job, thus satisfying one of the exceptions to the rule against abolition of the right to redress for an injury."[166] Despite all the shortcomings of the Florida Workers' Compensation Law, the Supreme Court of Florida offers it as an example of a "reasonable alternative" that avoids running afoul of Florida's Substantive Open Courts Clause.[167] This suggests that this first of the two possible exceptions may be the easier exception to meet.

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[161] FLA. STAT. § 440.11(1) (2018); *see* Travelers Indem. Co. v. PCR Inc., 889 So. 2d 779, 781 (Fla. 2004); *see also* PATRICK JOHN MCGINLEY, FLORIDA WORKERS' COMPENSATION § 6A:2 (2018) (providing an overview of employer immunity from civil suits via the exclusive remedy of the Florida Workers' Compensation Law).

[162] *See* FLA. STAT. §§ 440.09, 440.11; *see also* MCGINLEY, *supra* note 150, at § 1:5 (summarizing the benefits available under the Florida Workers' Compensation Law).

[163] *See* FLA. STAT. § 440.15(1)(f)(1) (2018) (limiting the time period for indemnity benefits); FLA. STAT. § 440.12(2) (2018) (creating a maximum compensation rate for indemnity benefits); *see also* MCGINLEY, *supra* note 161, at §§ 16:5, 22:30 (regarding maximum amounts of compensation, maximum compensation rates and maximum number of weeks payable for temporary disability).

[164] *See* FLA. STAT. § 440.13(2)(a) (2018) (empowering the injured workers' employer to choose the workers' doctors in most instances); *see also* MCGINLEY, *supra* note 150, at § 24:11 (discussing the employer's right to control the employee's medical treatment and choose the employee's doctors).

[165] *See* FLA. STAT. §§ 440.015, 440.29, 440.33, 440.25(3)(a) (2018) (requiring benefit disputes to be adjudicated by a Judge of Compensation Claims instead of a state court); *see also* MCGINLEY, *supra* note 150, at § 37:3 (summarizing how workers' compensation claims are adjudicated before a Judge of Compensation Claims).

[166] Kluger v. White, 281 So. 2d 1, 4 (Fla. 1973).

[167] *See id.* at 5.

4. Abolishment Permitted for an Overpowering Public Necessity When No Alternative Method Exists

The second of two possible exceptions that will permit abolishment under Florida's Substantive Open Courts Clause is proof that abolishment serves "an overpowering public necessity" for which no alternative method exists to meet that necessity.[168] The example given by the Supreme Court of Florida is Florida Statutes Chapter 771's abolishment of "the rights of action to sue for damages for alienation of affections, criminal conversation, seduction or breach of promise."[169] These actions had "become an instrument of extortion and blackmail, [so] the legislature has the power to, and may, limit or abolish them."[170] Florida Statutes Chapter 771's abolishment of these cause of action occurred in 1948, and in 1973, Florida's Supreme Court cited this abolishment as an example that meets the exception for an overpowering public necessity for which no alternative method existed.[171] Since then, no other Florida case finds that an abolishment of a protected cause of action met that exception.[172] This suggests that this second of the two possible exceptions may be the harder exception to meet.

B. Four Decades of Deference to Amending a "Reasonable Alternative"

The jurisprudence of Florida's Substantive Open Courts Clause has advanced so far as to answer the question as to what restrictions the Clause imposes upon legislative alterations of a previously-approved "reasonable alternative" to a protected cause of action.[173] By advancing this far, Florida illustrates a critical flaw in the jurisprudence of the Substantive Open Courts Clause.

The reasonable alternative at issue is the very one cited by Florida's Supreme Court in *Kluger v. White* as the example of a constitutionally-sound reasonable alternative: Florida's Workers'

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168 *See id.* at 4.

169 *Id.*

170 *Id.* (quoting Rotwein v. Gersten, 36 So. 2d 419, 421 (Fla. 1948)).

171 *See Kluger*, 281 So. 2d at 4; *Rotwein*, 36 So. 2d at 421.

172 *But see* Carr v. Boward Cty., 505 So. 2d 568, 575 (Fla. Dist. Ct. App. 1987), *aff'd* 541 SO.2d 92, 96 (Fla. 1989).

173 *See* Westphal v. City of St. Petersburg, 194 So. 3d 311, 313 (Fla. 2016).

Compensation Law.[174] From the 1973 *Kluger* decision through 2016, Florida, like so many other states, reduced workers' compensation benefits in what some commentators called a "race to the bottom."[175] But throughout that forty-three year span, each amendment to Florida's Workers' Compensation Law challenged under Florida's Substantive Open Courts Clause survived the challenge.[176] Florida's courts upheld these substantial erosions of an injured worker's benefits despite Florida's Substantive Open Courts Clause:

- 1978's amendment banning negligence lawsuits against co-workers except in certain enumerated and extreme cases such as willful and wanton behavior.[177]
- 1979's deletion of scheduled injury benefits called permanent partial disability benefits from the Workers' Compensation Law, replacing them, but only in part, with other classes of benefits designed to pay less.[178]
- 1979's reduction of wage loss benefits by up to fifty percent[179] or elimination of those benefits after the worker reached age sixty-five and became eligible for social security benefits.[180]
- 1979's amendment reducing the impairment income benefits received by all workers whose workplace

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[174] *See Kluger*, 281 So. 2d at 4, 5.

[175] *See, e.g.*, Robert F. Williams, *Can State Constitutions Block the Workers' Compensation Race to the Bottom?*, 69 RUTGERS U. L. REV. 1081, 1084 (2017) ([A] movement afoot in the country to further erode the workplace-injury compensation programs that formed one-half of the Grand Bargain: the Race to the Bottom. The[re is] ongoing litigation over the erosion of workers' compensation benefits in the states . . . ."); Michael C. Duff, *Worse Than Pirates or Prussian Chancellors: A State's Authority to Opt-Out of the Quid Pro Quo*, 17 MARQ. BENEFITS & SOC. WELFARE L. REV. 123, 184 (2016) ("By the end of the 1960s, this patchwork of uneven state court protections had led to a perhaps predictable race to the bottom.").

[176] *See* MCGINLEY, *supra* note 161, at § 1:7 ("So ultimately, all accusations of 'access to courts' violations by the Florida Workers' Compensation Law have been rejected prior to 2016.").

[177] *See* Iglesia v. Floran, 394 So. 2d 994, 995 (Fla. 1981) ("[A] 1978 amendment to section 440.11(1), Florida Statutes (1977) . . . grants immunity from tort liability to co-employees who, while in the course of their employment, negligently injure other employees of the same employer, unless the employees act with willful and wanton disregard or unprovoked physical aggression or with gross negligence.").

[178] *See* Acton v. Fort Lauderdale Hosp., 440 So. 2d 1282, 1284 (Fla. 1983) ("[T]he 1979 legislature's replacement of permanent partial disability benefits in subsection 440.15(3) with the enactment of a permanent impairment and wage-loss benefits system in subsections 440.15(3)(a) and (b) . . . .").

[179] *See* Morrow v. Amcon Concrete, Inc., 433 So. 2d 1230, 1231 (Fla. Dist. Ct. App. 1983).

[180] *See* Sasso v. Ram Prop. Mgmt., 452 So. 2d 932, 933 (Fla. 1984).

accident causes a permanent impairment.[181]

- 1979's amendment denying death benefits to injured workers whose death, despite being caused by the workplace accident, did not occur within five years of the workplace accident.[182]
- 1994's amendment reducing yet again the impairment income benefits received by all workers who suffer a permanent impairment.[183]
- 1994's amendment requiring heightened pleading requirements and requiring dismissal by a Docketing Judge for failure to comply.[184]
- 2003's end of permanent total disability benefits after five years if the worker's accident occurred after the worker reached age 70.[185]
- In 2009, the right of the employee and the employer to "opt out" of the Florida Workers' Compensation Law, and preserve their tort remedies, was repealed.[186]

C. Florida Finds Its Substantive Due Process Clause Imposes a Restriction upon Amending a "Reasonable Alternative"

Four decades passed without a Florida appellate court finding any amendment to Florida's Workers' Compensation Law to be unconstitutional under Florida's Substantive Open Courts Clause, despite some amendments being a substantial reduction in benefits

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[181] *See, e.g.*, Mahoney v. Sears, 419 So. 2d 754, 755 (Fla. Dist. Ct. App. 1982) (holding the 1979 amendments to § 440.15(3)(a)1, Florida Statutes (1980), do not violate the Open Courts Clause); *see also* Beauregard v. Commonwealth Elec., 440 So. 2d 460, 460 (Fla. Dist. Ct. App. 1983) (reaffirming the holding in *Mahoney*).

[182] *See* La Bella v. Food Fair, 406 So. 2d 1216, 1217 (Fla. Dist. Ct. App. 1981).

[183] *See* Bradley v. Hurricane Rest., 670 So. 2d 162, 164 (Fla. Dist. Ct. App. 1996) ("[T]he statute significantly reduces benefits to a permanently injured worker from benefits that same injured worker would have received had the worker been injured between July 1, 1990 and December 31, 1993, or between July 1, 1979 through June 30, 1990.").

[184] *See* Burdick v. Bob's Space Racers, 659 So. 2d 351, 352 (Fla. Dist. Ct. App. 1995) (per curiam) ("The [statute] requires specific information on the face of the petition identifying 'the type or nature of treatment care or attendance sought *and the justification* for such treatment.'").

[185] *See* Berman v. Dillard's & Esis, 91 So. 3d 875, 876–77 (Fla. Dist. Ct. App. 2012) (per curiam) (holding that the statue did not violate the claimant's right of access to courts or discriminate on the basis of age).

[186] *See* FLA. STAT. §§ 440.03, .15 (2018); Westphal v. City of St. Petersburg, 194 S. 3d 311, 326 (Fla. 2016).

to the injured worker.[187]

All that changed in 2016.[188] The Supreme Court of Florida found a violation of Florida's Substantive Open Courts Clause.[189] The violation was found in the most unlikely of amendments, considering its history. The violation was found in an amendment that made yet a second reduction to a type of workers' compensation indemnity payments called "temporary total disability benefits."[190]

This was not the first time that the Florida Legislature made a second reduction to a particular workers' compensation benefit.[191] The argument that a second reduction to previously-reduced workers' compensation benefits violated Florida's Substantive Open Courts Clause, was considered and rejected in 1996.[192] Why then did the argument succeed this time? To find the answer, we must dive a bit deeper into Florida's Workers' Compensation Law.

1. This "Reasonable Alternative" Always Had a "Gap Period" in Its "Temporary Indemnity"

The workers' compensation benefit at issue, called temporary total disability benefits, is one type of indemnity that Florida's workers may receive as a partial replacement for wages lost due to a workplace injury.[193] This temporary indemnity does not last forever. Generally speaking, this indemnity ceases at the earlier of two dates: the date of Maximum Medical Improvement or the expiration of the statutory maximum number of weeks of payment.[194]

For the first of the two possible expiration dates, temporary total disability ceases when the worker recovers medically as much as possible, which is a status that the statute calls Maximum Medical

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[187] *See* Martinez v. Scanlan, 582 So. 2d 1167, 1171 (Fla. 1991) ("This Court previously has rejected claims that workers' compensation laws violate access to courts by failing to provide a reasonable alternative to common-law tort remedies.") (collecting cases); s*ee also* MCGINLEY, *supra* note 161, at § 1:7 ("Despite [workers' compensation] serving as one of the original examples in 1973 of a statute that does not violate the 'access to courts,' [workers' compensation] continued to be challenged as an unconstitutional violation of 'access to courts' throughout the subsequent four decades, but never with success.").

[188] *See Westphal*, 194 So. 3d at 327.

[189] *See id.* at 314.

[190] *See id.* at 324.

[191] *See* Bradley v. Hurricane Rest., 670 So. 2d 162, 164 (Fla. Dist. Ct. App. 1996).

[192] *See id.*

[193] *See* FLA. STAT. § 440.15(2) (2018).

[194] *See id.* Speaking more specifically, temporary total disability benefits also cease upon the injured worker gaining entitlement to temporary partial disability benefits or upon the injured worker disqualifying him or herself by committing certain forbidden acts. *See id.*

Improvement.[195] Maximum Medical Improvement marks the start of one of two potential other entitlements to indemnity, either permanent total disability or permanent impairment benefits, assuming the worker's disability is deemed to endure permanently after Maximum Medical Improvement.[196]

For the second of the two possible expiration dates, temporary total disability benefits cease prior to Maximum Medical Improvement if the statutory maximum number of weeks is paid.[197] The statutory maximum marks the end of temporary indemnity benefits but does not mark the start of any other type of indemnity benefit.[198] The injured worker still must await Maximum Medical Improvement before any other class of indemnity benefit may start.[199] This creates a gap period for workers who receive the statutory maximum number of weeks of temporary indemnity before reaching Maximum Medical Improvement. These workers do not receive any indemnity benefits—a "gap" in such benefits—until some future date when Maximum Medical Improvement arrives.[200]

This gap existed when Florida's Supreme Court cited in *Kluger v. White* to Florida's Workers' Compensation Law as a "reasonable alternative" that did not violate Florida's Substantive Open Courts Clause. Three hundred and fifty weeks was the statutory maximum in effect in the year that *Kluger* was decided.[201] So as approved by *Kluger*, an injured worker who received 350 weeks of temporary disability benefits could fall into a gap period without indemnity until reaching Maximum Medical Improvement. This gap made the Florida Workers' Compensation Law consistent with the workers' compensation laws of at least eight other states.[202] This gap did not

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[195] *See id*.

[196] *See* FLA. STAT. § 440.15(2)(a), (3)(a).

[197] *See* FLA. STAT. § 440.15(2)(a).

[198] *See id*; Westphal v. City of St. Petersburg, 194 So. 3d 311, 314 (Fla. 2016).

[199] *See* FLA. STAT. § 440.15(2)(a); *Westphal*, 194 So. 3d at 314.

[200] MCGINLEY, *supra* note 152, at 320 ("A potential cessation of payment of temporary 'indemnity' (a type of wage-substitution benefits), combined with a potential delay on the start of permanent 'indemnity,' created a potential 'gap' where injured workers were unpaid for a potentially indefinite period.").

[201] *See Westphal*, 194 So. 3d at 324 ("A worker injured in 1968 was entitled to receive temporary total disability benefits for up to 350 weeks. . . . In 1990, the Legislature reduced the availability of temporary total disability benefits from 350 to 260 weeks . . . . Then, in 1993, the Legislature again reduced the availability of temporary total disability benefits, this time from 260 weeks to 104 weeks . . . .").

[202] Emily A. Spieler, *(Re)Assessing the Grand Bargain: Compensation for Work Injuries in the United States, 1900-2017*, 69 RUTGERS U. L. REV. 891, 943 n.271 (2017) ("[A]t least eight states limit temporary total disability benefits to a specified number of weeks."). It is important to note that "[t]he duration of temporary total disability has been limited to a specific number of weeks, without regard to whether the injured worker has reached maximum medical

prevent Florida's Workers' Compensation Law from being found constitutional under Florida's Open Courts Clause according to *Kluger*.[203]

2. As This Reasonable Alternative Is Amended, the Gap Widens

In 1990, the Florida Legislature reduced the statutory maximum from 350 weeks to 260 weeks.[204] The gap remained, but now, potentially more workers could fall into the gap because the gap widened.[205] In *Martinez v. Scanlan*, an injured worker argued to the Supreme Court of Florida that this widened gap violated Florida's Substantive Open Courts Clause.[206] The Supreme Court of Florida upheld the reduction and rejected the claim of unconstitutionality.[207]

In 1993, the Florida Legislature reduced the statutory maximum again, lowering it from 260 weeks to 104 weeks.[208] Florida's workers' compensation Judges of Compensation Claims enforced this 104-week maximum from 1993 until 2016 when the Supreme Court of Florida found it violated Florida's Substantive Open Courts Clause.[209]

3. The Size of the Gap Violates the Substantive Open Courts Clause

In the 2016 case of *Westphal v. City of St. Petersburg*, the Supreme Court of Florida held: "we conclude that the 104–week limitation on temporary total disability benefits results in a statutory gap in benefits, in violation of the constitutional right of access to courts."[210] That language states or at least implies that the gap in benefits was the constitutional infirmity.

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improvement or is able to return to work." *Id.* at 942–43.

[203] *See* Kluger v. White, 281 So. 2d 1, 3, 4 (Fla. 1973).

[204] *See Westphal*, 194 So. 3d at 324 ("In 1990, the Legislature reduced the availability of temporary total disability benefits from 350 to 260 weeks . . . .").

[205] We surmise that the gap widened because the old statutory maximum paid workers for 350 weeks before the gap in benefits left them unpaid until reaching Maximum Medical Improvement. But under the new statutory maximum of 260 weeks, the gap starts 90 weeks sooner. This leaves workers unpaid for a considerably longer time, and perhaps, might leave some workers unpaid under the new maximum that would have been paid under the old maximum.

[206] *See* Martinez v. Scanlan, 582 So. 2d 1167, 1171 (Fla. 1991) (citing *Kluger*, 281 So. 2d at 4).

[207] *See Martinez*, 582 So. 2d at 1171–72, 1174.

[208] *See Westphal*, 194 So. 3d at 324 ("Then, in 1993, the Legislature again reduced the availability of temporary total disability benefits, this time from 260 weeks to 104 weeks . . . .").

[209] *See id.* at 314.

[210] *Id.*

Despite the language chosen by Florida's Supreme Court, the gap was not a new feature of Florida's Workers' Compensation Law. As shown above, the gap existed when Florida's Supreme Court cited with approval the workers' compensation law in *Kluger v. White*.[211] The gap persisted, and widened, when Florida's Supreme Court upheld the workers' compensation law under Florida's Substantive Open Courts Clause in *Martinez v. Scanlan*.[212]

Yet *Westphal* struck down this amendment to the Florida Workers' Compensation Law because of the gap.[213] In so doing, *Westphal* altered the rule of law applicable to amendments to reasonable alternatives.[214] *Westphal* holds that

> the statutory gap must . . . be viewed through the analytical paradigm of *Kluger* . . . . The "reasonable alternative" test is then the linchpin and measuring stick . . . .
>
> But, there must eventually come a "tipping point," where the diminution of benefits becomes so significant as to constitute a denial of benefits—thus creating a constitutional violation. . . .
>
> As applied to Westphal, the current workers' compensation statutory scheme does not just reduce the amount of benefits he would receive . . . but in fact completely cuts off his ability to receive any disability benefits at all.[215]

Stated somewhat differently, *Westphal* supplements the rule of *Kluger v. White* with the following rule: if a "reasonable alternative" replaced an abolished but protected cause of action, then amending the alternative violates the Substantive Open Courts Clause if the diminution of the remedy becomes so significant as to constitute a denial of a remedy.[216]

Viewed in this way, *Westphal* seems to be a minor alteration to *Kluger v. White*. From this perspective, *Westphal* is nothing more than a restriction against amending a reasonable alternative so drastically as to offer no remedy at all. To the extent this is the rule of law arising from *Westphal*, the jurisprudence of the Substantive Open Courts Clause makes very little advancement because it was

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211 *See Kluger*, 281 So. 2d at 4.
212 *See Martinez*, 582 So. 2d at 1171, 1174.
213 *See Westphal*, 194 So. 3d at 314.
214 *See id.* at 323.
215 *See id.*
216 *See id.*

always a potential violation of *Kluger v. White* to abolish a protected cause of action without providing a remedy.[217]

But the facts of *Westphal* show us that *Westphal* does more to advance Florida's Substantive Open Courts Clause than its rule of law may imply. Upon a close analysis, as shown below, *Westphal* transforms the Substantive Open Courts Clause into a judicial tool for supplanting legislative policy decisions in economic legislation.

D. Florida's Substantive Open Courts Clause Evolves to Empower the Judiciary to Alter the Legislature's Policy Decisions Embodied in Economic Legislation

The *Westphal* opinion begins with the observation that "that the 104–week limitation on temporary total disability benefits results in a statutory gap in benefits, in violation of the constitutional right of access to courts."[218] *Westphal* states this conclusion as if a gap in benefits were a new result of the statutory amendment under review. Yet the gap was always present. So *Westphal* should not be read to strike down the legislative amendment to the Florida Workers' Compensation Law because it created a gap. The gap was found constitutional previously and it was not a creation of the amendment struck down in *Westphal*.[219] So what was different about this newest gap? Size.

Specifically, the Supreme Court of Florida in *Westphal* found fault because the size of the gap "cuts off a severely injured worker from disability benefits at a critical time, when the worker cannot return to work and is totally disabled but the worker's doctors—chosen by the employer—deem that the worker may still continue to medically improve."[220] Size was the issue, as acknowledged in this language in the *Westphal* decision:

> [A]s we have indicated throughout this opinion, we previously held that the pre–1994 statute's limitation of 260 weeks "passes constitutional muster" because it "remains a reasonable alternative to tort litigation," where a worker "is not without a remedy." . . . Although the length of time available for the administration of temporary total disability benefits to a worker before the worker reaches maximum

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[217] *See* Kluger v. White, 281 So. 2d 1, 4 (Fla. 1973).
[218] *Westphal*, 194 So. 3d at 314.
[219] *See* Martinez v. Scanlan, 582 So. 2d 1167, 1171–72 (Fla. 1991); *Kluger*, 281 So. 2d at 4.
[220] *Westphal*, 194 So. 3d at 314.

> medical improvement does involve line drawing, the difference between a period of only two years (104 weeks) and five years (260 weeks) is significant as it relates to the time it takes a worker to attain maximum medical improvement.[221]

Yet Florida's rule of law for evaluating legislation under its Substantive Open Courts Clause—the rule of *Kluger v. White*—makes no mention of size. *Kluger* makes mention of a "reasonable" alternative.[222] *Kluger* does not ask whether the alternative is large or small, great or humble, better or worse than the protected cause of action that the alternative is replacing, *Kluger* asks only whether the alternative is *reasonable*.[223] Reasonableness, as a concept in constitutional law, is a concept of deference.[224]

Such deference was extended to previous amendments to the Florida Workers' Compensation Law. Thirty-four years prior to *Westphal*, Florida's Supreme Court reviewed a decision of Florida's First District Court of Appeal refusing to find a Substantive Open Courts Clause violation in an amendment that drastically reduced workers' compensation benefits.[225] In that case, called *Mahoney v. Sears Roebuck & Co.*, Florida's First District Court of Appeal opined that: "[E]ven if we might believe the statute [is] fraught with unfairness, wrong in its intent, and failing to accomplish any of the goals as a reason for passage," the worker's compensation statute "has not *totally eliminated* the previously recognized cause of action and, as such, does not offend Article I, Section 21, of the Florida Constitution['s Substantive Open Courts Clause]."[226]

Upon review, Florida's Supreme Court approved of the First District Court of Appeal's decision, stating the amendment reducing benefits "may appear inadequate and unfair, but it does not render the statute unconstitutional" under the Substantive Open Courts

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[221] *Id.* at 327 (quoting *Martinez*, 582 So.2d at 1171–72).

[222] *Kluger*, 281 So. 2d at 4.

[223] *See id.*

[224] *See, e.g.*, R. Randall Kelso, *Standards of Review Under the Equal Protection Clause and Related Constitutional Doctrines Protecting Individual Rights: The "Base Plus Six" Model and Modern Supreme Court Practice*, 4 U. PA. J. CONST. L. 225, 228 (2002) ("Thus, under minimum rationality review, the legislation only has to be rationally related to legitimate government interests, and not impose irrational burdens on individuals.").

[225] Mahoney v. Sears, 419 So. 2d 754, 755–56 (Fla. Dist. Ct. App. 1982), *aff'd*, 440 So. 2d 1285, 1286 (Fla. 1983).

[226] *Mahoney*, 419 So. 2d at 755–56 (quoting McKee v. City of Jacksonville, 395 So. 2d 222, 224–25 (Fla Dist. Ct. App. 1981); citing Jetton v. Jacksonville Elec. Auth., 399 So. 2d 396 (Fla. Dist. Ct. App. 1981)).

Clause.[227] So prior to *Westphal*, Florida's rule of law for evaluating an amendment to a reasonable alternative under its Substantive Open Courts Clause remained the rule of *Kluger v. White*. The rule remained whether the alternative was *reasonable*. Now *Westphal* transforms Florida's Substantive Open Courts Clause from a reasonableness analysis to a quantitative analysis and it does so in evaluating economic legislation.[228]

History shows us the danger of allowing a constitutional clause to evolve into a tool that empowers the judicial branch to replace the legislature's policy decisions in economic legislation.[229] Just as a state constitution's Open Courts Clause can be said to contain both a Procedural Open Courts Clause and a Substantive Open Courts Clause, so too is the Federal Constitution's Due Process Clause said to contain both a Procedural Due Process Clause and a Substantive Due Process Clause.[230] Americans respect and cherish the protections of the Procedural Due Process Clause, and the same is true for the Substantive Due Process Clause when it comes to fundamental liberties, civil rights, and non-economic legislation.[231] But history shows us the danger of allowing the Substantive Due Process Clause to be a tool empowering the judiciary to replace the legislature's policy decisions in economic legislation.[232]

The era of federal Substantive Due Process began at or within a few years of one of the Supreme Court of the United States' most egregious errors: the 1857 decision in *Scott v. Sandford*.[233] The Substantive Due Process cited as support in *Dred Scott* evolved to include Economic Substantive Due Process, most notably during the *Lochner* era of 1897 to 1937.[234] During that era, the U.S. Supreme

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[227] *Mahoney*, 440 So. 2d at 1286.

[228] Westphal v. City of St. Petersburg, 194 So. 3d 311, 327 (Fla. 2016).

[229] *See, e.g.*, Victor E. Schwartz & Leah Lorber, *Judicial Nullification of Civil Justice Reform Violates the Fundamental Federal Constitutional Principle of Separation of Powers: How to Restore the Right Balance*, 32 RUTGERS L.J. 907, 907–08 (2001).

[230] *See* Ryan C. Williams, *The One and Only Substantive Due Process Clause*, 120 YALE L.J. 408, 419 (2010).

[231] *See* Halsey v. Pfeiffer, 750 F.3d 273, 293 (3d Cir. 2014) (quoting Ricciuti v. N.Y.C. Transit. Auth. 124 F.3d 123, 130 (2d Cir. 1997); *see, e.g.*, Ingraham v. Wright, 430 U.S. 651, 673 (1977) (quoting Meyer v. Nebraska, 262 U.S. 390, 399 (1923); citing Dent v. West Virginia, 129 U.S. 114, 123–24 (1889)).

[232] *See* Schwartz & Lorber, *supra* note 229, at 917.

[233] Scott v. Sandford, 60 U.S. 393 (1857); *see* Johnson v. United States, 135 S. Ct. 2551, 2567 (2015); Obergefell v. Hodges, 135 S. Ct. 2584, 2616 (2015) (Roberts, C.J., dissenting). *But see* Bloomer v. McQuewan, 55 U.S. 539, 550–51 (1853) (a case preceding *Dred Scott* that arguably applies the concept of substantive due process).

[234] *See* David E. Bernstein, *Lochner Era Revisionism, Revised: Lochner and the Origins of Fundamental Rights Constitutionalism*, 92 GEO. L.J. 1, 10–11 (2003) [hereinafter Bernstein, *Lochner Era Revisionism*] ("In practice there was not one *Lochner* era, but three. The first

Court used what is now called Economic Substantive Due Process to strike down legislation that did not agree with the deciding judge's particular economic philosophy.[235] In the *Lochner* era, the Supreme Court struck as unconstitutional economic legislation such as laws setting a minimum wage for women and children[236] and laws setting maximum working hours per week for laborers.[237] During "the so-called *Lochner* era . . . the court was criticized for substituting its own view of public policy . . . for that of the legislature."[238]

The *Lochner* Era derives its name from the U.S. Supreme Court's infamous decision in *Lochner v. New York*. The case involved a law limiting a baker's employee's working hours to a maximum of sixty hours per week that the State of New York enacted for the purpose of protecting workers from harsh working conditions.[239] An employer was fined repeatedly for violating this law and appealed.[240] The Supreme Court of the United States held that "no State can deprive any person of life, liberty or property without due process of law. The right to purchase or to sell labor is part of the liberty protected by this amendment . . . ."[241] *Lochner* therefore struck down New York's worker protection law as unconstitutional under the Due Process Clause.[242]

In one of history's most famous dissents, Justice Oliver Wendell Holmes Jr. wrote,

> Some . . . laws embody convictions or prejudices which judges

period began in approximately 1897 and ended in about 1911, with moderate Lochnerians dominating the Court. The second era lasted from approximately 1911 to 1923, with the Court, while not explicitly repudiating *Lochner*, generally refusing to expand the liberty of contract doctrine to new scenarios, and at times seeming to drastically limit the doctrine. From 1923 to the mid-1930s, the Court was dominated by Justices who expanded *Lochner* by voting to limit the power of government in both economic and noneconomic contexts.").

[235] Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 691 (1999) ("We had always thought that the *distinctive* feature of *Lochner*, nicely captured in Justice Holmes's dissenting remark about 'Mr. Herbert Spencer's Social Statics,' . . . was that it sought to impose a particular economic philosophy upon the Constitution.") (quoting Lochner v. New York, 198 U.S. 45, 75 (1905)).

[236] *See* Adkins v. Children's Hosp., 261 U.S. 525, 560–62 (1923), *overruled by* W. Coast Hotel Co. v. Parrish, 300 U.S. 379, 400 (1937).

[237] *Lochner*, 198 U.S. at 64, *overruled by* Day-Brite Lighting, Inc. v. Missouri, 342 U.S. 421, 425 (1952), *and* Ferguson v. Skrupa, 372 U.S. 726, 730 (1963), *and abrogated by W. Coast Hotel Co.*, 300 U.S. at 392.

[238] Schwartz & Lorber, *supra* note 229, at 917–18.

[239] *See Lochner*, 198 U.S. at 52–53; *id.* at 69 (Harlan, J., dissenting).

[240] *See id.* at 52; People v. Lochner, 713 A.D. 120, 121 (N.Y. App. Div. 1902), *aff'd* 69 N.E. 373 (N.Y. 1904).

[241] *See Lochner*, 198 U.S. at 53, 64–65.

[242] *See id.*

> are likely to share. Some may not. But a constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the State or of *laissez faire*. It is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar or novel and even shocking ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States.[243]

Justice Holmes was on the right side of history. Today, *Lochner* "is famous because there is virtually universal agreement among judges and scholars that it was incorrectly decided."[244] Although the *Lochner* era ended long ago, "[a]lmost one hundred years after the Supreme Court decided the case, *Lochner* and its progeny remain the touchstone of judicial error."[245] Scholars opine that "[m]odern constitutional theory still responds to the protection of individual rights and the avoidance of Lochnerism as its central dynamic."[246] *Lochner* "is presented in modern constitutional theory as a case that all mainstream theorists must reject."[247]

Most scholars mark the end of the *Lochner* era as occurring contemporaneously with the Supreme Court of the United States' 1937 decision in *West Coast Hotel v. Parrish*.[248] There, the Supreme Court overruled its own prior precedent and upheld minimum wage legislation.[249] In so doing, the Court noted that "[l]iberty under the Constitution is thus necessarily subject to the restraints of due process, and regulation which is reasonable in relation to its subject

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[243] *Id.* at 75–76 (Holmes, J., dissenting).

[244] JOHN PAUL STEVENS, FIVE CHIEFS: A SUPREME COURT MEMOIR 25 (2011); *accord* Cass R. Sunstein, *Lochner's Legacy*, 87 COLUM. L. REV. 873, 903 (1987) ("Lochner was wrongly decided, and one of the reasons that it was wrong is that it depended on baselines and consequent understandings of action and neutrality that were inappropriate for constitutional analysis."); *see also* Bernstein, *Lochner Era Revisionism*, *supra* note 234, at 5 n.12 ("*Lochner* was so reviled that, between the demise of *Lochner* in *West Coast Hotel v. Parrish* in 1937 and the publication of Bernard Siegan's *Economic Liberties and the Constitution* in 1980, it appears that only a single article that expressed even mild support for Lochner was published.").

[245] David E. Bernstein, *Lochner's Legacy's Legacy*, 82 TEX. L. REV. 1, 2 (2003) [hereinafter Bernstein, *Lochner's Legacy's Legacy*].

[246] James L. Kainen, *The Historical Framework for Reviving Constitutional Protection for Property and Contract Rights*, 79 CORNELL L. REV. 87, 101 (1993).

[247] Bernstein, *Lochner's Legacy's Legacy*, *supra* note 245, at 2 n.4.

[248] *See* Bernstein, *Lochner Era Revisionism*, *supra* note 234, at 10; *see, e.g.* Sunstein, *supra* note 244, at 876.

[249] Adkins v. Children's Hosp., 261 U.S. 525 (1923), *overruled by* W. Coast Hotel Co. v. Parrish, 300 U.S. 379, 399, 400 (1937).

and is adopted in the interests of the community is due process."[250] This and subsequent decisions established that U.S. Supreme Court review of economic legislation would be based upon the rational relationship test, which shows deference to the policy-making role of the legislature by upholding economic legislation that has a rational relationship to a legitimate governmental objective.[251]

> It is by now well established that legislative Acts adjusting the burdens and benefits of economic life come to the Court with a presumption of constitutionality, and that the burden is on one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way.[252]

The end of the *Lochner* era marked the end of heightened federal constitutional scrutiny of the legislative policy decisions embodied in economic legislation, replacing it with rational basis review.[253] "Under rational basis review a law will be upheld if it is rationally related to a legitimate government purpose. . . . The means chosen only need be a rational way to accomplish [that purpose]."[254] Stated somewhat differently, "[i]t is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it."[255] Under this highly deferential standard "regulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional" if the legislation is based "upon some rational basis within the knowledge and experience of the legislators."[256] Today, "under the deferential standard of review applied in substantive due process

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[250] *W. Coast Hotel Co.*, 300 U.S. at 391.

[251] *See id.* at 391, 399; *see, e.g.*, Duke Power Co. v. Carolina Envtl. Study Grp., 438 U.S. 59, 83–84 (1978); United States v. Carolene Prods. Co., 304 U.S. 144, 152 (1938) ("[T]hat a statute would deny due process which precluded the disproof in judicial proceedings of all facts which would show or tend to show that a statute depriving the suitor of life, liberty or property had a rational basis."); *see also* Tracy A. Thomas, *Restriction of Tort Remedies and the Constraints of Due Process: The Right to an Adequate Remedy*, 39 AKRON L. REV. 975, 995 (2006) ("[T]he U.S. Supreme Court has adopted a minimal scrutiny standard for reviewing economic legislation challenged under due process.").

[252] Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 15 (1976) (citing Ferguson v. Skrupa, 372 U.S. 726, 730–31 (1963); Williamson v. Lee Optical Co., 348 U.S. 483, 487–88 (1955)).

[253] *See* Sean P. Costello, *Strange Brew: The State of Commercial Speech Jurisprudence Before and After* 44 Liquormart, Inc. v. Rhode Island, 47 CASE W. RES. 681, 696, 700 (1997).

[254] ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 529 (1997).

[255] *Williamson*, 348 U.S. at 488.

[256] *Carolene Prods. Co.*, 304 U.S. at 152 (citing Metro. Cas. Ins. Co. v. Brownell, 294 U.S. 580, 584 (1935)).

challenges to economic legislation there is no need for mathematical precision in the fit between justification and means."[257] Instead, "action within the legislative power is not subject to greater scrutiny merely because it trenches upon the case law's ordering of economic and social relationships."[258]

The state constitutional Substantive Open Courts Clause, when expanded in the way seen in *Westphal v. City of St. Petersburg*, follows in the footsteps of *Lochner*-era interpretations of the Economic Substantive Due Process Clause by imposing heightened state constitutional scrutiny of the legislative policy decisions embodied in state economic legislation.[259] An interpretation of an Open Courts Clause that empowers the judiciary to supplant legislative policy decisions

> threatens to compromise the legislature's autonomy. Though the remedy provision serves to protect the integrity of the judiciary, it should not serve this purpose by compromising the legislature's integrity. Using the remedy provision to enable the court to become a super-legislature would contradict the provision's original purpose.[260]

This quote is from a commentator that was speaking specifically of the Constitution of the State of Kansas, but the quote expresses a concern that is equally valid of any constitution's Substantive Open Courts Clause.[261] Although the Substantive Open Courts Clause always affected the separation of powers between the judiciary on the one hand and the legislative branch on the other,[262] evolving the clause in the direction shown by *Westphal* erodes that separation of powers to greatly so as to shift policy-making away from the state legislature and onto the state judiciary.

The historical origins of the Substantive Open Courts Clause do not show an intent to shift policy-making from the legislature to the judiciary.[263] As discussed above, the purpose of Magna Carta

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[257] Concrete Pipe & Prods. of Cal., Inc. v. Constr. Laborers Pension Tr., 508 U.S. 602, 639 (1993) (citing *Turner Elkhorn Mining Co.*, 428 U.S. at 19).

[258] Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 166 (1996) (Souter, J., dissenting).

[259] *See* Lochner v. New York, 198 U.S. 45, 64 (1905); Westphal v. City of St. Petersburg, 194 So. 3d 311, 314 (Fla. 2016).

[260] Roesler, *supra* note 28, at 665–66.

[261] *See id.* at 655, 665–66.

[262] *See* Schwartz & Lorber, *supra* note 229, at 931.

[263] *See id.* at 919–20 ("[Open Courts Clauses] are intended to provide citizens of a state with justice and reasonable access to the courts. Open court provisions, however, can be

Chapter 40 was to restore the integrity of the courts by specifically prohibiting the selling of writs.[264] Historians opine that Magna Carta Chapter 40 was intended as a restriction upon the courts not the legislature.[265] Sir Coke's restatement in his *Second Institute* expanded the meaning of Magna Carta Chapter 40 to include the right to a remedy.[266] Colonial America's purpose in adopting Open Courts clauses was to protect the independence of the judiciary and to keep courts open to the adjudication of civil law claims, but when implementing this goal, the influence of Sir Coke's *Second Institute* is evident.[267] None of this history shows any intent to shift policy-making from the legislature to the judiciary. But, in the most advanced jurisprudence of the Substantive Open Courts Clause, the clause shifts the final say on policy-making from the legislative branch to the judicial branch.[268]

CONCLUSION

While critics continue to debate how well states answered the call to be "laboratories of democracy," states succeeded in answering the call when it comes to their Open Courts Clauses. The state constitutional Procedural Open Courts Clauses do not add new rights that were not already found in either the Procedural Due Process Clause or the federal statutes requiring physical access to courts. But the state constitutional Substantive Open Courts Clauses are a true example of a new and greater right absent from federal constitutional law jurisprudence. Substantive Open Courts Clauses affect the separation of powers between the state legislative branch and the state judicial branch. A right to a remedy exists within the Substantive Open Courts Clause insofar as the clause prevents the abolishment of protected causes of action. The highest level of constitutional scrutiny is applied to legislative abolishment's that do not provide a reasonable alternative to the abolished cause of action.

Yet the Substantive Open Courts Clause may have a flaw. The lesson from Florida is that State Substantive Open Courts Clauses evolve to empower the judiciary to alter the legislature's policy decisions embodied in economic legislation. Those adopting or

stretched . . . . There is no state constitutional history that suggests this extreme result. Respect for fundamental principles of separation of powers abhors such an interpretation.").

[264] *See supra* Section I.A.

[265] *See supra* note 40 and accompanying text.

[266] *See supra* Section I.B.

[267] *See supra* notes 46–55 and accompanying text.

[268] *See supra* Section III.D.

interpreting Substantive Open Courts Clauses should be aware of their tendency to alter which branch of government has the final say on economic policy decisions. Over a century ago, the Supreme Court of the United States reversed its prior precedent, ended the *Lochner* era, and turned its back upon Economic Substantive Due Process, holding instead that the federal judicial branch would defer to the legislative branch on economic policy decisions. The laboratory of democracy teaches us that Substantive Open Courts Clauses, if left to evolve, can put state judicial branches in a place of economic policy decision-making authority that the federal judicial branch rejected. Whether federal constitutional law jurisprudence should adopt a Substantive Open Courts Clause that can lead to such results is for others to decide. Whether a given state should allow its Substantive Open Courts Clause to make such a policy shift is for each state's highest court to decide. Ultimately, should a state's high court make the undesirable choice, the remedy is to amend the state's constitution.