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CONSTITUTIONAL CHALLENGES TO TORT REFORM: EQUAL PROTECTION AND STATE CONSTITUTIONS

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INTRODUCTION

During the past decade, state legislatures have enacted statutes circumscribing tort remedies in an apparent effort to curb rising insurance costs.[1] The effect of some of the legislation has been to discriminate against certain groups of injured persons and to grant special privileges to select groups of tortfeasors.[2] Accordingly, a variety of equal protection challenges have been raised.

A growing number of state courts have relied on the language of their state constitutions to decide these equal protection challenges.[3] This article examines, in particular, cases from Montana and other states in which state constitutional language has been employed by courts reviewing equal protection attacks on "tort reform" legislation. The law in this area is embryonic, but evolving.

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1. Approximately 30 states have enacted statutory measures designed to contain jury awards (and otherwise limit amounts and types of recoverable damages), as well as restrict recognized theories of tort liability. Burke, *Constitutional Initiative 30: What Constitutional Rights Did Montanans Surrender in Hopes of Securing Liability Insurance?*, 48 MONT. L. REV. 53, 53 (1987) [hereinafter *Initiative 30*]; *see also* Boyd v. Bulala, 647 F.Supp. 781, 785 n.2 (W.D. Va. 1986) (citing cases in which statutory damage limitations were ruled both constitutional and unconstitutional).

2. *See* Bernthal v. City of St. Paul, 376 N.W.2d 422 (Minn. 1985) (holding unconstitutional, as a violation of equal protection, a statute that preserved municipal immunity from tort suits brought by injured persons covered by workers' compensation act); Oien v. City of Sioux Falls, 393 N.W.2d 286 (S.D. 1986) (holding a statute unconstitutional that attempted to expand sovereign immunity to municipalities acting in a proprietary capacity, thereby limiting causes of action for negligence).

3. State courts have increasingly relied on state constitutional language as the basis for resolving constitutional questions. It has been suggested that states were forced to do so when the Burger Court retreated from the expansion of individual constitutional protection brought about by the Warren Court. Galie and Galie, *State Constitutional Guarantees and Supreme Court Review: Justice Marshall's Proposal in Oregon v. Hass*, 82 DICK. L. REV. 273, 273 (1978). Justices Marshall and Brennan have strongly urged states to use their own constitutions creatively and frequently to avoid Supreme Court review. *See id.* at 289 (citing Oregon v. Hass, 420 U.S. 714, 726 (1975) (Marshall, J., dissenting)); Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977); Howard, *State Courts and Constitutional Rights in the Day of the Burger Court*, 62 VA. L. REV. 873 (1976).

I. STRICT SCRUTINY IN MONTANA AND ARIZONA

A. *Montana*

1. Legislative Attempt to Limit the Recovery of Noneconomic Damages Held Unconstitutional

The Montana Supreme Court first upheld a constitutional challenge to tort reform legislation in *White v. State*.[4] In *White*, the court held that a statute prohibiting the recovery of noneconomic damages from governmental entities[5] violated the equal protection clause of the Montana Constitution.[6] The plaintiff, Karla White, was attacked by an inmate who had escaped from the state mental hospital five years earlier. White alleged that the state negligently and recklessly allowed the inmate to escape, and then made insufficient attempts to find him. As a result of the attack, White contended that she received severe emotional injuries. Because demonstrable economic losses were nominal, White filed the action seeking noneconomic and punitive damages. The defendant, the State of Montana, answered, contending that the government was statutorily immune from liability for both noneconomic and punitive damages. The trial court granted White's motion for summary judgment on grounds that the pertinent parts of the State Tort Claims Act were unconstitutional.[7]

The Supreme Court of Montana engaged equal protection analysis in reviewing separately the statutory limitations on noneconomic and punitive recovery. The court recognized that where fundamental rights are implicated, the statute must be strictly scrutinized and a compelling state interest must be shown in order to justify a discriminatory scheme.[8] With respect to noneconomic damages, the court found a fundamental right in article II, section 16 of the Montana Constitution, which guarantees that all persons shall have a "speedy remedy... for every injury of person, property, or character."[9] The majority in *White*

4. 203 Mont. 363, 661 P.2d 1272 (1983).

5. MONT. CODE ANN. § 2-9-104 (1977) (repealed 1983) provided:
(1) Neither the state, a county, municipality, taxing district, nor any other political subdivision of the state is liable in tort action for:
(a) noneconomic damages; or
(b) economic damages suffered as a result of an act or omission of an officer, agent, or employee of that entity in excess of $300,000 for each claimant and $1 million dollars [sic] for each occurrence.
(2) The legislature or the governing body of a county, municipality, taxing district, or other political subdivision of the state may, in its sole discretion, authorize payments for noneconomic damages or economic damages in excess of the sum authorized in subsection (1)(b) of this section, or both, upon petition of plaintiff following a final judgment. No insurer is liable for such noneconomic damages or excess economic damages unless such insurer specifically agrees by written endorsement to provide coverage to the governmental agency involved in amounts in excess of the limitation stated in this section or specifically agrees to provide coverage for noneconomic damages, in which case the insurer may not claim the benefits of the limitation specifically waived.

6. *See infra* text accompanying note 9.

7. *White*, at 363, 661 P.2d at 1273.

8. *Id.* at 368-70, 661 P.2d at 1274-75.

9. MONT. CONST. art. II, § 16 (1972) (originally MONT. CONST. art. III, § 6 (1889)). Thirty-four states with "right-to-redress" clauses include: Alabama, Arizona, Arkansas,

stated: "The language 'every injury' embraces all recognized compensable components of injury, including the right to be compensated for physical pain and mental anguish and the loss of enjoyment of living."[10] The court concluded that when dealing with a fundamental right, in the absence of a compelling state interest, strict scrutiny applies to make the statute unconstitutional.[11]

Affirming the trial court with respect to noneconomic recovery, the court addressed the State's compelling state interest argument. The State contended that ensuring the availability of public funds to enable state government to provide essential services was a sufficiently compelling state interest.[12] In rejecting the State's argument, the court concluded:

> The government has a valid interest in protecting its treasury. However, payment of tort judgments is simply a cost of doing business. There is no evidence in the record that the payment of such claims would impair the State's ability to function as a governmental entity or create a financial crisis. In fact, the State of Montana does have an interest in affording fair and reasonable compensation to citizens victimized by the negligence of the State. Therefore, the strict scrutiny test mandated by the implication of a fundamental right has not been satisfied and the statute prohibiting recovery for noneconomic damage is unconstitutional under the Montana State Constitution.[13]

Two weeks after *White* was handed down, the Montana legislature went back to work. New legislation was passed, placing a $300,000 across-the-board limitation on all tort damages recovered against governmental entities.[14] This legislation was also challenged.

Connecticut, Delaware, Florida, Georgia, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maine, Massachusetts, Minnesota, Mississippi, Missouri, Montana, Nebraska, New Hampshire, North Carolina, North Dakota, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, Utah, Vermont, Washington, West Virginia, Wisconsin and Wyoming. Note, *The Right of Access to Civil Courts under State Constitutional Law: An Impediment to Modern Reforms, or a Receptacle of Important Substantive and Procedural Rights?*, 13 RUTGERS L.J. 399, 399 (1982). A recent article calculates the number to be 36. *See* Marcotte, *Federalism and the Rise of State Courts*, 73 A.B.A. J. 60, 62 (1987).

10. *White*, at 369, 661 P.2d at 1275 (affirming Corrigan v. Janney, 626 P.2d 838 (Mont. 1981)).

11. *White*, at 368, 661 P.2d at 1275.

12. *Id.* at 367, 661 P.2d at 1275.

13. *Id.* As to punitive damages, however, the court denied recovery under a "rational basis" analysis stating: "[the] problem with assessing punitive damages against the government is that the deterrent effect is extremely remote and innocent taxpayers are, in fact, the ones punished. Those taxpayers have little or no control over the actions of the guilty tortfeasor." *Id.* at 369, 661 P.2d at 1276.

14. MONT. CODE ANN. § 2-9-107 (1985) (repealed 1986) provided:

Limitation on governmental liability for damages in tort.

(1) Neither the state, a county, municipality, taxing district, nor any other political subdivision of the state is liable in tort action for damages suffered as a result of an act or omission of an officer, agent, or employee of that entity in excess of $300,000 for each claimant and $1 million for each occurrence.

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

2. An Equal Protection Challenge to the Statutory Limitation on All Tort Damages

In *Pfost v. State*,[15] the $300,000 limitation on tort damages was attacked as a denial of equal protection. Pfost suffered catastrophic injuries and was rendered quadriplegic when his tractor-trailer slid on an icy bridge, crashed through a guardrail and plunged over the edge. Pfost alleged that the state and county had been negligent because they failed to maintain the road, despite three recent accidents in the same location. Pfost sought compensatory damages of $6.0 million.[16] The flat $300,000 limitation on government liability barred Pfost from full reparation, although unlike the limitation reviewed in *White*,[17] no particular type of damage was singled out for limitation.

In his constitutional challenge, Pfost relied on language from the same clause which had protected Karla White three years earlier.[18] In addition to the requirement that a speedy remedy be afforded for every injury, the Montana Constitution provides:

> No person shall be deprived of this full legal redress for injury incurred in employment for which another person may be liable except as to fellow employees and his immediate employer who hired him if such immediate employer provides coverage under Workman's Compensation Laws of this state. . . .[19]

The guarantee of full legal redress, however, appears in a sentence relating to "employment" injuries.[20] The majority in *Pfost* sought to determine whether full legal redress was limited to that narrow context or whether it was a fundamental right for equal protection purposes implied in the guarantee of a "speedy remedy" for "every injury." The court focused on the first few words of the clause in question: "No person shall be deprived of *this* full and legal redress. . . ."[21] The word "this" appeared to require an antecedent; the phrase "full legal redress" seemed to refer to the preceding sentence and to assist in defining "speedy remedy." Construing the two sentences together, the majority held that the constitutional framers intended for "remedy" to include "full legal redress."[22] Thus, the court determined that a fundamental right to full legal redress was created. Continuing its equal protection analysis, the court ruled that the state encroached upon this fundamental right in a discriminatory way by denying full compensation to catastrophically-injured plaintiffs whose damages exceeded $300,000.[23] Accordingly, the court noted that demonstration of a compelling state

15. 713 P.2d 495 (Mont. 1985).

16. *Id.* at 496. Pfost also sought a declaratory judgment that the $300,000 tort damage limitation was unconstitutional. *Id.* at 497.

17. *See supra* note 5 and accompanying text.

18. *See supra* note 9 and accompanying text.

19. *Pfost*, 713 P.2d at 503 (quoting MONT. CONST. art. II, § 16 (1972) (originally MONT. CONST. art. III, § 6 (1889))).

20. *See supra* text accompanying note 19.

21. *See supra* text accompanying note 9.

22. *Pfost*, 713 P.2d at 503.

23. *Pfost*, 713 P.2d at 500 ("It discriminates in that any person who sustains damages

interest was necessary in order to sustain the constitutional validity of the statute.[24] Finding no such interest, the court ruled the statute invalid.[25]

3. Nondiscriminatory Abolition of Tort Remedies

In *White* and *Pfost*, the Montana Supreme Court struck down statutes which violated state constitutional guarantees of equal protection. The court did *not*, however, address the question of whether article II, § 16 would constitutionally invalidate a legislative attempt to abolish tort remedies in a *non*discriminatory fashion. The majority opinions simply held that certain statutes discriminated against particular classes of claimants, that the discriminatory schemes affected fundamental constitutional rights to a "speedy remedy" for "every injury" and "full legal redress," and that absent a compelling state interest, the statutes violated state equal protection guarantees.[26]

Although no ruling has directly required a showing of compelling state interest to justify nondiscriminatory tort reform legislation,[27] an initiative movement, apparently based on the assumption that such legislation would not be upheld, formed in the wake of *Pfost*.[28] Constitutional Initiative 30 proposed to eliminate "this full" from the "full legal redress" clause and to provide that no language of article II, section 16 could be used in reviewing the constitutionality of legislation affecting rights and remedies.[29] The initiative passed on November 4, 1986, but

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of less than $300,000 in value will be fully redressed if the tortfeasor is the State, but any person with catastrophic damages in excess of $300,000 will not have full redress.").

24. *Id.*

25. *Id.*

26. White v. State, 203 Mont. at 365, 661 P.2d at 1275 (1983); *Pfost*, 713 P.2d at 505-06.

27. Historically, the Montana Supreme Court has afforded the "right to remedy" clause minimal significance, construing it to mean only that courts must administer the law, as provided for by the legislature. *See Initiative 30, supra* note 1, at 57-58. In 1981, the court abandoned the minimal significance interpretation and required that an adequate substitute be provided if pre-existing rights or remedies were abolished. *See* Corrigan v. Janney, 626 P.2d 838 (Mont. 1981). The decisions in *White* and *Pfost* went further and included the implication of fundamental rights with the result that Montana's partial sovereign immunity statute was found invalid. *See Initiative 30, supra* note 1, at 79.

Montana courts have *not* subjected nondiscriminatory tort reform legislation to the compelling state interest test. *See* Kelleher v. Big Sky of Montana, 642 F.Supp. 1128 (D. Mont. 1986). In *Kelleher*, the court reviewed a constitutional challenge to a state statute protecting ski areas from liability for injuries sustained by skiers. *Id.* at 1129. The court distinguished *White* and *Pfost* by noting that these cases involved a discriminatory limitation on the amount of recovery, as opposed to an elimination of liability altogether. *Id.* at 1130. The federal court used this distinction to justify the application of the rational basis test, and upheld the statute by finding that a legitimate governmental objective was served by promoting the ski industry in Montana. *Id.* at 1130-31.

28. In the spring of 1986, a special session of the Montana legislature was called, during which several bills limiting governmental liability were considered and defeated. *See Initiative 30, supra* note 1, at 80. A resolution was passed setting up a special joint interim committee to study and to prepare legislation to address insurance problems, tort reform and constitutional amendments, as well as general questions involving public and private liability. Before the study was completed, interested private parties developed Initiative 30.

29. Initiative 30 was intended to modify MONT. CONST. art. II, § 16 (1972) (originally

procedural defects in the adoption of the measure led opponents to challenge it soon after its passage.[30] In *State, ex. rel., Montana Citizens v. Waltermire*,[31] opponents of Initiative 30 argued that the defects were so egregious that the initiative should have no effect. Specifically, the Voter Information Pamphlet, which was the sole published source of information concerning the Initiative,[32] showed "this full" to be underlined, indicating inclusion, rather than crossed out, indicating exclusion. In effect, the voters ratified language diametrically opposed to the intent of the framers of the initiative. The Montana Supreme Court agreed that the error was sufficiently material, considered with other procedural problems, to justify nullification of the initiative.[33]

The effect of Initiative 30 would have been to eliminate an array of fundamental rights necessary to the strict scrutiny analyses employed in *White* and *Pfost*. Because the initiative was defective and held invalid, *White* and *Pfost* will continue to ensure that tort victims are protected against legislative efforts to curtail fundamental rights, absent a showing of compelling state interest.

B. *Arizona*

The Supreme Court of Arizona has exercised the same strict scrutiny in reviewing a three-year statute of limitations for medical malpractice actions. In *Kenyon v. Hammer*,[34] the mother of a stillborn child brought an action for bodily injury and wrongful death allegedly resulting from a nurse's incorrect recording of the mother's Rh factor during

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MONT. CONST. art. III, § 6 (1889)) as follows (new portions are italicized, deleted portions are lined through):

> Section 16. The administration of justice. *(1)* Courts of justice shall be open to every person, and speedy remedy afforded for ~~every~~ injury to person, property, or character. *Right and justice shall be administered without sale, denial, or delay.*
>
> *(2)* No person shall be deprived of ~~this full~~ legal redress for injury incurred in employment for which another person may be liable except as to fellow employees and his immediate employer who hired him if such immediate employer provided coverage under the Workmen's Compensation Laws of this state. ~~Right and justice shall be administered without sale, denial, or delay~~.
>
> *(3) This section shall not be construed as a limitation upon the authority of the legislature to enact statutes establishing, limiting, modifying, or abolishing remedies, claims for relief, damages, or allocations of responsibility for damages in any civil proceeding; except that any express dollar limits on compensatory damages for actual economic loss for bodily injury must be approved by a 2/3 vote of each house of the legislature.*

State, *ex. rel.*, Montana Citizens v. Waltermire, 738 P.2d 1255, at 1257 (Mont. 1987).

30. Constitutional Initiative 30 was first challenged prior to the November election. *See Montana Citizens* at 1255-56 (declining to exercise pre-election jurisdiction over the initiative). A lengthy, three-judge dissent was filed by Justice Sheehy, author of the majority opinion in the post-election hearing in which the initiative was nullified. *Id.* at 1268-72 (Sheehy, J., dissenting).

31. 738 P.2d 1255 (Mont. 1987).

32. *Id.* at 1257-58. The adoption of Initiative 30 was further flawed by the failure of the Secretary of State to publish the proposed amendment in accordance with art. 14, § 9 of the Montana Constitution. Only the Attorney General's summary was published, and that was found incomplete. *Id.* at 1258-64.

33. *Id.* at 1264.

34. 142 Ariz. 69, 688 P.2d 961 (1984).

pregnancy.[35] While statutes of limitation in Arizona tort actions typically run from the date an action "accrues," or the point at which injuries become manifest,[36] the Arizona medical malpractice statute ran from the date of *injury*, regardless of whether such injury was known.[37]

The mother, whose claim for bodily injury would have been barred, argued the statute discriminated against the class of tort claimants who are victims of medical malpractice.[38] Victims of professional negligence other than medical malpractice and victims of other torts generally, received more favorable treatment under Arizona's "discovery rule."[39] After a brief survey of the traditional, three-tier approach to equal protection review, the Arizona Supreme Court looked to the state constitution for guidance regarding the appropriate level of scrutiny.[40] In article 18, section 6, the Arizona Constitution provides: "The right of action to recover damages for injuries shall never be abrogated, and the amount recovered shall not be subject to any statutory limitation."[41]

The court held that this clause created a fundamental right to bring and pursue a medical malpractice action and that strict scrutiny should therefore attach.[42] The statute, however, failed to withstand the scrutiny. In the final analysis, the court struck down the three-year statute of limitation, and concluded that the State of Arizona "has neither a compelling nor legitimate interest in providing economic relief to one segment of society by depriving those who have been wronged of access to, and remedy by, the judicial system."[43]

In *Kenyon*, the Arizona Supreme Court specifically noted that its decision was based "entirely on state constitutional grounds."[44] The remark is significant because the unique language of a state constitution may provide a particularly suitable framework for equal protection review. Indeed, when state constitutional language is as clear and mandatory as that in the Arizona Constitution, it affords a solid basis for heightened scrutiny.

35. *Id.* at 963-64. As a result of this error, the plaintiff lost her baby and was required to have a tubal ligation.

36. *Id.* at 968 n.6. This method of commencing the statute of limitations is known as the "discovery rule." For numerous examples of the discovery rule's application in Arizona tort law, see *id.*

37. *Id.* at 967.

38. *Id.* at 968.

39. *Id.* at 968-69.

40. *Id.* at 970-71; *see e.g.*, Fox, *Equal Protection Analysis: Laurence Tribe, The Middle Tier, and the Role of the Court*, 14 U.S.F. L. Rev. 525 (1980) (describing the three tiers applicable to equal protection analysis).

41. Ariz. Const., art.18, § 6.

42. *Kenyon*, 688 P.2d at 973 (in analyzing precedent from other states that recognize a fundamental right in a similar context, the court cited the Montana Supreme Court's decision in *White*. *Id.*) *See supra* text accompanying notes 4-14.

43. *Kenyon*, 688 P.2d at 976.

44. *Id.* at 963.

II. OTHER STATES; OTHER TESTS

A. *Louisiana*

During the past few years, several other state courts have wrestled with the equal protection aspects of "tort reform" legislation. The Supreme Court of Louisiana confronted an equal protection challenge to a statute limiting liability in *Sibley v. Board of Supervisors*.[45] In *Sibley*, the statute in question limited medical-malpractice judgments against state affiliated health care providers to $500,000, exclusive of future medical care.[46] Nineteen-year-old Jane Sibley was transferred to the psychiatric ward of Louisiana State University's Medical Center, from a private hospital where she was being treated for depression. An inexperienced team of health care providers at LSU changed her diagnosis from depression to psychosis and administered antipsychotic drugs. After weeks of such treatment, Sibley developed an adverse reaction, culminating in cardio-pulmonary arrest and massive brain damage. As a result, she was consigned to a lifetime of institutional care and her damages were recognized to be far in excess of the $500,000 mark.[47]

Sibley's case was first heard by the Louisiana Supreme Court in 1985.[48] In that hearing, Sibley raised the equal protection argument and urged the application of strict scrutiny.[49] The court ruled that such strict scrutiny could be applied only to statutes which disadvantaged a suspect class or infringed upon a fundamental right.[50] Because no pertinent fundamental right was specifically mentioned in the Louisiana Constitution, the court applied the rational basis test and upheld the challenged limitation.[51]

On rehearing, the Louisiana Supreme Court lamented the great vacuum left between "compelling state interest" and "rational basis."[52]

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45. 477 So.2d 1094 (La. 1985) ("*Sibley II*"), *modifying* Sibley v. Board of Supervisors, 462 So.2d 149 (La. 1985) ("*Sibley I*").

46. LA. REV. STAT. ANN. § 40:1299.39B (West 1987).

47. *Sibley II*, 477 So.2d at 1098. In fact, Sibley's damages at the time of trial had already surpassed $420,000. *Id.* In addition, she required, on a continuing basis: hospital care; around-the-clock attendant care; physical, occupational, and speech therapy; psychological services; medical and rehabilitative coordinators; administrative services; and medical consultations. Experts estimated the annual cost of Sibley's treatment to be approximately $222,000; over her lifetime, discounted to present value, her total medical requirements were estimated at more than $9.0 million. Sibley v. Board of Supervisors, 490 So.2d 307, 309-10 (La. App. 1986) ("Sibley III").

48. *Sibley I*, 462 So.2d 149, *reh'g granted*, *Sibley II*, 477 So.2d 1094.

49. *Sibley I*, 462 So.2d at 154.

50. *Id.* at 155. The court included a recitation of fundamental rights cases: Mayer v. Chicago, 404 U.S. 189 (1971) (right to fairness in the criminal process); Boddie v. Connecticut, 401 U.S. 371 (1971) (right to privacy); Goldberg v. Kelly, 397 U.S. 254 (1970) (right to fairness in procedures concerning governmental deprivations of life, liberty or property); Shapiro v. Thompson, 394 U.S. 618 (1969) (right to interstate travel); Harper v. Virginia Board of Election, 383 U.S. 663 (1966) (right to vote and participate in the electoral process); NAACP v. Alabama *ex. rel.* Patterson, 357 U.S. 449 (1958) (freedom of expression and association).

51. *Sibley I*, 462 So.2d at 155-58.

52. *Sibley II*, 477 So.2d at 1105-07. Reviewing the historical underpinnings of accepted judicial review, the Supreme Court of Louisiana said:

An important feature of the United States Supreme Court's current equal protec-

Likewise, the court was unimpressed with the more recently developed "intermediate" or "middle-level" scrutiny.[53] The court sided with those critics who argue that the multi-tiered review has outlived its usefulness.[54] In particular, the majority said: "[The] rigidity [of the three-level system] forces courts to begin the decision-making process by pigeon-holing a case in a particular category. Once assigned a category, the case theoretically must receive the same type of treatment as all other cases of the same level."[55]

The Louisiana court favored a more flexible approach based on a balance between constitutionally protected rights and government interests. The "Declaration of Right to Individual Dignity," contained in the Louisiana Constitution, delineates the rights deserving protection:

> No person shall be denied the equal protection of the laws. No law shall discriminate against a person because of race or religious ideas, beliefs, or affiliations. No law shall arbitrarily, capriciously, or unreasonably discriminate against a person because of birth, age, sex, culture, physical condition, or political ideas or affiliations. Slavery and involuntary servitude are prohibited, except in the latter case as punishment for crime.[56]

The majority expressed its belief that there was no basis for discrimination "of any sort" on racial or religious grounds, but that discrimination with respect to the other rights may be permissible if not arbitrary, capricious or unreasonable.[57] In an analysis similar to that employed by the Montana Supreme Court in *Pfost*, the Louisiana Supreme Court recognized that victims whose damages exceed statutory limitations on liability constituted a class discriminated against on the basis of "physical condition."[58]

The court then referred to the record of proceedings of the 1974

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tion analysis is an elaborate system of judicial review composed of three levels of scrutiny, commonly referred to as strict, intermediate, and minimal scrutiny. This system arose out of the constitutional crisis caused by the Court's clash with the Roosevelt administration and its New Deal legislation. After the collision, the Court's prestige plummeted, and the Court renounced much of its power by adopting a posture of extreme deference to the other branches of government. Governmental actions were presumed to be constitutional, forcing a challenging party to prove the challenged action to be completely unrelated to any legitimate governmental objective. However, to provide adequate protection for express constitutional rights, such as freedom of speech, to protect implicit fundamental rights, such as the right of privacy, or to protect against governmental action based on an invidious suspect classification, such as race or ethnic origin, the Court has retained a more exacting mode of judicial review that requires strict scrutiny of such governmental conduct. Under strict scrutiny, government action is not presumed to be constitutional, and will not be upheld by the Court unless shown to be necessarily related to a compelling state interest.

Id. at 1105 (citing J. NOWAK, R. ROTUNDA & J. YOUNG, HANDBOOK ON CONSTITUTIONAL LAW, 524-25 (1978); L. TRIBE, AMERICAN CONSTITUTIONAL LAW, 1000-02 (1978)).

53. *Sibley II*, 477 So.2d at 1105.

54. *Id.* at 1106-07. "The federal three-level system is in disarray and has failed to provide a theoretically sound framework for constitutional adjudication." *Id.* at 1107.

55. *Id.* at 1106.

56. *Id.* at 1107 (quoting LA. CONST. art. I, § 3).

57. *Sibley II*, 477 So.2d at 1107, nn. 20 & 21.

58. *Id.* at 1108.

Louisiana Constitutional Convention to find a new equal protection standard for liability limitation legislation.[59] Using reasoning gleaned from the committee which developed the "physical condition" clause, the court concluded: "[t]he proposed article would require judicial examination when any such classification was challenged and would assign to the State the burden of showing that the classification reasonably furthers a legitimate purpose."[60] Adopting this language as the new test for constitutional validity of tort limitation statutes, the Louisiana Supreme Court remanded the case for consistent proceedings.[61]

B. *New Hampshire*

A similar level of scrutiny was applied by the New Hampshire Supreme Court in *Carson v. Maurer*.[62] In *Carson*, the New Hampshire court considered an equal protection challenge to the state's comprehensive medical injury statute.[63] The plaintiffs argued that the statute improperly singled out victims of medical negligence (as distinguished from other tort victims) because it restricted the means by which such victims could sue and the damages they could recover for their injuries.[64] The court acknowledged that the statute created a discriminatory classification.[65]

In its equal protection analysis, the New Hampshire Supreme Court moved directly to the "fair and substantial relation" test which it typically applied when reviewing economic and social legislation.[66] The court described the test as one which asks "whether the challenged classifications are reasonable and have a fair and substantial relation to the object of the legislation."[67] Applying this intermediate standard, the

59. *Id.* at 1109.

60. *Id.* at 1108.

61. On remand, the court of appeals awarded damages in the amount of $2.0 million, but found no direct liability on the part of the hospital board. Accordingly, the case was remanded to the district court to determine the constitutionality of the $500,000 damages limitation as it applied to the state hospital which the board governed. *Sibley III*, 490 So.2d 307, 317. No determination was made, however, as certiorari was denied. Sibley v. Board of Supervisors, 496 So.2d 325 (La. 1986).

The Louisiana judiciary has further refined its equal protection analysis with respect to tort limitation statutes. *See* Crier v. Whitecloud, 496 So.2d 305 (La. 1986). In *Crier*, the Louisiana Supreme Court held that a law which classifies individuals on a basis outside the scope of the Declaration of Right to Individual Dignity, *supra* text accompanying note 54, will be upheld unless a member of the disadvantaged class "shows that it does not suitably further any appropriate state interest." *Id.* at 310. The statute upheld in *Crier* was a three-year statute of limitations on medical-malpractice claims. *See also* Parker v. Cappel, 500 So.2d 771 (La. 1987) (applying an "appropriate state interest" test to uphold a statute excluding sheriff's deputies from state workers' compensation coverage); Stuart v. City of Morgan City, 504 So.2d 934 (La. App. 1987) (upholding a "recreational use" statute which insulated public and private landowners from liability for injuries resulting from authorized, non-commercial use as reasonably furthering a legitimate state purpose).

62. 120 N.H. 925, 424 A.2d 825 (1980).

63. N. H. REV. STAT. ANN. § 507-C (1977 & Supp. 1979).

64. *Carson*, at 930, 424 A.2d at 830.

65. *Id.* at 931, 424 A.2d at 830-31.

66. *Id.* at 932, 424 A.2d at 831 (citing Opinion of the Justices, 113 N.H. 205, 213, 304 A.2d 881, 887 (1973); State v. Moore, 91 N.H. 16, 21-22, 13 A.2d 143, 147-48 (1940)).

67. *Carson*, at 931, 424 A.2d 831.

court ruled several provisions in the malpractice statute invalid. Rules concerning background of medical experts and notice of intent to sue were found not to substantially further the objectives of the statute.[68] Provisions which made the "discovery rule" unavailable,[69] imposed a two-year statute of limitations with no tolling period for incompetents and minors,[70] abolished the collateral source rule, and capped noneconomic damages at $250,000,[71] were found to be unreasonable when the harm to the plaintiff was balanced against the public utility of each provision.

The "fair and substantial relation" test applied by the New Hampshire Supreme Court was derived expressly from the court's interpretation of the New Hampshire Constitution, independent of middle-tier analysis developed by the United States Supreme Court.[72] The New Hampshire court's specific notation of this fact is evidence of the court's faith in the independent state grounds relied upon for its decision.

III. THE JUDICIARY'S ROLE NECESSARY TO PROTECT THE RIGHTS OF TORT VICTIMS

The foregoing cases underscore the relationship between state constitutional language and the degree of scrutiny exercised by appellate courts when considering a discriminatory statute. That relationship places constitutional analysis of "tort reform" legislation at the cutting edge of the growing movement toward "independent state grounds." The spirit of that movement was captured by the South Dakota Supreme Court in its opinion in *Daugaard v. Baltic Cooperative Building Supply Association*.[73] In this case, rather than employing an equal protection analysis, the South Dakota court applied the state constitution's "court access" clause directly, to strike down a statute eliminating actions based on negligent design of improvements to real property.[74] While equal protection was not the focus of the decision, the majority opinion eloquently stated the role of independent state courts in reviewing tort limitations:

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68. *Id.* at 934, 935, 424 A.2d at 832, 834.
69. *Id.* at 936, 424 A.2d at 833.
70. *Id.*
71. *Id.* at 941, 424 A.2d at 836-37.
72. *Id.* at 931, 424 A.2d at 831. See N. H. CONST. pt. 1 arts. 1 & 12 which provide:
Article 1. [Equality of Men; Origin and Object of Government.] All men are born equally free and independent: Therefore, all government, of right, originates from the people, is founded in consent, and instituted for the general good.
. . . .
Article 12. [Protection and Taxation Reciprocal.] Every member of the community has a right to be protected by it, in the enjoyment of his life, liberty, and property; he is therefore bound to contribute his share in the expense of such protection, and to yield his personal service when necessary. But no part of a man's property shall be taken from him, or applied to public uses, without his own consent, or that of the representative body of the people. Nor are the inhabitants of this state controllable by any other laws than those to which they, or their representative body, have given their consent.
73. 349 N.W.2d 419 (S.D. 1984).
74. *Id.* at 424-25.

> Our constitution . . . is [the] solid core upon which all our state laws must be premised. Clearly and unequivocally, our constitution directs that the courts of this state shall be open to the injured and oppressed. We are unable to view this constitutional mandate as a faint echo to be skirted or ignored. Our constitution is free to provide greater protections for our citizens than are required under the federal constitution.[75] Our constitution has spoken, and it is our duty to listen.[76]

In those states where fundamental rights of tort victims are watered down by constitutional amendments,[77] and in those states lacking clear constitutional protections for such rights, courts may have to look further to find constitutional language which supports a level of scrutiny above the rational basis test. Rights not specifically afforded by redress or access provisions in state constitutions may receive heightened scrutiny under other constitutional provisions. For example, the Montana State Constitution, article II, section 3, provides:

> Inalienable rights. All persons are born free and have certain inalienable rights. They include the right to a clean and healthful environment and the rights of pursuing life's basic necessities, enjoying and defending their lives and liberties, acquiring, possessing and protecting property, and seeking their safety, health and happiness in all lawful ways. In enjoying these rights, all persons recognize corresponding responsibilities.[78]

In Montana, citizens have a right to seek safety and health. The prophylactic effect of tort law furthers those objectives. In article II, section 4, the Montana Constitution further provides:

> Individual dignity. The dignity of the human being is inviolable. No person shall be denied the equal protection of the laws. Neither the state nor any person, firm, corporation, or institution shall discriminate against any person in the exercise of his civil or political rights on account of race, color, sex, culture, social origin or condition, or political or religious ideas.[79]

Legislation which severely circumscribes the rights of handicapped persons, including the catastrophically injured, may discriminate on the basis of "social condition." Further, an argument can be made that forcing the seriously injured to become wards of the state through receiving welfare — as opposed to an insurance settlement — violates the dignity of the human being.

In most states, strict scrutiny will likely remain reserved for protec-

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75. *Id.* at 425 (citing State v. Opperman, 247 N.W.2d 673 (S.D. 1976)).

76. *Daugaard*, 349 N.W.2d at 425.

77. Overruling an unpopular judicial decision through the use of amendments to a constitution is entirely possible. Most states already have procedures by which their constitutions may be amended. As these procedures are usually easily accomplished, state constitutions are amended "at a furious rate." *See Developments in the Law — The Interpretation of State Constitutional Rights*, 95 HARV. L. REV. 1324, 1354 (1982); *see also* Williams, *In the Supreme Court's Shadow: Legitimacy of State Rejection of Supreme Court Reasoning and Result*, 35 S.C.L. REV. 353, 382-83 (1984).

78. MONT. CONST. art. II, § 3 (1972) (originally MONT. CONST. art. III, § 3 (1889)).

79. MONT. CONST. art. II, § 4.

tion of fundamental constitutional rights clearly and specifically affected by a discriminatory statute. In such cases, equal protection represents a great shield for the rights of tort claimants. Rational basis analysis, on the other hand, can provide little protection for such rights. Scrutiny which falls between these extremes may take any number of forms, depending on the language of the particular state's constitution. State courts facing challenges to "tort reform" statutes should be encouraged to arrive at some intermediate standard of review. By raising scrutiny above the rational basis test, an appropriate balance may be struck between the rights of the claimant and the government interest to be served in limiting tort liability.

CONCLUSION

As tort reform legislation proliferates and initiatives seek to weaken state constitutional guarantees, courts will be flooded with litigants suggesting new constitutional approaches. Increasingly, courts will face the challenge of defining an appropriately assertive judicial role that does not excessively encroach upon the legislative prerogative. This challenge represents a unique opportunity for those who serve on appellate courts and for those who aspire to be appellate judges. Excessive judicial activism can result in a clear judicial supremacy not contemplated by constitutional framers. Yet, without a strong judiciary, the republic itself stands exposed. Appellate courts should not succumb to legislative overreaching no matter how vehement the public sentiment. Such submission will unduly compromise the judicial role and thereby threaten those citizens whose rights the judiciary was designed to protect.