

Chapter 14

COURTS TO BE OPEN;
SUITS AGAINST THE COMMONWEALTH

Article I, Section 11

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§ 14.1. INTRODUCTION

Article I, Section 11, of the Pennsylvania Constitution provides:

All courts shall be open; and every man for an injury done him in his lands, goods, person or reputation shall have remedy by due course of law, and right and justice administered without sale, denial or delay. Suits may be brought against the Commonwealth in such manner, in such courts and in such cases as the Legislature may by law direct.

The principles that judicial tribunals should conduct open, public proceedings and give redress to every person who has suffered a legal injury are two of the linchpins of Anglo-American law. Other basic precepts require that notice and hearing precede such hearings, and that tribunals be impartial. Together, this modest bundle of principles—in large part procedural¹—defines what people think of as the vital core of our legal system. Everything else flows from them.²

That courts should be “open” and accessible for public use and the dispensation of justice, and that “remedial justice is an inherent part of civil liberty,”³ are ideas reflected in *Marbury v. Madison*, one of the defining decisions of our highest federal court.⁴ However, the federal courts and Constitution have played a secondary role in the exposition and protection of open courts and remedies.⁵

The guarantees of open courts and remedies have been a more vital and explicit element of state constitutional law ever since the colonial era, with Pennsylvania at the vanguard of their development. Open-courts clauses⁶ appear in the constitutions of about three-quarters of the states,⁷ in provisions for which there is no federal analogue.⁸ They generally are part of a state constitution’s declaration of fundamental rights. Their inclusion as part of that section typically means, as it does in Pennsylvania, that they are meant to be “recognized and unalterably established” as “general, great and essential principles of liberty and free government. . . .”⁹ Substantive rights are mere “dead letter[s] of the laws, if the constitution has provided no . . . method to secure their just enjoyment.”¹⁰

§ 14.2. TEXT AND CONTEXT OF ARTICLE I, SECTION 11¹¹

The origin of the first sentence of Section 11 can be traced directly back to Magna Carta,¹² whose basic principles have been kept alive and transported to the present through such iconic figures as Sir Edward Coke, Sir William Blackstone, and William Penn.

For the past thirty years or so, however, open-courts clauses have appeared most often in less lofty settings, as part of an ongoing debate about the need for and propriety of a recent spate of statutory changes in state tort law,¹³ and the resulting avalanche of state constitutional litigation.¹⁴ This debate is extremely heated. It is replete with dire warnings about legal Armageddon and full measures of fire and brimstone—in part because very important principles are involved, and because many of those principles are unique to state constitutional law. Without a federal equivalent of an open-court clause, each state supreme court is free to interpret its own constitution as it deems fit. There is no national court of last resort to decide issues about these state constitutional provisions.¹⁵ There is no central unifying institutional influence in this area of the law.¹⁶

There are other factors that lead to the lack of uniformity in interpreting open-courts clauses, including the fact that it is “easier to cite the impressive lineage than to explain the historical understanding of the meaning” of an open-courts clause.¹⁷ The clause “does not lend itself to simple summaries.” Like the term “due process,” it involves some of the “least specific and most comprehensive protection of liberties . . . , [but at the same time it is part of the] basic delineation of government’s proper role in society.”¹⁸ For these reasons, there has been a decided lack of uniformity in interpretation of open-courts clauses.¹⁹

§ 14.3. THE ORIGINS OF ARTICLE I, SECTION 11

History is important to understanding the open-courts provision of the Pennsylvania Constitution. “We cannot hope to understand its present meaning and application without first understanding its past.”²⁰ All schools of constitutional interpretation give at least some consideration to the original context and meaning of the provision, because “good historical research is a necessary predicate to principled judicial interpretation.”²¹

The fact that Article 1, Section 11 has “no direct analogue under the federal constitution” is also important. “In such cases, the need for independent analysis is even more significant” than when analyzing provisions of the state constitution which have some federal counterpart.²² As shown below, Section 11 has a unique history that has been largely untapped. Part of the purpose of this chapter, therefore, is to “reduce to writing a deep history of unwritten legal and moral codes which had guided the colonists from the beginning of William Penn’s charter [from the King] in 1681.”²³

These factors require that we examine the history of Article I, Section 11—a history that goes back to Magna Carta, and involves William Penn, the founder of the Commonwealth.

§ 14.3[a]. THE POLITICAL PHILOSOPHY OF WILLIAM PENN

William Penn was not only a champion of religious freedom and toleration—the thing for which he is most well known—²⁴ but he was also an ardent student of government. When he came to Pennsylvania in 1682, he did not come empty-handed. He had with him the precursor of Article I, Section 11, which was part of the Frame of Government and Laws Agreed Upon in England,²⁵ one of the defining documents of American history and law. William Penn literally brought the open-courts clause to Pennsylvania and to America.²⁶ He also brought Magna Carta.²⁷

Two parts of Magna Carta have been especially important to American constitutional law. In Chapter 39, the King agreed that “[n]o free man shall be taken or imprisoned or disseised or outlawed or exiled or in any way ruined, nor will we go or send against him, except by the lawful judgment of his peers or by the law of the land.”²⁸ In Chapter 40, he agreed that “[t]o no one will we sell, to no one will we deny or delay right or justice.”²⁹ Over the centuries, these two chapters of the Great Charter became, respectively, the guarantees of due process and open courts—“enduring propositions of government under law . . . the essentials of an orderly society.”³⁰ Clearly “[m]uch justice was squeezed from the unripened fruit” of the thirteenth century.³¹

Sir Edward Coke was a prime force in accomplishing those ends.³² He was the “unchallenged authority of his time on the laws of England” and the interpreter of the Great Charter.³³ After several centuries of relative neglect,³⁴ he resurrected the Great Charter in the seventeenth century in his *Second Institutes*, adapting it to new social and political conditions, while maintaining its power as a “yardstick of legality.”³⁵ Coke’s comments about Magna Carta and other important statutes had a profound effect on William Penn and Americans in general,³⁶ especially Chapter 29. That chapter, Coke said, “containeth nine several branches,”³⁷ one of which became the remedy clause in the constitutions of Pennsylvania and many other states. About this Coke said:

Nulli vendemus, &c. This is spoken in the person of the king, who in judgement of law, in all his courts of justice is present, and repeating these words, nulli vendemus, &c.

And therefore, every subject of this realm, for injury done to him in bonis, terris, vel persona, 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 to him, freely without sale, fully without any denial, and speedily without delay.³⁸

These comments are generally accepted as the source of the state remedy clauses.³⁹ Some argue that they relate strictly to judicial procedure,⁴⁰ but Coke's comments seem to address the problem of interference with substantive matters, in a message that is directed to every person, entity, and branch of government.⁴¹

Some scholars object to the accuracy of Coke's comments, especially concerning remedies.⁴² However, there is overwhelming recognition that, regardless of whether he took some liberties in interpreting Magna Carta, Americans took his words as legal gospel. Coke's remedy language accurately reflects principles that many consider fundamental and that have been warmly embraced from colonial times to the present.⁴³

This is seen most clearly in the writings of William Penn.⁴⁴ Penn's "thorough grounding"⁴⁵ in Magna Carta and Coke is displayed throughout his works. Like many others, he saw in Magna Carta the antithesis of the arbitrary rule to which he and others were sometimes subjected. He included the text of and comments about Magna Carta in *The Excellent Priviledge of Liberty & Property Being the Birth-Right of Free-Born Subjects of England*,⁴⁶ which he published in 1687.⁴⁷ Penn's most extensive observations were on Chapter 29 of Magna Carta—including the language about open courts and remedies.⁴⁸

Plainly, the open-courts clause, including the provision for remedies for certain injuries, has deep roots that began in England but ran directly to Pennsylvania⁴⁹ and to the rest of the colonies.

§ 14.3[b]. COLONIAL PRECURSORS

Penn's treatises about and documents of government "contributed markedly to subsequent constitutional developments during Pennsylvania's statehood."⁵⁰ Perhaps because of his own experiences with the (mal)administration of justice, the principle of open courts and related matters are featured prominently in these writings.⁵¹ Penn attempted to establish a system of justice which was open, accessible, clear, deliberative, and a matter of public knowledge, so that he could "give the greatest possible measure of freedom to the people."⁵² All of these characteristics are elements of a procedural system whose virtues Blackstone and others have extolled.⁵³ To a significant degree, William Penn is responsible for their presence in the American system of justice.

There was an open-courts provision in every colonial document of government in Pennsylvania. Each was meant to ensure that the courts were to be open, impartial, speedy, inexpensive, comprehensible to the average citizen, and available to give redress for cognizable injuries. When Pennsylvania became a state in the new United States, these principles were maintained in each of the Commonwealth's successive constitutions, down to the present.

§ 14.3[b][1]. Concessions and Agreement of West New Jersey—1676

William Penn was one of the trustees of the Province West New Jersey. In 1676, he helped draft its Concessions and Agreement, which contained procedural elements guaranteeing substantive justice, including the first open-courts clause in a formal document of government in America.⁵⁴ It stated that

[I]n all publick courts of justice for tryals of causes, civil or criminal, any person or persons . . . may come into, and attend the said courts, and hear and be present, at all or any such trials . . . that justice may not be done in a corner nor in any covert manner . . . and by these

our Concessions and Fundamentals, that all and every person and persons inhabiting the said Province, shall, as far as in us lies, be free from oppression and slavery.⁵⁵

Like later documents of government that Penn authored, this one also contained related procedural protections that made the court system known⁵⁶ and accessible to every person.⁵⁷

§ 14.3[b][2]. Concessions of 1681

Before coming to Pennsylvania, Penn entered into an agreement with some of the “Adventurers and Purchasers in the same Province.” These “conditions, or concessions” did not contain an open-courts clause, but there were other provisions that showed Penn’s commitment to equality and fair treatment, especially of “the poor natives of the country. . . .”⁵⁸

§ 14.3[b][3]. The Fundamental Constitutions (1681–82)

The “Fundamental Constitutions” was probably Penn’s most comprehensive and liberal early plan of government; it contained many elements that appeared in later constitutions of Pennsylvania and elsewhere, even though it never was actually in effect.⁵⁹

Concerning the courts, Penn mandated:

That justice may be speedily as well as impartially done, and that to prevent tedious and expensive pilgrimages to obtain it, I do for me and mine hereby declare and establish . . . that monthly sessions shall be held in every country in which all sorts of causes belonging to that county shall be heard and finally determined, whether relating to civil or criminal acts. And . . . that every person may freely plead his own cause or bring his friend to do it for him. And the judges are hereby obliged to inform him or her what they can to his or her assistance in the matter before him, that none be prejudiced through ignorance in their own business⁶⁰

Other sections of the Fundamental Constitutions were also aimed at creating a justice system that was speedy, impartial, and accessible to the general public.⁶¹

§ 14.3[b][4]. Frame of Government and Laws Agreed Upon in England (1682)

Penn was tireless in his efforts to take “tender care to the government that it be well laid at first.”⁶² Perhaps the most polished and complete of his efforts to establish a system that was faithful to the ideals of Magna Carta, Sir Edward Coke, and his Quaker faith was a two-part document, the Frame of Government (“The Frame”) and the Laws Agreed Upon in England (“The Laws”).

The Frame set out general principles of government,⁶³ while The Laws were more like a bill of rights, although there was no sharp demarcation. The Laws contained an explicit open-courts clause,⁶⁴ as well as many elements of civil and criminal procedure that remain important parts of our system of justice today.⁶⁵

§ 14.3[b][5]. Charter of Privileges

The final significant⁶⁶ document of William Penn's colonial government was the Charter of Privileges of 1701, which remained in effect until the Revolution.⁶⁷ This document was less detailed than the other plans of government and dealt mostly with structural matters. The only section dealing with the civil judicial system contained some elements of previous open-courts clauses. It said that "no Person or Persons shall or may, at any Time hereafter, be obliged to answer any Complaint, Matter or Thing whatsoever, relating to Property, before the Governor and Council, or in any other Place, but in ordinary Course of Justice, unless Appeals thereunto shall be hereafter by Law appointed."⁶⁸

§ 14.3[c]. CONSTITUTIONAL HISTORY OF THE OPEN-COURTS/ REMEDIES CLAUSE

Pennsylvania has had five constitutions since the American Revolution—1776, 1790, 1838, 1874, and 1968.⁶⁹ Each of them has had an open-courts clause.

The Pennsylvania Constitution of 1776⁷⁰ along with that of other states came into existence as a result of a resolution of the Continental Congress in May 1776, "advising the colonies to adopt new governments 'where no government sufficient to the exigencies of their affairs have been hitherto established.'"⁷¹ This was a time of unprecedented thinking about the structure of government—"Constitutions employed every pen."⁷²

Pennsylvania responded to the Congressional suggestion by creating "the most radical of all the new state constitutions."⁷³ It created a powerful, unicameral legislature and a plural executive—the Council of Censors—whose job was to ensure that "the freedom of the commonwealth may be preserved inviolate forever"⁷⁴ and that "the exercise of . . . [legislative] power . . . should be constantly monitored by the people . . ."⁷⁵

There was some controversy about some of the content of the Constitution of 1776⁷⁶ but none about its rights provisions⁷⁷—including the open-courts clause, section 26 of the Frame of Government, which in pertinent part said that "[a]ll courts shall be open, and justice shall be impartially administered without corruption or unnecessary delay . . ."⁷⁸

The Constitution of 1776 was controversial from its inception. It was met with a firestorm of criticism⁷⁹ which continued throughout its relatively brief life. Some of this involved political wrangling from those who believed that the document simply did not work well.⁸⁰ Following the lead of the federal constitution of 1787,⁸¹ the state legislature became a bicameral body.⁸² The plural executive—the Council of Censors—was replaced by a single, more powerful governor. The judiciary was made more independent by having life tenure during good behavior. These were all major structural changes from the Pennsylvania Constitution of 1776.

Although the rights provisions remained mostly the same in the Constitution of 1790, the open-courts clause was altered significantly by the addition of two important provisions: a remedy clause and a clause discussing suits against the Commonwealth.⁸³ The open-courts/remedy clause was proposed in what was essentially its final form, consisting of two parts—the language prohibiting "sale, denial, or delay" taken from the Constitution of 1776, along with the addition of the remedy language of Sir Edward Coke and William Penn.⁸⁴

As to suit against the state, James Wilson proposed the following: "Suits may be brought against the Commonwealth as well as against other bodies corporate and individual."⁸⁵ Although that language was initially approved,⁸⁶ it went through a series of amendments.⁸⁷ Eventually the whole of Section 11 was finally amended to read virtually as it does today:

That all courts shall be open, and every man, for an injury done him in his lands, goods, person or reputation, shall have remedy by the course of law, and right and justice administered without sale, denial or delay. Suits may be brought against the commonwealth in such manner, in such courts and in such cases as the legislature may, by law, direct.⁸⁸

The notes of the convention provide no information about the reasons for any element of this provision or the section as a whole.⁸⁹ There was no discussion, debate, or explanation about whether there was any connection intended between the first sentence, granting rights to open courts and remedies, and the second sentence, which has variously been interpreted as mandating sovereign immunity,⁹⁰ allowing sovereign immunity,⁹¹ or establishing only a procedural context for suits against the state.⁹² Even so, the Supreme Court has read this history to mean, for suits against the state, that “the 1790 Convention adopted this section in that form” not to grant immunity unless the Legislature waived it but rather “to preserve for the Legislature the opportunity, denied by Wilson’s amendment, to make Pennsylvania immune [from suit] in certain cases.”⁹³

As to the remedy provision, there are no Pennsylvania cases delving into its background in any depth.⁹⁴ It is therefore important to try to place the remedy provision in its historical context, especially in light of current debate about whether it was meant as a limit on the legislative power to diminish or extinguish remedies. In the Constitution of 1776, the legislative branch was seen as the people’s servant and salvation and the executive branch was distrusted. Things turned full circle in the ensuing decades.⁹⁵ People “became disillusioned with legislative supremacy” because of improprieties and abuses.⁹⁶ Clear evidence from Pennsylvania and other states shows that:

[t]ime and again, the legislatures interfered with the governor’s legitimate powers, rejected judicial decision, disregarded individual liberties and property rights, and in general violated the fundamental principles that led the people to create their constitutions in the first place.⁹⁷

There are many examples of legislative abuse in Pennsylvania. By the mid-1780s, there was general agreement that “[m]any of the existing ills [could be] traced to an impotent judiciary,” and that the “primary need . . . was a check on the legislature,” which was then uninhibited save by revolution.⁹⁸

These problems are reflected in the 1783–84 Report of the Council of Censors.⁹⁹ Although it was riven by factionalism,¹⁰⁰ the Council’s records are filled with examples of serious problems. It “freely censured deviations from the constitution, by whomsoever committed”¹⁰¹ Without question, both Republicans and Constitutionals agreed that, above all else, there had been serious problems with the legislature overstepping its bounds and taking actions which were improper under the Constitution.¹⁰² Increasingly, people came to think like Thomas Jefferson, that “173 despots would surely be as oppressive as one,” and that an “elective despotism was not the government we fought for.”¹⁰³ In the end, however, the Council of Censors was unable to agree on what to do about these problems, only that the Constitution of 1776 had been violated. The Republicans wanted a convention, but they did not have the political power to make that happen until 1789, when they gained control of the state Assembly, “assumed extra-constitutional powers and issued the call” for a convention, which took place and resulted in the Constitution of 1790.¹⁰⁴

There is no direct evidence linking this history of legislative abuse directly to the amendment of the open-courts provision in the Constitution of 1790. Even so, it is important to recognize this background, which is evidence of the fact that, although “legislatures have been the institutional correlate of democracy” in America, courts have been the “institutional correlate of liberalism” and a “check against the abuse of legislative power.”¹⁰⁵

The Constitution of 1838 was the first to provide a formal method of constitutional amendment by legislative proposal with popular approval, and for the governor's loss of "nearly all of his patronage" power by "making most offices elective."¹⁰⁶ It was also the first Pennsylvania Constitution submitted to the public for approval.¹⁰⁷ Aside from these high points, however, the Constitution of 1838 was "essentially a compromise and left unchanged the main structure established under the 1790 constitution."¹⁰⁸ A minor change to the open courts provision was proposed but summarily rejected without any discussion.¹⁰⁹

Curbing legislative improprieties was a major theme of the Constitution of 1790. It was also the major theme of Constitution of 1874.¹¹⁰ This is reflected in many features of that document, including Article III, Section 21, which prohibited limits on recoveries for personal injuries or death and proscribed different statutes of limitations for corporations than for natural persons.¹¹¹ It was adopted in response to a statute which capped damages against railroads at \$3,000 for personal injuries and \$5,000 for wrongful death, and imposed a shorter time limitation than that applicable to similar actions against other defendants.¹¹² This and similar constitutional amendments enacted at the time were responses to corporate power and favoritism.¹¹³

On several occasions during the convention, Article III, Section 21, was expressly linked to the open-courts provision. One delegate noted that the prohibitions on limiting damages against corporations and, on making corporations subject to shorter time limitations were:

nothing more than a distinct enunciation of one of the provisions of our present Constitution. Section eleven of the Declaration of Right is in these words: "That all courts shall be open, and every man, for an injury done him in his lands, goods, person or reputation, shall have remedy by the due course of law, and right and justice administered without sale, denial or delay." . . . [L]imiting the amount of damages to be recovered in these cases . . . is a denial of right and justice for an injury done to the person. . . . [T]he courts have not been open to him, and right and justice have not been administered without denial.¹¹⁴

In fact, at one point the Committee on the Declaration of Rights proposed that the prohibition against the limitation of damages be inserted as part of the open-courts provision in Section 11 of the Declaration of Rights.¹¹⁵

There was one other relevant proposal, concerning the second sentence of Section 11, relating to suits against the Commonwealth, which would have mandated that the Legislature provide for suits against the state, rather than leaving it optional.¹¹⁶ It did not pass. Thus, the substance of the open-courts provision did not change from that in the Constitution of 1790.¹¹⁷

This history shows that although the origins of Article III, Section 21 and Article I, Section 11 are somewhat different, there are substantial connections between the two. In recent years, there have been a number of Pennsylvania cases that have dealt both of these provisions.¹¹⁸ This relationship is mirrored in the spate of national activity concerning open-courts clauses, which are "often at the epicenter of the current battle between business and the plaintiffs' bar over legislative tort reform, as well as the historic power struggle between legislatures and courts."¹¹⁹

§ 14.4. PENNSYLVANIA CASE LAW

Article I, Section 11 touches on a variety of issues, both procedural and substantive. It requires that courts be "open" to "every man." It grants a right to a remedy for injuries not only to people and their property, but also their reputation.¹²⁰ The remedy must be accomplished "by due course of law," and there can be no "sale, denial, or delay" involved in that process.

Pennsylvania courts have not been entirely consistent in construing these phrases—a situation by no means unique to this state.¹²¹ This is due to a variety of factors, including institutional ones, that make interpretation of a state constitution more complex than a federal document. The federal constitutional process involves actions by federal and state legislatures.¹²² By contrast, for state constitutions, including Pennsylvania’s, it is the “people, not the framers, [who] actually enact constitutional amendments.”¹²³ This fact “complicates questions surrounding the intent of the framers of state constitutional provisions,” including the relevance of such intent.¹²⁴

In spite of Pennsylvania’s constitutional procedure, the state Supreme Court has sometimes relied entirely on the intent of “the Framers,” i.e., the legislative draftsmen, to the exclusion of that of the voters.¹²⁵ In other cases, the Court has discussed the intent of both the voters and the framers.¹²⁶ The Court has also cited a sort of plain-meaning rule of interpretation.¹²⁷

The Court has also vacillated in deciding how much weight to give the rights set out in Article I, Section 11. In one case, the Court held that the rights “to have open courts and justice administered ‘without sale, denial, or delay’ . . . are fundamental. . . .”¹²⁸ In other cases, however, the Court has characterized the Section 11 right to a remedy as only “important,” using “typical fourteenth amendment analysis.”¹²⁹ Indeed, in at least one Section 11 case, the Court used the very lenient rational basis test,¹³⁰ that is normally reserved for judging interests that are neither fundamental nor important—not interests that appear in a constitutional declaration of rights.¹³¹

The word “open” has at least “two apparent meanings. First, it plainly means that the Commonwealth courts are available to all cases recognized as legal injury by modern courts Second, it may also mean that the courts are physically open to the public.”¹³²

As a result of court rules promulgated beginning in the 1980s, litigants in Pennsylvania can be excused from paying court costs if they are “without financial resources to pay the costs of litigation. . . .”¹³³ Well before then, and long before the United States Supreme Court recognized a limited right of access to courts for indigent parties,¹³⁴ Article I, Section 11 of the Pennsylvania Constitution afforded litigants relief in these circumstances.¹³⁵ The United States Supreme Court has held that there is only a “narrow category” of civil cases in which there is a due process right of access to courts, “without regard to a party’s ability to pay courts fees.”¹³⁶ By contrast, Pennsylvania courts have a long tradition of granting access to courts in a variety of cases and circumstances¹³⁷ to those who cannot afford to pay court costs, based on Article I, Section 11.¹³⁸

§ 14.4[a]. PHYSICAL ACCESS

The influence of William Penn and the Pennsylvania Constitution of 1776 are evident in both state¹³⁹ and federal cases¹⁴⁰ about whether the public and the media should have physical access to adjudicative proceedings and records.¹⁴¹ Pennsylvania has a long, consistent, and unambiguous history that establishes a “principle of openness.”¹⁴² It has been said that Article I, Section 11 places an “added responsibility” on our state courts to “protect the public’s right of access” to courts.¹⁴³ Thus Article I, Section 11 has been the basis of a formidable right of open courts and physical access to court proceedings for civil and criminal litigants,¹⁴⁴ the public, and the press.¹⁴⁵

Members of the general public have a “right of admission to the court, as they are largely interested in the public administration of law and justice.”¹⁴⁶ However, this general right is not absolute; at times, it must be “subservient to the orderly and peaceful administration of law. . . .”¹⁴⁷ It is also subject to being balanced against the rights of criminal defendants to a fair trial.

On the other hand, although a criminal defendant can waive his right to a “speedy public trial” under Article I, Section 9 of the Pennsylvania Constitution, such a waiver does not trump the right of the public and press of access to proceedings, even where the defendant’s liberty is at stake.¹⁴⁸ The public has an independent “strong interest in the judicial process. ‘A trial is a public event. What transpires in the court room is public property.’”¹⁴⁹ Likewise, the press also has its own interest in access to court proceedings, independent of either the defendant or the general public.¹⁵⁰

There are times, however, when the protection of a criminal defendant’s constitutional liberties outweighs the constitutional interests of the public and press, such as a pre-trial suppression hearing, at which the defendant is attempting to challenge alleged inculpatory information and prevent it from being used at trial.¹⁵¹ Thus, court access may be limited where there is a “compelling state obligation to protect constitutional rights” of a criminal defendant.¹⁵² Even then, however, the limitation must be “carefully drawn.” Public access should not be limited unless: there is a “serious” threat to the protected interest; the limit will “effectively present the harms at which they are aimed”; and the limitation is “no more than is necessary to accomplish the end sought.”¹⁵³ A request to close an adjudicative proceeding “should be granted only with the gravest of reservations.”¹⁵⁴ Even in the case of a suppression hearing, if there is “an effective and efficient alternative means to assure the accused’s fair trial rights,” the right of access of the public and press prevails over competing interests.¹⁵⁵

The principle of openness extends to documents as well as to adjudicative proceedings. There is a “presumption of openness attached to a public judicial document,” including an affidavit in support of an arrest warrant.¹⁵⁶ The presumption is based on the open-courts provision, a defendant’s right to a speedy, public trial (Article I, Section 9), as well as a “common law right of access. . . .”¹⁵⁷ However, as in the case of access to a suppression hearing, the right to inspect public records is not absolute, but it cannot be denied upon a mere allegation of harm by the defendant or the state. Rather, such affidavits and similar documents¹⁵⁸ are deemed open unless the prosecution or defendant satisfies the burden of showing they ought to be sealed from public access.¹⁵⁹

The United States Supreme Court has recognized that state constitutional open-courts provisions such as Pennsylvania’s are in “conspicuous contrast” to the federal Sixth Amendment, which simply grants criminal defendants the right to a public trial.¹⁶⁰ Although there has been some dissent, it appears that the Pennsylvania Supreme Court would agree with that characterization and hold that Article I, Section 11 has a different history from and provides different and potentially greater rights than the Sixth Amendment.¹⁶¹

At least for the time being, however, the standards that the Pennsylvania and United States Supreme Courts apply seem more alike than not.¹⁶² Other states have established similarly strict proscriptions against limitations of the public and media access to adjudicative proceedings.¹⁶³

§ 14.4[b]. “EVERY MAN”

Equality inheres in the term “every man.” Equality was an important element open-courts jurisprudence provision from the time of its inception in Magna Carta.¹⁶⁴ It was a key component in Sir Edward Coke’s interpretation of the Great Charter in the 17th century.¹⁶⁵ Sir William Blackstone’s influential interpretation of the law maintained that status in the 18th century,¹⁶⁶ as did the Pennsylvania Constitution of 1776¹⁶⁷ and state cases from 1863¹⁶⁸ to the contemporary cases discussed below.

§ 14.4[c]. “DUE COURSE OF LAW”

Article I, Section 11 guarantees that “every man . . . shall have remedy by due course of law. . . .” Although at times there may have been confusion between terms “due process” and “due course of law,” it is generally accepted that they are different.¹⁶⁹ The right to due process protects people against official deprivations of liberty or property by the state, except ‘by the law of the land.’ By contrast, the right to “due course of law” provides an “independent guarantee of legal remedies for private wrongs” by one person against another, through the state’s judicial system.¹⁷⁰

A number of older Pennsylvania cases discuss “due course of law” in connection with legislative action that attempted to interfere with or negate the judicial process. For instance, in one case, the legislature passed a statute to extend the statute of limitations in a case which had been decided years earlier in court.¹⁷¹ The state Supreme Court discussed the principle of separation of powers, equal treatment, and the open-court provision and held:

[a] man’s rights are not decided by due course of law, if the judgment of the courts upon them may be set aside or opened for further litigation by an Act of Assembly. That would be a plain violation of the due course of law, a departure from the functions of legislation, and an assumption of those of jurisdiction. . . . [L]egislation cannot be just that gives opposite rules for distinct cases in the same class. . . . This is nothing like ‘the due course of law.’¹⁷²

In 1859, the Court struck down a statute meant to reverse a final court judgment concerning title to real property, holding that when the legislature attempts to change the law that is applicable to a case, “justice [is] denied, and the due course of law violated.”¹⁷³ In 1861, the Court held that a statute purporting to tell the courts how to interpret a prior statute violates the “due course of law” mandate.¹⁷⁴ In addition, the Court has condemned a legislative attempt to limit the “full amount of pecuniary damages that a person suffers from an injury” as being “palpably in conflict with the right to a remedy by due course of law.”¹⁷⁵

These “due course of law” cases all involve some sort of legislative interference with the judicial process. Many involve the related principles of separation of powers and judicial review, two of America’s unique contributions to Anglo-American law.¹⁷⁶ Some of the cases provide stark proof that these principles may have existed in theory at the start of our state and nation but took time to be established in fact.¹⁷⁷ At the time of the federal constitutional convention and well beyond,¹⁷⁸ the country was living “among the ruins of a system of intermingled legislative and judicial powers. . . .”¹⁷⁹

More than two centuries after the founding of the Commonwealth of Pennsylvania and the United States of America, issues about the “due course of law,” separation of powers, and limitations on remedies are still hotly contested in Pennsylvania¹⁸⁰ and elsewhere.¹⁸¹ The current wave of “tort reform” statutes, which attempt to limit plaintiffs’ access to the full range of tort remedies, makes it likely that this battle will continue with open-courts provisions—including “due course of law”—in the future.¹⁸²

§ 14.4[d]. “WITHOUT SALE, DENIAL, OR DELAY”

The mandate that justice should be “administered without sale, denial or delay” is one of the oldest provisions in Pennsylvania law, dating back to 1682.¹⁸³ A related provision of that time was that court fees were to be “moderate” and that any person “convicted of taking more, shall pay twofold, and be dismissed from his employment; one moiety of which shall go to the party wronged.”¹⁸⁴ The statute was held to be valid and “in furtherance of that clause in the [state] bill of rights which requires justice to be administered without sale, denial or delay.”¹⁸⁵

A number of cases discuss the denial of justice that occurs when a party is prohibited from seeking relief from a court for an injury recognized by law. The Supreme Court in *Boyle v. O'Bannon* held that a trial court did not have the “power and authority to dismiss a complaint, sua sponte, before it [was] served on the named defendant and without affording the plaintiff the opportunity to be heard,” even where the plaintiff is a litigious prisoner.¹⁸⁶ The Court said that the “initiation of a lawsuit contemplates an orderly process leading to a just consideration and ultimate resolution of a claim.”¹⁸⁷

Similarly, the Pennsylvania Superior Court cited Article I, Section 11 in holding that, while a judicial claim might ultimately be denied, a person has a right to ask a court for relief at any time, based on compliance with legal requirements, and has a right to a hearing to see if the conditions for granting relief have been satisfied.¹⁸⁸ While the court has right to grant or deny a judicial remedy, it may not order a summary dismissal; rather, it must hear the case and exercise not “an arbitrary discretion but a judicial discretion.”¹⁸⁹

Article I, Section 11 also limited the legislature’s powers in this regard. That body cannot recognize harm to a party as a legal injury, on one hand, but deny the party’s right to seek relief in the courts, on the other. Thus, where a statute acknowledges that a city may be harmed by a strike of its transit workers, the statute cannot deny the city standing to seek to have the strike enjoined because of the harm it is causing without violating the mandate of Article I, Section 11 that justice must be “administered without sale, denial or delay.”¹⁹⁰ Section 11 “prevent[s] the Legislature from denying an injured part the right to seek relief from the courts for a legal injury. . . .”¹⁹¹

Likewise, the state would violate Section 11 by improperly denying a person a remedy if it sanctioned the loss of the person’s right to receive statutory benefits, where she had been forced to give up her day in court to seek a remedy for an injury. Thus, the Commonwealth Court has held that a person who was fired for refusing to sign a document releasing her employer for liability for injuries did not commit an act of willful misconduct that would disqualify her from receiving unemployment compensation benefits.¹⁹²

As a number of cases demonstrate the saying “justice delayed is justice denied” is, as a rule, more than just an aphorism in Pennsylvania. In granting the attorney general’s petition for mandamus against a judge who had an inordinate number of cases waiting to be decided, the Supreme Court cited the protection against delay in Article I, Section 11 and the “29th Chapter of Magna Carta [, which] has been characterized as ‘the foundation of the liberty of Englishmen’ . . . which reads. . . . ‘To none will we sell, to none deny to none delay, either right or justice.’”¹⁹³ Judicial “dereliction flouts the proud promise of the Magna Carta . . . [and] contravenes the Constitution of this Commonwealth . . . Article I, Section 11.”¹⁹⁴ Similarly, a legislative act that causes delay in a person’s ability to get judicial relief also violates Section 11.¹⁹⁵

§ 14.4[e]. THE RIGHT TO A REMEDY

Article I, Section 11 guarantees that every man “shall have remedy . . . for an injury done him in his lands, goods, person or reputation. . . .” This is the most contentious component of Article I, Section 11. In state after state over the past thirty years, remedy clauses like this have generated the most legislation,¹⁹⁶ litigation,¹⁹⁷ and literature¹⁹⁸ of any element of open-courts provisions. These activities have taken place in an atmosphere that often has the look and feel of war,¹⁹⁹ or at least chaos.²⁰⁰

Adding to the difficulty of the issues, the cases and literature about open-courts clauses are often paired with other important constitutional provisions and principles, including separation of powers,²⁰¹ the right to a jury trial, due process, equal treatment, and the prohibition against special laws.²⁰² Also at issue is whether open-courts clauses place substantive restraints on legislative power to limit remedies, or only procedural restraints on and directives to the courts.²⁰³ In this context, the “procedure-substance dichotomy takes on constitutional dimensions. . . .”²⁰⁴ And lurking in the background is the prospect of federal tort legislation²⁰⁵ that would affect existing state remedies and that might entirely negate state open-courts provisions and jurisprudence, because of supremacy and pre-emption considerations.²⁰⁶

Finally, underlying the controversy surrounding both state and federal remedies jurisprudence and tort reform is the issue of whether there is a factual basis for the beliefs that are offered to support it, including whether there is a litigation explosion, insurance crisis, or other situation that would factually justify the abridgment of a plaintiff’s right to access to courts and a remedy.²⁰⁷

§ 14.4[f]. REMEDIES IN GENERAL²⁰⁸

There are two competing lines of remedy cases under Article I, Section 11. In one, it is recognized that the rights “to have open courts and justice administered ‘without sale, denial, or delay’ . . . are fundamental rights. . . .”²⁰⁹ Consistent with that fundamental status and the “prevailing philosophy that liability follows tortious conduct,”²¹⁰ the Pennsylvania Supreme Court has stated that the “doors of the courts” should be open to a person whose body, property, or reputation has been injured by another person.²¹¹ In addition to being constitutionally mandated, these precepts are “fundamental to our common law system,” which holds that “one may seek redress for every substantial wrong . . . [A] wrongdoer is responsible for the natural and proximate consequence of his misconduct. . . . [The] “humanitarianism of our judicial system and its responsiveness to the current need of justice dictate that” every person “be afforded a chance to present his case to a jury and perhaps be compensated for the injury he has incurred.”²¹²

Where a remedy is prescribed, “it is impossible to avoid the presumption that . . . the remedy is intended to be coextensive with the injuries . . . [N]othing is more glorious and necessary to a state and to its citizens than full execution of justice. . . . [Remedies] are entitled . . . to a liberal construction for the purpose of redressing the wrong. . . .”²¹³ As the Court noted in 1978, it is “the business of the law to remedy wrongs” and be skeptical of an “status-based immunities of parties.”²¹⁴

In more recent cases, however, the Pennsylvania Supreme Court has been less generous. Using what it calls the “typical fourteenth amendment [equality] analysis,”²¹⁵ it has characterized the Section 11 right to a remedy—at least against the state—as “important”²¹⁶ or even less,²¹⁷ resulting in a virtually automatic affirmance of the legislative classifications. Using that and other analyses, it has read the open-courts provision in a “miserly”²¹⁸ fashion and it has upheld some rather drastic legislative limitations of remedies.²¹⁹

In these cases, the courts have held that nothing in Article I, Section 11 prevents the legislature from completely eliminating a cause of action, since the right to a remedy for an injury means a “legal injury,” as defined by the legislature.²²⁰ Therefore, there is no “immutable body of negligence law . . . [W]hat today is a trespass may, by development of law, not be so tomorrow. . . .”²²¹ Moreover, where the legislature abolishes a cause of action, it need not provide a substituted remedy.²²² If, however, it chooses to do so, it need not be the same as the original remedy.²²³ In addition, the legislature has the right to, in effect, immunize certain classes of defendants from liability, based on their status.²²⁴

This “legislative power” approach²²⁵ places Pennsylvania in the minority, among the states most deferential to legislative action and least generous in allowing remedies to injured plaintiffs under their respective state constitutions.²²⁶

§ 14.4[g]. “FOUNDATION” PENNSYLVANIA REMEDY CASES

The cases discussed in this section are often cited as the foundation of recent open-courts decisions and because of their frequent citation, they deserve some extended discussion.

§ 14.4[g][1]. Jackman v. Rosenbaum

In the 1919 case of Jackman v. Rosenbaum,²²⁷ the plaintiff sued for damages caused by the defendant’s removal of a party-wall during new construction. The defendant had “strictly complied” with the party-wall statute, had not acted negligently, and “had the legal right to erect the new wall and, if necessary, to cause the removal of obstructions. . . .”²²⁸ In spite of this, the plaintiff brought suit, asking the court to overturn the party-wall statute which originated centuries before, following the great London fire of 1666 and was introduced in this country by William Penn. Plaintiff argued that the origins “antedate . . . the foundation of the Commonwealth.”²²⁹ The Court rejected plaintiff’s argument, stating that the open-courts provision was limited to “legal injuries,” not those which may have been suffered by a lawful action taken pursuant to a centuries-old statute.²³⁰ In the course of its opinion, the court stated what was to become a mantra in later cases:

The fundamental principles of the common law, while liable to expansion, are in essence unchangeable, but their applicability to given conditions necessarily varies according to changes wrought by usage or statutory enactment . . . [W]hat today is a trespass, may, by development of law, not be so to-morrow. Therefore, it will not do to say . . . [that] since, once upon a time, at common law [an act] would have been a tort, giving rise to a claim for damages, that at the present day such an act has all the attributes of a common law trespass.²³¹

This passage is cited in virtually every subsequent remedies case,²³² but without any mention of the context—that the plaintiff was asking the court to overturn a statute whose principles had been established for hundreds of years.²³³ This factor is not present in later open-courts cases.

§ 14.4[g][2]. Sherwood v. Elgart

In the 1954 case of *Sherwood v. Elgart*,²³⁴ the Court upheld a statute limiting an innkeeper's liability to \$300 for the loss of or damage to certain types personal property of a guest,²³⁵ where the innkeeper provides safe deposit facilities for storage and posts copies of the statute in conspicuous places on the premises.²³⁶ The plaintiff, who prevailed in the trial court, did not raise the constitutional remedies issue under Article I, Section 11 until he filed a supplemental reply brief in the appellate court.²³⁷ The Court gave only limited consideration to the issue. It wrote that "after considering appellee's contention we find it to be without merit."²³⁸ This rationale was later aptly termed "non-existent."²³⁹

Without pointing out this summary disposition, *Sherwood* is cited in later cases²⁴⁰ as fully supporting the principles that a) the legislature's abolition of a common law cause of action without providing a substitute is not a violation of the remedies provision of Article I, Section 11,²⁴¹ and b) the legislature "may permissibly limit liability on the basis of a defendant's status."²⁴²

§ 14.4[g][3]. *Thirteenth and Fifteenth Street Railway v. Boudrou*

In the 1880 case of *Thirteenth and Fifteenth Street Passenger Railway v. Boudrou*,²⁴³ the Court struck down a statute that limited a plaintiff's personal injury recovery against a railroad to \$3,000. In affirming the lower court's verdict of \$10,000, the court emphasized the

right to every man, that for an injury done him in her person, he shall have remedy by due course of law. The people have withheld power from the legislature and the courts to deprive them of that remedy, or to circumscribe it so that a jury can only give a pitiful fraction of the damage sustained. Nothing less than the full amount of pecuniary damages which a man suffers from an injury to him in his lands, goods or person, fills the measure secured to him in the Declaration of Rights. As well might it be attempted to defeat the whole remedy as a part . . . A limitation of recovery to a sum less than the actual damages, is palpably in conflict with the right to remedy by due course of law.²⁴⁴

Although this case and language were cited with approval in a 1959 case,²⁴⁵ since that time the Court has read it very narrowly or distinguished it entirely.²⁴⁶

§ 14.4[g][4]. *Dolan v. Linton's Lunch*

In the 1959 case of *Dolan v. Linton's Lunch*,²⁴⁷ a worker sued his employer for injuries suffered from an assault by a co-worker, whom plaintiff alleged had a history of violent conduct from which the employer should have protected him. At the time, the worker's compensation statute covered only accidental injuries and specifically excluded intentional acts of third parties intended to injure the employee, for reasons not related to his work.²⁴⁸ The lower court granted the demurrer of the employer, who argued that the Article III constitutional provision authorizing a worker's compensation statute²⁴⁹ prevented the worker from bringing a common-law cause of action. The Supreme Court reversed, holding that to read the act in that way "might well violate the mandate of Article I, Section 11," the open-courts provision.²⁵⁰

In its opinion, the Court stated that Article III did not authorize the legislature to enact a law which vitiates an existing common-law remedy without concurrently providing for some statutory remedy. Of course, the substituted remedy need not be the same, but that is far different from saying that no remedy at all may be substituted. It is only because of Article III, Section 21 . . . that the limited recovery in a Workmen's Compensation case is valid . . . In all "other cases" nothing less than full actual damage would satisfy requirement of Article I, Section 11.²⁵¹

The Court cited Dolan with approval some eighteen years later in *Greer v. U.S. Steel Corporation*,²⁵² but just six years after that in *Freezer Storage, Inc. v. Armstrong Cork Co.*, it retreated sharply by upholding a statute of repose for deficiencies in the design or construction of buildings.²⁵³

In *Freezer Storage*, the Court said that the Dolan language:

was dictum . . . used to support a decision that limited the pre-emptive effect of the Workmen's Compensation Law to those cases under which that statute actually supplies a remedy. The case before us has no effect on the holding in Dolan. To the extent that the dictum therein suggests that the Legislature may never abolish a judicially recognized cause of action, we decline to follow it.²⁵⁴

These cases show that the Pennsylvania Supreme Court's recent open-courts jurisprudence recognizes few if any limits on the power of the legislature to alter, limit, or abolish remedies. The Court has tended to follow the cases that limit remedies and distinguish those that grant them.²⁵⁵

§ 14.4[h]. CONSTITUTIONAL LIMITATIONS ON TORT DAMAGES

Most of the recent major open-courts cases under Article I, Section 11, also involve Article III, Section 18, which prohibits limitations on the "amount to be recovered" for "injuries to persons or property" or those "resulting in death. . . ."²⁵⁶ Section 18 sanctions the establishment of a worker's compensation system providing for not full but "reasonable compensation" for work-related injuries. Section 18 stipulates, however, that "in no other cases shall the General Assembly limit the amount to be recovered for injuries resulting in death, or for injuries to person or property. . . ."²⁵⁷

Despite this language, the jurisprudence flowing from this provision has primarily involved the Supreme Court's distinguishing cases and taking them out of reach of Article III, Section 18. As a result, the open-courts provisions and Section 18 have been rendered remarkably impotent, alone or together, to prevent legislative limitations of remedies or limits on monetary damages.

For instance, in *Seymour v. Rossman*, the Court approved an equal distribution of insurance proceeds to the decedent's widow and his child of a prior marriage, even though the widow had suffered an economic loss twenty times greater than that of the daughter.²⁵⁸ After summarily rejecting the widow's open-courts argument,²⁵⁹ the Court dismissed her Section 18 argument without any discussion or analysis.²⁶⁰

In later cases, the Court continued to reject plaintiffs' arguments under Section 18. For instance, in upholding the no-fault motor vehicle insurance law²⁶¹ and a statute of repose in negligence cases involving the design or construction of improvements to real property,²⁶² the Court stated that the Legislature is entitled to eliminate a cause of action²⁶³ and, where it does so, it does not limit the amount to be recovered, since any prior right to recovery no longer exists.²⁶⁴

If the Legislature can eliminate a cause of action involving private parties, it is not surprising that the Court has also held that, under Article I, Section 11, “the Framers intended that the legislature have complete control over suits brought against the Commonwealth,” either by abolition or limitations on recovery.²⁶⁵ The Court has also justified monetary limits on judgments against government bodies by noting that Article III, Section 18, was adopted not because of official wrongdoing but rather “in response to the fact that certain powerful private interests had been able to influence legislation which limited recovery in negligence cases filed against them.”²⁶⁶ The Court rejected the argument that the plain meaning of the section²⁶⁷ should govern suits against the government by pointing out that “the Framers would have had no occasion to apply the prohibition against limiting damages to government, since at that time, the state was immune from suit.”²⁶⁸

The Court has not yet confronted a situation in which the legislature has continued to recognize a cause of action against a non-governmental defendant but has imposed a monetary limit on a plaintiff’s recovery. In such circumstances, there is a plausible argument that such a statute would violate Article III, Section 18.²⁶⁹

§ 14.4[i]. EQUALITY ISSUES IN PENNSYLVANIA OPEN-COURTS CASES

Almost every modern Pennsylvania open-court case has been decided using an equality analysis based on the federal three-tier approach.²⁷⁰ Although as a general rule, one’s rights under Article I, Section 11, may be “fundamental rights which should not be infringed upon, unless no other course is reasonably possible,”²⁷¹ in the last forty years or so the rights to open-court and remedies at times have been given less weight than such status would seem to merit.

The question that underlies these issues of classification, inclusion and exclusion, is the proper degree of deference to legislative judgments. If the legislature has the power to eliminate certain causes of action,²⁷² immunize certain defendants,²⁷³ or enact statutes of repose for particular groups,²⁷⁴ then the ultimate test of such legislation may be to determine if the group excluded or harmed has been treated fairly, under the constitution, compared with those treated in a different manner.²⁷⁵ The critical question, then, is what standard the Court should use to determine whether a person’s right to equal treatment has been compromised.

Over the past thirty years, the Pennsylvania Supreme Court has declared that the legislature has a “large measure of discretion in prescribing remedies for wrongs.”²⁷⁶ The Court has applied the rational relationship test in a number of its open-courts cases involving equality challenges, whether based on the state or federal constitution.²⁷⁷ In more recent cases, however, the Court has accorded Article I, Section 11 a slightly more elevated status.²⁷⁸ In *James v. SEPTA*, the Court upheld the rejection of a negligence claim based on plaintiff’s failure to comply with a provision requiring him to give written notice of his injury to a government defendant within six months of the injury. The Court said that there was “no ‘fundamental right’ to sue the Commonwealth, for such right is explicitly limited by Art. I, § 11 . . . [which] explicitly reserves to the Commonwealth the power to determine in which cases it will be sued.”²⁷⁹ The Court said, however, that while not fundamental, the plaintiff had an “important interest in access to courts to sue the Commonwealth in cases where the Commonwealth has consented to suit,” and that the notice requirement had restricted that right.²⁸⁰

Given the existence of an “important” private interest, the Court said that the government had to show that its interest was also important and that the classification was closely related to the purposes of the statute. In addition, the plaintiff had to be given the opportunity to show that, in his particular case, the denial of the right would not further the government’s interest.²⁸¹ In short order, however, the Court found that the state had satisfied its burden. It was deemed “self-evident” that the purpose of the statute—to allow the state to make a timely investigation and avoid stale of fraudulent claims—was “important and legitimate. . . .”²⁸² The Court also held that the classification was “so narrowly drawn as to be closely fitted to the statutory purpose. . . .”²⁸³

Both James and its progeny involved suits against the state in which the Court has held that the second sentence of Article I, Section 11, limiting suits against the state, qualifies the first, granting a right to a remedy. Even in those cases, however, the Court has recognized that a plaintiff’s right of access to the courts is “important.” Thus, it seems logical to predict that in a matter involving a suit by one non-governmental party against another, the plaintiff’s right to a remedy under Article I, Section 11, and a full recovery under Article III, Section 18, would be deemed to be “fundamental,” and that any limitation would be judged under the most demanding standards, such as “strict scrutiny.”²⁸⁴

§ 14.4[j]. STATUTES OF REPOSE

Statutes of repose are a common feature of modern tort reform, albeit a “highly controversial” one,²⁸⁵ because they operate to bar a cause of action before the underlying injury can reasonably be discovered. Pennsylvania courts upheld a statute of repose in *Freezer Storage*, decided in 1978, involving a twelve-year statute applicable to architects and builders.²⁸⁶

As a matter of policy, it is arguable whether a statute of repose serves generally accepted policies behind imposing time limits on bringing a lawsuit.²⁸⁷ A time limitation “must proceed on the idea that the party has full opportunity afforded him to try his right in the courts.”²⁸⁸ A statute of repose forecloses an action before a party is injured or aware of his injury. It is also fundamentally at odds with the policies underlying the “discovery rule,” which holds that a person “cannot reasonably be required to act until knowledge that action is needed is possible to him.”²⁸⁹ Thus, it has been held that “to hold that the statute begins to run at the date of the trespass” is “absurd and so unjust [that] it ought not to be possible” in a case where a person does not know that an injury has been done to him, or the injury has not yet manifested itself.²⁹⁰

For these and other reasons, there has been considerable and sometimes harsh commentary about statutes of repose.²⁹¹ “No one area under dispute under state access to court rights has more evenly divided state courts” than this issue.²⁹²

§ 14.4[k]. THE “QUID PRO QUO” DOCTRINE

The notion of the need for a substitute remedy—a quid pro quo—to replace one eliminated by the legislature has received inconsistent treatment in Pennsylvania cases. On one hand, the need for a substituted remedy to justify the abolition or limitation of a prior well established common law cause of action has been approved in a number of workmen’s compensation cases,²⁹³ most notably *Dolan v. Linton’s Lunch*,²⁹⁴ and a decision upholding the no-fault vehicle insurance law.²⁹⁵ On the other hand, the need for a substituted remedy was rejected in *Freezer Storage*, where the Court called its language in *Dolan* dictum and explicitly rejected it “to the extent that [it] suggests that the Legislature may never abolish a judicially recognized cause of action”²⁹⁶ without providing some sort of substituted remedy.

A few years after *Freezer Storage*, however, the Court backtracked. In *Kline v. Verner*,²⁹⁷ it upheld the dismissal of a worker's negligence suit against his employer for a work injury to his pelvis that resulted in his impotence in addition to lost time and wages from work. The Court supported its decision denying damages for the worker's impotence, in part, by noting that the claimant got "some statutory remedy"—benefits for the time he was unable to work²⁹⁸—holding that this was enough to satisfy the Constitution. The Court cited the substituted-remedy language from *Dolan* with approval in support of its opinion.²⁹⁹ Given this inconsistent treatment, then, it is difficult to predict the current status of the quid pro quo doctrine in Pennsylvania.³⁰⁰

This is one issue in which the federal Constitution might play a greater role than other areas of tort law. This is so in spite of the fact that, as the Pennsylvania Supreme Court has done, the United States Supreme Court has stated that the common law of negligence can be changed by legislation, without necessarily running into any constitutional obstacle.³⁰¹ Nonetheless, the United States Supreme Court has left open the possibility that the federal due process clause might require a "reasonably just substitute for the common-law or state tort law remedies it replaces" when a statute pre-empts a former remedy.³⁰² Each time that issue has arisen, however, the Court has determined that an adequate quid pro quo had been provided, thus obviating the need to decide whether such a substitute remedy may be required in some circumstances.³⁰³ The consistent push for tort reform raises the possibility that the federal high court might eventually have to decide the issue.³⁰⁴

§ 14.4[1]. SUITS AGAINST THE COMMONWEALTH

For many years, Pennsylvania courts held that sovereign immunity in tort cases was mandated either by the common law or by Article I, Section 11.³⁰⁵ In *O'Connor v. Pittsburgh*, the Supreme Court reluctantly found that, as a matter of common law, it was "the prerogative of a sovereign to be exempt from coercion by action; for jurisdiction implied superiority, and a sovereign can have no superior."³⁰⁶ Even though it was repugnant to the very principles on which Pennsylvania and the United States were founded and was "criticized at its very inception," the doctrine of sovereign immunity somehow became a canon of Pennsylvania law by the middle of the eighteenth century.³⁰⁷

Beginning in 1934, the Supreme Court changed the basis of its decisions, holding that it was not the common law but "article I, Section 11 of the Constitution [which] embodies the doctrine that the state may not be sued without its consent. . . ."³⁰⁸ This "status-based immunity of parties,"³⁰⁹ whatever its source, slowly began to erode starting in the 1960s, as the Court repudiated charitable immunity,³¹⁰ parental immunity,³¹¹ and local government immunity.³¹²

This trend culminated in 1978 in *Mayle v. Pennsylvania Department of Highways*, where the Court held that sovereign immunity had been entirely a creature of the common law and thus could be judicially repealed.³¹³ After examining the history of Article I, Section 11, the Court said that its framers "did not intend to grant sovereign immunity to the Commonwealth," as it had previously held.³¹⁴ Rather, Section 11 was said to be "neutral—it neither requires nor prohibits sovereign immunity. It merely provides that the presence or absence of sovereign immunity shall be decided in a non-constitutional manner."³¹⁵

The Court based this conclusion on its reading of a piece of pertinent history. In the Convention of 1790, “James Wilson, a known opponent of sovereign immunity, persuaded the Convention to” put substantive language in the open-courts provision which would have explicitly made the Commonwealth liable to suit.³¹⁶ However, the language was amended in the Convention to read in its present form. On its face, that language appears to be more procedural than substantive: “Suits may be brought against the Commonwealth in such manner, in such courts and in such cases as the legislature may by law direct.”³¹⁷ However, the Court adopted a substantive rather than a procedural reading,³¹⁸ stating that:

although no debate concerning any of the versions has been preserved, it appears that the 1790 Convention adopted this section in that form to preserve for the Legislature the opportunity, denied by Wilson’s amendment, to make Pennsylvania immune in certain cases.³¹⁹

Shortly after *Mayle* was decided, the Legislature accepted the Court’s invitation and enacted a statute establishing sovereign immunity as the general rule³²⁰ with certain exceptions.³²¹

As discussed in the case law section of this chapter, the Court has favored the grant of immunity by broadly construing statutory grants of immunity over the constitutional grant of the right to a remedy, “given the express legislative intent to insulate government bodies] from tort liability.”³²²

§ 14.5. CONCLUSION

Article I, Section 11 of the Pennsylvania Constitution is a fundamental right. It is in the Declaration of Rights, because—as the preamble to Article I states—it is one of the “general, great and essential principles of liberty and free government” which are “recognized and unalterably established” by that document. Given its status as a fundamental right, any attempt to limit the protections and reach of Article I, Section 11 should be judged with a measure of scrutiny appropriate to its status—strictly.

Whatever one’s views about Article I, Section 11 or the areas of positive, substantive law that it affects, it ought to give judges and legislators pause to try to solve problems of our legal system by reducing or eliminating the constitutional right of injured people to be compensated for harm that the law generally recognizes as legitimate. If legislatures are not, then courts should be “uncomfortable with placing the burden of paying for . . . [a defendant’s] negligence on the one least able to pay and least responsible for the injury, the innocent victim.”³²³ The “law imposes on the malfeasant the obligation to make the victim whole, in every phase in which the victim has suffered, to the extent that rehabilitation is possible in terms of money.”³²⁴

This would seem to be required under Article I, Section 11 which establishes a fundamental right that “every man for an injury done him in his or her lands, good, person or reputation shall have remedy by due course of law, and right and justice administered without sale, denial or delay.”

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1. “The history of American freedom is, in no small measure, the history of procedure.” *Malinski v. New York*, 324 U.S. 401, 414 (Frankfurter, J., concurring).

2. These principles form the “dominant theme of Anglo-American jurisprudence.” WILLIAM F. SWINDLER, *MAGNA CARTA: LEGEND AND LEGACY* at 317 (1965). The open-courts clause is the “tap root of the English and our common law system. . . .” Thomas J. Lewis, *Jural Rights under Kentucky’s Constitution: Realities Grounded in Myth*, 80 KY. L. J. 953, 964 (1992). Open-courts provisions are the “most widespread and important” of a number of “unique state provisions . . . not found in the Federal Constitution.” Thomas R. Phillips, *The Constitutional Right to a Remedy*, 78 N.Y.U. L. REV. 1309, 1310 (2003).

3. JENNIFER FRIESEN, *STATE CONSTITUTIONAL LAW: LITIGATING INDIVIDUAL RIGHTS, CLAIMS, AND DEFENSES* 6-6 (3rd ed. 2000). “Intuitive morality and basic precepts of equity counsel that a just community will aspire to a system of law that respond to a member’s injury with a legal remedy.” One can date “the beginning of civil society from the moment when the community itself assumed responsibility for matching remedies to justice, wresting this function from the private realm into the public.” David Schuman, *Oregon’s Remedy Guarantee Article I, Section 10 of the Oregon Constitution*, 65 OREGON L. REV. 35 (1986) [hereafter, “Schuman, Oregon’s Remedy Guarantee.”]. The “inherent humanitarianism” of our system makes it “fundamental . . . that one may seek redress for every substantial wrong.” *Niederman v. Brodsky*, 261 A.2d 84, 85 (Pa. 1970).

4. The “very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives injury. One of the first duties of government is to afford that protection. . . .” 5 U.S. (1 Cranch) 137, 163 (1803).

5. State’s open-courts provisions address access more fully and specifically than any federal provision. *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 12 nn.10-11.

6. For clarity and simplicity, these provisions will be referred to as open-courts clauses or provisions, but, unless otherwise noted, that term should be understood to include the guarantees of a) open courts, b) remedies c) by due course of law d) for injuries to person, property, and reputation, e) with right and justice administered; and f) without sale, denial or delay.

7. The full text of forty of these clauses is set out in Suzanne L. Abram, *Note: Problems of Contemporaneous Construction in State Constitutional Interpretation*, 38 BRANDEIS L.J. 613, 619-612 note 36 (2000). A list of citations and general elements of state constitutional open courts provisions also appears in FRIESEN, *supra* note 3 at Appendix 6 and at 6-3 note 11. See also Phillips, *supra*, n. 2 at 1310-1311. See also A.E. DICK HOWARD, *THE ROAD FROM RUNNYMEDE, MAGNA CARTA AND CONSTITUTIONALISM IN AMERICA*, Appendix O (hereafter, “HOWARD, THE ROAD FROM RUNNYMEDE”); John H. Bauman, *Remedies Provisions in State Constitutions and the Proper Role of the State Courts*, 26 WAKE FOREST L. REV. 237, 284-288 (1991).

8. ROBERT F. WILLIAMS, *STATE CONSTITUTIONAL LAW, CASES AND MATERIALS* at 489 (3rd ed. 1999). See also *Petition of Daily Item*, 456 A.2d 580, 585 (Pa. Super. 1983) (Beck, J. concurring); G. ALAN TARR, *UNDERSTANDING STATE CONSTITUTIONS* at 13 (1998); FRIESEN, *supra* note 3 at 6-2.

9. Pennsylvania Constitution, Preamble. See also *Brown v. Hummel*, 6 Pa. 86, 90 (1847). The ability to seek redress for injuries is “a substantive right of considerable magnitude.” Stephen J. Werber, *The Constitutional Dimension of National Products Liability Statute of Repose*, 40 VILL. L. REV. 985, 988 (1995). It is a right which is “[e]specially important to the concept of a rule of law. . . .” HOWARD, *THE ROAD FROM RUNNYMEDE*, *supra* note 7, at 271. It is “essential to any democratic form of government. . . .” Josephine Hicks, *Note: The Constitutionality of Statutes of Repose: Federalism Reigns*, 38 VAND. L. REV. 627, 655 (1985).

Pennsylvania courts have sometimes called Section 11 rights fundamental, e.g., *Kelly v. Brenner*, 175 A. 845, 847 (Pa. 1934). At other times, however, Article I, Section 11 rights have been deemed only “important.” *James v. SEPTA*, 477 A.2d 1302, 1306-7 (Pa. 1984); *Smith v. City of Philadelphia*, 516 A.2d 306, 311 (Pa. 1986). This dichotomy is discussed more fully below.

10. WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAW OF ENGLAND* at 129-30. (1765) (Reese Welsh & Co. edition 1902). Accord, Potter Stewart, *The Road to Mapp v. Ohio and Beyond: The Origins, Development and Future of the Exclusionary Rule in Search-and-Seizure Cases*, 83 COLUM. L. REV. 1365, 1385 (1983) (a substantive right without an appropriate remedy is “reduced to a form of words” . . . [and] might as well be stricken from the Constitution.”); Donald B. Brenner, *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, 424-5 (1982).

11. Professor Friesen sets out two basic formulations of the open-courts clause. FRIESEN, *supra* note 3, at 6-4 n. 12, and Appendix 6. See also Bauman, *supra* note 7 at 244; 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, 443-5 (1997).

12. THOMAS R. WHITE, COMMENTARIES ON THE CONSTITUTION OF PENNSYLVANIA 159 (1907).

13. "Since 1986, forty-five states and the District of Columbia have enacted at least one limitation on plaintiffs' tort rights and remedies," including Pennsylvania Medical Care Availability and Reduction of Error Act, Act of March 20, 2002, Act No. 2002-13, H.B. No. 1802, 40 P.S. §1303.101 et seq. Michael L. Rustad & Thomas H. Koenig, Taming the Tort Monster, The American Civil Justice System as a Battleground of Social Theory, 68 BROOKLYN L. REV. 1, 69, 122 n. 749 (2002). For a listing of the number and type of tort reform statutes enacted since 1980, see *id.* at 66 n.410, Table One. See also Francis E. McGovern, The Variety, Policy and Constitutionality of Product Liability Statutes of Repose, 30 AMER. U. L. REV. 579, 580-581 n.3, 625-41 (1981).

14. 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, 939-975 (2001) (listing cases since 1983 upholding and striking down state tort reform statutes); Richard C. Turkington, Constitutional Limitations on Tort Reform: Have the State Courts Placed Insurmountable Obstacles in the Path of Legislative Response to the Perceived Liability Insurance Crisis?, 32 VILL. L. REV. 1299, 1317-1320, n. 52-54 (1987); Christopher J. Trombetta, The Unconstitutionality of Medical Malpractice Statutes of Repose: Judicial Conscience Versus Legislative Will, 34 VILL. L. REV. 397-399, n. 4-5; McGovern, *supra* note 13, at 622-4; Phillips, *supra*, at nn. 11-23 at 1311-1314.

15. See, e.g., Pennzoil Co. v. Texaco, Inc., 481 U.S. 1, 12 (1987).

16. "The United State Supreme Court has not developed its own interpretation or approach to this constitutional concept [of open courts and right to a remedy] because the United States Constitution does not contain an open courts or right to remedy provision." Koch, *supra* note 11, at 436.

17. Bauman, *supra* note 7 at 241.

18. David Richards and Chris Riley, Symposium on the Texas Constitution: Developing a Coherent Due-Course of Law Doctrine, 68 TEXAS L. REV. 1649, 1650 (1990).

19. "The courts are in total disarray about how to interpret" the various open-courts provisions. Jonathan M. Hoffman, By the Due Course of Law: The Origins of the Open Courts Clause of State Constitutions, 74 OR. L. REV. 1279, 1282 (1995) [hereafter, "Hoffman, Origins."] See also Bauman, *supra* note 7 at 244, 284; Schuman, Oregon's Remedy Guarantee, *supra* note 3 at 46; HOWARD, THE ROAD FROM RUNNYMEDE, *supra* note 7 at 296, 297; Phillips, *supra*, n. 2 at 1314-1317.

20. Koch, *supra* note 11 at 348. See also Robert F. Williams, Foreword: A Research Agenda in State Constitutional Law, 66 TEMPLE L. REV. 1145, 1149 (1993); Robert F. Williams, State Constitutional Law Processes, 24 W. & MARY L. REV. 169, 195-6 (1983). History inheres in our common law system, in which durable "principles emerge from small bits of real life experience" left by past legal accretions. Thomas P. Lewis, Jural Rights Under Kentucky's Constitution: Realities Grounded in Myth., 80 KY. L. J. 953, 983 (1992). Giving "precedents . . . the force of law" helps satisfy the constitutional demand for equality by mandating that "similar cases be similarly disposed of" and ensures "continuity of principles and institutions," rather than creating new ones for each new case. JAMES R. STONER, JR., COMMON LAW AND LIBERAL THEORY: COKE, HOBBS, AND THE ORIGINS OF AMERICAN CONSTITUTIONALISM at 6, 1 (1992).

21. Hoffman, Origins, *supra* note 19, at 1281.

22. Commonwealth v. Edmunds, 586 A.2d 887, 896 note 9 (1991).

23. *Id.*

24. See Chapter 6 *infra*.

25. These documents are reproduced in WILLIAM PENN AND THE FOUNDING OF PENNSYLVANIA 1680-1684: A DOCUMENTARY HISTORY at 118-133 (Jean R. Soderlund et al. eds. 1983) (hereafter, "THE FOUNDING OF PENNSYLVANIA"). They can also be found in 8 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS 253-262 (William F. Swindler, ed. 1979) [hereafter, "SOURCES AND DOCUMENTS"]. They are also available online as part of the Avalon Project of Yale Law School, Documents of Law, History and Diplomacy, at <http://www.yale.edu/lawweb/avalon/states/pa04.htm>. Other primary documents have been published by the Pennsylvania Legislative Reference Bureau at www.palrb.us.

26. Hoffman, Origins, *supra* note 19, at 1299.

27. Penn was responsible for the first publication of Magna Carta (with his commentary) in America. HOWARD, THE ROAD FROM RUNNYMEDE, *supra* note 7, at 84.

28. J.C. HOLT, MAGNA CARTA, 327 (1965).

29. *Id.*

30. WILLIAM F. SWINDLER, *MAGNA CARTA: LEGEND AND LEGACY* at 80 (1965). In the 14th century, Chapters 39 and 40 were combined into Chapter 29, which read: “No Freeman shall be taken or imprisoned or disseised or any freehold, or liberties, or free customs, or outlawed, or banished, or in any other way destroyed, nor will be go upon him, nor send upon him, except by the legal judgment of his peers or by the law of the land. To no one will we sell, to no one will we deny, or delay right or justice.” *Id.* at 316-317.

31. HOLT, *supra* note 28, at 12.

32. Coke was born in 1552 and died in 1634. During his life, he was a member of Parliament, Speaker of the House of Commons, attorney general, chief justice of the Court of Common Pleas, and chief justice of the King’s Bench. STONER, *supra* note 20, at 15.

33. Koch, *supra* note 11, at 357.

34. *Id.*

35. *Id.*

36. Americans saw the Magna Carta “through the lens of Coke.” Hoffman, *Origins*, *supra* note 19, at 1281. Together, Magna Carta and Coke “served as the primary sources for the development of the new articles of governance”—the state constitutions. Jack B. Harrison, *How Open is Open? The Development of the Public Access Doctrine Under State Open Court Provisions*, 60 U. CIN. L. REV. 1307, 1311 (1992). Coke’s “eminence as an authority on law was unchallenged. . . . Until the late nineteenth century, the common law of England would be substantially what Sir Edward Coke said it was.” SWINDLER, *supra* note 2, at 174, 175. For other comments about Coke’s influence, see, e.g., *Gannett Co., Inc. v. DePasquale*, 443 U.S. 368, 423 (Blackmun, J., concurring and dissenting); BERNARD BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION*, at 30 (1967); HOWARD, *THE ROAD FROM RUNNYMEDE*, *supra* note 7 at 131; Carol Rice Andrews, *A Right of Access to Court Under the Petition Clause of the First Amendment: Defining the Right*, 60 OHIO ST. L.J. 557, 608 (1999).

37. SIR EDWARD COKE, *THE SECOND PART OF THE INSTITUTES OF THE LAWS OF ENGLAND, CONTAINING THE EXPOSITION OF MANY ANCIENT AND OTHER STATUTES*, vol. 1 at 45 (1662) (reprint of 1797 edition, William S. Hein & Co., 1986).

38. *Id.* at 55.

39. FRIESEN, *supra* note 3, at 6-4, 6-5; Bauman, *supra* note 7 at 247; Hoffman, *Origins*, *supra* note 19 at 1281, 1284-9; Koch, *supra* note 11, at 358-364.

40. See notes 203 and 204 and accompanying text, *infra*. These “traditional words are invoked to challenge [both] procedural impediments to judicial access . . . [and] block substantive modifications to established causes of action or remedies.” Phillips, *supra* n. 2, at 1311.

41. Coke said that “by no means” should “common right, or common law . . . be disturbed, or delayed . . . though it be commanded under the great seale, or privie seale, order, writ, letters, message, or commandement whatsoever, either from the king, or any other, and that the justices shall proceede, as if no such writs . . . [etc.] were come to them. . . . That the common lawes of the realme should by no meanes be delayed, for the law is the surest sanctuary that a man can take and the strongest fortresse to protect the weakest of all. . . .” COKE, *supra* note 37 at 55 (emphasis added).

42. See, e.g., WILLIAM SHARP MCKECHNIE, *MAGNA CARTA: A COMMENTARY ON THE GREAT CHARTER OF KING JOHN* at 385 (2nd ed. 1914); SWINDLER, *supra* note 2, at 226, 242; Bauman, *supra* note 7, at 243; Andrews, *supra* note 36 at 608.

43. “Coke’s words reflect many of the core ideas that stand at the center of American constitutional law.” Harrison, *supra* note 36 at 1310-11.

44. Koch, *supra* note 11, at 364. Penn relied on and quoted Coke and Magna Carta numerous times during his criminal trial in London in 1670 for “tumultuous assembly.” HOWARD, *ROAD FROM RUNNYMEDE*, *supra* note 7 at 78-82; REMEMBER WILLIAM PENN 1744-1944, *A TRICENTENARY MEMORIAL* at 35-53 (William Penn Tricentenary Committee 2nd ed. Harrisburg, Pa., 1945) (hereafter, “REMEMBER WILLIAM PENN”).

45. HOWARD, *THE ROAD FROM RUNNYMEDE*, *supra* note 7, at 84.

46. *Id.* at 88-90. See also Appendix O at 412-425.

47. *Id.* at 412.

48. *Id.* at 418-425.

49. Section 11 derived originally from “Magna Charta: ‘To none will we sell, to none will we deny or delay, right or justice.’” CHARLES R. BUCKALEW, *AN EXAMINATION OF THE CONSTITUTION OF PENNSYLVANIA, EXHIBITING THE DERIVATION AND HISTORY OF ITS SEVERAL PROVISIONS* at 17-18 (1883).

50. ROSALIND L. BRANNING, *PENNSYLVANIA CONSTITUTIONAL DEVELOPMENT*, 1 (1960).

51. “William Penn was himself the victim of a trial conducted without regard for due process . . . It seems not unduly speculative that Penn had this trial in mind when . . . he wrote by his own hand in his Frame of Government that all courts shall be open.” *Commonwealth v. Contakos*, 453 A.2d 578, 580-82 (Pa. 1982).

52. WHITE, *supra* note 12, at xviii.

53. People have “certain . . . auxiliary subordinate rights . . . which serve principally as outworks or barriers to protect and maintain inviolate the three great and primary rights” of life, liberty, and property. BLACKSTONE, *supra* note 10 at 130. One such right “is that of applying to the courts of justice for redress of injuries. . . . [C]ourts of justice must at all times be open to the subject and the law be duly administered therein.” *Id.* See, generally, Phillips, *supra*, n. 2, at 1321-1324.

54. KOCH, *supra* note 11, at 365; REMEMBER WILLIAM PENN, *supra* note 44, at 60; Harrison, *supra* note 36 at 1312-3.

55. 6 SOURCES AND DOCUMENTS, *supra* note 25, at 408.

56. The Concessions were to be “writ in fair tables in every common hall of justice within this Province, and . . . read in a solemn manner four time every year, in the presence of the people, by the chief magistrates of those places.” *Id.* at 405-06.

57. Every person who prosecuted a criminal case was to be “master of his own process,” with the power to “forgive and remit the person . . . offending against him” either before or after judgment. 6 SOURCES & DOCUMENTS, *supra* note 25, at 408. Every person was to “have free liberty to plead his own cause, if he please.” *Id.*

58. 8 SOURCES AND DOCUMENTS, *supra* note 25, at 251. Natives were to “have liberty to do all things . . . that any of the planters shall enjoy.” *Id.*

59. THE FOUNDING OF PENNSYLVANIA, *supra* note 25, at 96. It “was probably never signed by any prospective settlers, nor ever published” in Penn’s lifetime. *Id.* at 97.

60. *Id.* at 104.

61. For example, Section XVIII provided that all “officers of justice as delay or deny justice” were to compensate the party aggrieved by their (in)action. *Id.* at 105. Section XXIII established that government officers were “obliged to reject” any order “to omit and delay justice. . . .” *Id.* at 107. Copies of the Fundamental Laws were to be hung at the seat of government and read there “as the first thing at the opening of every General Assembly. . . .” *Id.*

62. THE FOUNDING OF PENNSYLVANIA, *supra* note 25, at 95.

63. 8 SOURCES AND DOCUMENTS, *supra* note 25, at 256-257.

64. “That all courts shall be open, and justice shall neither be sold, denied, nor delayed.” 8 SOURCES AND DOCUMENTS, *supra* note 25 at 259.

65. 8 SOURCES & DOCUMENTS, *supra* note 25, at 259-60.

66. The Second Frame of Government (1683) was a much-reduced document. The only reference to the judicial system was the direction that the Governor and Provincial Council were to erect “from time to time, standing courts of justice, in such places and number as they shall judge convenient. . . .” 8 SOURCES AND DOCUMENTS, *supra* note 25, at 265. Similarly, the only reference to the judicial system in the Third Frame of Government (1696) concerned a quorum and majority vote for “case and matters of moment, as about erecting courts of justice. . . .” *Id.* at 271.

67. WHITE, *supra* note 12, at xxi.

68. 8 SOURCES AND DOCUMENTS, *supra* note 25, at 275.

69. ROBERT E. WOODSIDE, PENNSYLVANIA CONSTITUTIONAL LAW 91-100, 567-581 (1985). See also ROSALIND BRANNING, A HISTORY OF PENNSYLVANIA CONSTITUTIONS, REFERENCE MANUAL NO. 3 (1968) (hereafter, “BRANNING, REFERENCE MANUAL”). See also Pennsylvania Constitution Web Page of the Duquesne University Law School, at www.paconstitution.duq.edu.

70. The full text of the Constitution of 1776 is reproduced at 8 SOURCES AND DOCUMENTS, *supra* note 25, at 277-285.

71. Gordon S. Wood, Foreword: State Constitution-Making in the American Revolution, 24 RUTGERS L.J. 911, 913 (1993). The text of the resolution is set out at page 37 of THE PROCEEDINGS RELATIVE TO CALLING THE CONVENTIONS OF 1776 AND 1790, THE MINUTES OF THE CONVENTION THAT FORMED THE PRESENT CONSTITUTION OF PENNSYLVANIA, TOGETHER WITH THE CHARTER TO WILLIAM PENN, THE CONSTITUTIONS OF 1776 AND 1790 AND A VIEW OF THE PROCEEDINGS OF THE CONVENTION OF 1776 AND THE COUNCIL OF CENSORS (John Westling, Harrisburg, 1825) (hereafter “PROCEEDINGS OF 1776 & 1790”), available on microfiche at the Pennsylvania State Library (Harrisburg) and the library of the Dickinson School of Law, Pennsylvania State University.

72. Wood, *supra* note 71, at 913. See also Matthew J. Herrington, Popular Sovereignty in Pennsylvania 1776-1791, 67 TEMP. L. REV. 575, 578 (1994); CECILIA M. KENYON, Constitutionalism in Revolutionary America, in NOMOS, Constitutionalism at 84, 114 (1979).

73. Wood, *supra* note 71 at 915. The Constitution of 1776 was “eloquent on the power of the people to institute and control government. . . . [I]t embodies the notion that simple democracy, the direct translation of the popular will into government policy, conducted to the public good.” TARR, *supra* note 8 at 86. See also Robert F. Williams, The State Constitutions of the Founding Decade: Pennsylvania’s Radical 1776 Constitution and its Influence on American Constitutionalism, 62 TEMP. L. REV. 541, 548 (1989); Richard Alan Ryerson, THE REVOLUTION IS NOW BEGUN: THE RADICAL COMMITTEES OF PHILADELPHIA, 1765-1776, 254, 256 (1978).

74. 8 SOURCES AND DOCUMENTS, *supra* note 25, at 285. The Council of Censors, a twelve-person body elected every seven years, “was an institutional device for securing or formally encouraging the recurrence to fundamental principles called for” in the Declaration of Rights. KENYON, *supra* note 72, at 99, 103.

75. However, the Council’s opinions had no legal force. KENYON, *supra* note 72, at 99, 103, 105. The legislature was “entirely unlimited in its power, except as it was restrained by the constitution.” WHITE, *supra* note 12, at xxiii.

76. The ultimate outcome of the Pennsylvania constitutional process was “much closer and less predetermined than has been commonly recognized.” Robert F. Williams, *The State Constitutions in the Founding Decade: Pennsylvania’s Radical 1776 Constitution and Its Influences on American Constitutionalism*, 62 TEMP. L. REV. 541, 545 (1989). See generally ROBERT L. BRUNHOUSE, *THE COUNTER-REVOLUTION IN PENNSYLVANIA, 1776-1790* (1942); PAUL LEICESTER FORD, *The Adoption of the Pennsylvania Constitution of 1776*, 10 POL. SCIENCE QTRLY. (1895).

77. Williams, *Pennsylvania’s 1776 Constitution*, *supra* note 76, at 544-5. The provisions of the Declaration of Rights “were issues on which liberals and conservatives were agreed.” BRANNING, *REFERENCE MANUAL*, *supra* note 69, at 5.

78. 8 SOURCES AND DOCUMENTS, *supra* note 25, at 283. In addition to requiring that the judicial system be accessible, the Constitution of 1776 also mandated that legislature be an open, deliberative body which was “responsive and accountable to the people. . .” KENYON, *supra* note 72, at 101. See also DONALD S. LUTZ, *POLITICAL PARTICIPATION IN EIGHTEENTH-CENTURY AMERICA: IN TOWARD A USABLE PAST, LIBERTY UNDER STATE CONSTITUTIONS* at 19, 32-3 (1991). Moreover, although the Constitution gave the legislature great power, it also contained provisions that “do seem to reflect an early awareness of the potential for abuse by a powerful legislature.” Williams, *Pennsylvania’s 1776 Constitution*, *supra* note 76, at 580-1. This was extraordinary at a time when all concern was focused on the abuse of executive power, and all confidence was placed in the legislative branch. TARR, *supra* note 8, at 66.

79. Williams, *Pennsylvania’s 1776 Constitution*, *supra* note 76, at 558, 563; FORD, *supra* note 76, at 455. The period 1776-1790 was marked by “fierce conflict” and “extraordinary turmoil.” TARR, *supra* note 8, at 65 n. 19, 86. Society was “rent . . . into bitterly hostile factions. . .” FORD, *supra* note 76, at 459.

80. WHITE, *supra* note 12, at xxiv.

81. Williams, *Pennsylvania’s 1776 Constitution*, *supra* note 76, at 574-585.

82. BRANNING, *REFERENCE MANUAL*, *supra* note 69, at 5.

83. The open-courts/remedy provision became Section 11 of the Declaration of Rights, which was Article IX of the Constitution of 1790.

84. “That all courts shall be open, and every freeman for an injury done him in his lands, goods, person or reputation, shall have remedy by the due course of [the] law, and right and justice administered [to him] without sale, denial or delay.” The word “freeman” was changed to “man” without discussion or debate. *Proceedings of 1776 and 1790*, *supra* note 71, at 223. There were also a few grammatical changes; in the final version, the bracketed words above were omitted, and a comma was added after “denial.” Other than these minor points, the remedy provision remained the same from its proposal to final adoption. That progression is set out in *PROCEEDINGS OF 1776 AND 1790*, *supra* note 71, at 162, 174, 223, 243, 261; it is also discussed as to suits against the state in *Mayle v. Department of Highways*, 388 A.2d 709, 717 (Pa. 1978).

85. *PROCEEDINGS OF 1776 AND 1790*, *supra* note 71, at 282.

86. *Id.*

87. On August 31, 1790, James Ross moved to reconsider the language about “suits against the commonwealth as well as against other bodies corporate and individuals” by striking out the phrase beginning with “as well as. . .” and replacing them with the words “in such manner, in such courts and upon such contracts as the legislature shall by law direct.” *PROCEEDINGS OF 1776 AND 1790*, *supra* note 71, at 291. The convention agreed to reconsider the language of Section 11. However, Mr. Lewis moved to substitute the suggested new language with the following: “in such courts and under such regulations as shall be prescribed by law.” The suggestion was rejected. He then moved to strike out “the words ‘upon such contracts’ and in lieu thereof, to insert the words ‘in such cases.’ Which was determined in the affirmative.” *Id.* at 291-2. The last sentence of Section 11 was “adopted as follows . . . Suits may be brought against the commonwealth in such manner, in such courts and in such cases as the legislature shall, by law direct.” *Id.* at 292. Without further proceedings, the final version changed the last few words and some punctuation, so that on September 2, 1790, the Constitution was affirmed with only one dissenting vote. *Id.* at 294, 296. The last sentence of Section 11 read: “Suits may be brought against the commonwealth in such manner, in such courts and in such cases as the legislature may, by law, direct.” *Id.* at 304. But see 8 SOURCES AND DOCUMENTS, *supra* note 25, at 293, setting out a version which has a comma after “courts” and omits the final two commas.

88. *PROCEEDINGS OF 1776 AND 1790*, *supra* note 71, at 304. As of 1874, the word “the” has been omitted in the phrase “by the due course of law,” as have the commas in the phrase “. . . and in such cases as the legislature may, by law, direct.” 8 SOURCES AND DOCUMENTS, *supra* note 25, at 311.

89. James Wilson “ruled the convention with an iron fist. . . . Thus the records unfortunately betray very little substantive discussion.” Herrington, *supra* note 72 at 607.

90. See, e.g., *Bell Telephone Co. v. Lewis*, 169 A. 571 (Pa. 1934).

91. *Mayle v. Department of Transportation*, 388 A.2d 709 (Pa. 1978).

92. *Smith v. City of Philadelphia*, 516 A.2d 306, 314 et seq. (Pa. 1986) (Papadakos, dissenting).

93. *Mayle*, 388 A.2d at 717-8.

94. Pennsylvania appellate courts have discussed the historical basis for the first phrase of Section 11 (“all courts shall be open”) in several cases, e.g., *Commonwealth v. Contakos*, 453 A.2d 578, 580-2 (Pa. 1983) and *Petition of Daily Item*, 456 A.2d 580, 585-7 (Pa. Super. 1983) (Beck, J. concurring), but not the remedy clause. Compare, e.g., *Craftsman Builder’s Supply, Inc. v. Butler Manuf. Co.*, 974 P.2d 1194, 1204-9 (Utah 1999) and *Smothers v. Gresham Transfer Inc.*, 23 P.3d 333 (Ore. 2001).

95. There was a “compete reversal of popular temper . . . between 1776 and 1789. . . .” BRANNING, REFERENCE MANUAL, *supra* note 69, at 5.

96. LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 48, 122-3 (2nd ed. 1985).

97. Wood, *supra* note 71, at 922.

98. BRANNING, REFERENCE MANUAL, *supra* note 69, at 4. See also WHITE, *supra* note 12, at xxiv; BRUNHOUSE, *supra* note 76 at 16; Williams, *Pennsylvania’s 1776 Constitution*, *supra* note 76, at 578.

99. Every seven years, the Council was to help maintain the “freedom of the commonwealth” by inquiring a) whether the Constitution had been “preserved inviolate in every part; b) whether the legislative and executive had properly done their jobs “as guardians of the people”; c) whether taxes had been “justly laid” and public monies properly spent; and d) whether the laws had been faithfully executed. 8 SOURCES AND DOCUMENTS, *supra* note 25, at 285.

100. Herrington, *supra* note 72, at 596 (“It was by all accounts a partisan affair.”) Prior to issuing its Report, the Council met in two sessions, the first with the Republicans in a slight majority and the second dominated by the radical Constitutionalists. The Republicans, or Anti-Constitutionalists, represented the old guard, which had been in power prior to the Constitution of 1776. The new guard, “whose political welfare depended on the existence of the new frame of government, were termed Radicals or Constitutionalists.” BRUNHOUSE, *supra* note 76, at 16, 156-163. See also BRANNING, PENNSYLVANIA CONSTITUTIONAL DEVELOPMENT, *supra* note 50, at 18-19.

101. Proceedings of 1776 and 1790 *supra* note 71, at 125.

102. *Id.* at 68, 70, 77-80, 84. The reports “list many examples of legislative violations of the state constitution and bill of rights.” They show that “‘fines had been remitted, judicially established claims disallowed, verdicts of juries set aside, the property of one given to another, defective titles secured, marriages dissolved,’ and so forth.” Donald Elfenbein, *The Myth of Conservatism as a Constitutional Philosophy*, 71 IOWA L. REV. 401, 472 (1986). The reports also condemned the “practice of entering into personal discussion and hasty votes” rather than following proper legislative procedure, evidencing “what extravagancies a single legislature, unrestrained by the rules of the constitution, may be capable of committing.” PROCEEDINGS OF 1776 AND 1790, *supra* note 71, at 85 (emphasis in original).

103. Wood, *supra* note 71, at 923. The Report of the Council of Censors is cited in, e.g., THE FEDERALIST No. 48 (James Madison); *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 220-1 (1995); *INS v. Chadha*, 462 U.S. 919, 982 (1983) (White, dissenting); and *Delaware v. Van Arsdall*, 475 U.S. 673, 707 note 14 (1986) (Stevens dissenting). Despite efforts to resolve the issue, problems of legislative interference in the judgments of courts continued well into the next century. See, e.g., *Brown v. Hummel*, 6 Pa. 86 (1847); *Ervine’s Appeal*, 16 Pa. 256 (1851); *DeChastellux v. Fairchild*, 15 Pa. 18 (1850); *Menges v. Dentler*, 33 Pa. 495 (1859); *Reiser v. William Tell Saving Fund Assn.*, 39 Pa. 137 (1861); *Bagg’s Appeal*, 43 Pa. 512 (1863).

104. BRANNING, PENNSYLVANIA CONSTITUTIONAL DEVELOPMENT, *supra* note 50, at 19.

105. Elfenbein, *supra* note 102 at 475.

106. BRANNING, REFERENCE MANUAL, *supra* note 69, at 9.

107. *Id.* at 2-9.

108. *Id.* at 8. For a history of the Constitution of 1838, see *id.* at 7-10 and BRANNING, PENNSYLVANIA CONSTITUTIONAL DEVELOPMENT, *supra* note 50, at 21-33. The 1838 Constitution added the commas in the phrase “. . . and in such cases as the legislature may, by law, direct.”

109. It was proposed that the first sentence of Section 11 be amended by inserting the italicized phrase in the following: “That all courts shall be open, and every man for an injury done him in his lands, good, person or reputation, shall have remedy by the due course of law and have a right to be heard by himself and his counsel. . . .” 12 PROCEEDINGS & DEBATES OF THE 1838 PENNSYLVANIA CONSTITUTION at 43-44. (Remarks of Mr. Brown; emphasis added). There is no indication that there was any particular problem in that regard, and the proposal was “negated” without any discussion or debate. *Id.* at 44. The right of every person charged with a crime “to be heard by himself and his counsel” has been in every Pennsylvania Constitution, including Article I, Section 9, of the current constitution.

110. BRANNING, PENNSYLVANIA CONSTITUTIONAL DEVELOPMENT, *supra* note 50, at 37. Along with concerns about corporate power and influence, the “cardinal questions” of “grave and pressing import” in 1873 were “what should be the limitations upon the granting of special favors by legislative action, and how best the lines may be drawn between the judgment of the courts and the judgment of legislative bodies in private controversies. . . .” *Id.* at 59 (quoting remarks of delegate Wayne MacVeagh, who later became United States Attorney General, *Id.* at 61). “Legislative reform was truly the dominant motif of the convention and that purpose is woven into the very fabric of the constitution.” *Id.* at 37. See also Donald Marritz, *Making Equality Matter (Again): The Prohibition Against Special Laws in the Pennsylvania Constitution*, 3 WIDENER J. PUB. L. 161, 183-196 (1993).

111. 8 SOURCE AND DOCUMENTS, *supra* note 25, at 316. Section 21 was amended in 1915, to allow for the enactment of a workmen’s compensation system that imposed some limits on recoveries for damages. It was re-enacted verbatim but renumbered as Section 18 in the Pennsylvania Constitution of 1968. It allows the General Assembly to enact laws setting minimum and maximum amounts for payments of work-related injuries and diseases, regardless of fault.

112. Act of April 4, 1868; see *Pennsylvania Railroad Co. v. Bowers*, 124 Pa. 183 (1889).

113. See Marritz, *supra* note 110, at 185-194; Robert F. Williams, *State Constitutional Limits on Legislative Procedure: Legislative Compliance and Judicial Enforcement*, 48 U. PITT. L. REV. 797, (1987).

114. II DEBATES OF THE CONVENTION TO AMEND THE CONSTITUTION OF PENNSYLVANIA at 729-30 (1873) (emphasis in original) (hereafter, “Debates”).

115. It was proposed that the last sentence of Section 11 be amended to read: “Suits may be brought against the Commonwealth in such manner, in such courts, and in such cases as the Legislature may by law direct; and that no law shall limit the amount of damages recoverable, and where an injury caused by negligence or misconduct result in death the action shall survive.” IV DEBATES, *supra* note 115 at 755. The only objection was that the “new provision is amply provided for in the article on legislation which was adopted in the committee of the whole. It is not necessary at all that it should be repeated here.” *Id.* (remarks Mr. MacConnell). Another delegate thought that the prohibition against a limit on damages was “much more applicable to the Bill of Rights than to the article on legislation; and that it should be stricken out in the other article and not in this.” *Id.* (remarks of Mr. Gibson). *Id.* It appears that the proposal to add the prohibition to Article I, Section 11, was defeated only because it had already been provided for in Article III. *Id.*

116. The second sentence of Article IX, Section 11 of the 1838 Constitution said that “[s]uits may be brought against the commonwealth in such manner, in such courts, and in such cases as the legislature may, by law, direct.” One delegate moved to “amend by adding, after the word ‘direct,’ . . . ‘and the Legislature shall so provide.’ In other words, that that which by the language of the section, as written, is merely optional on the part of the Legislature shall become compulsory. I can perceive no reason why the Commonwealth should have the power to inflict a wrong upon the citizen, and the citizen be left without redress in the courts of justice.” V DEBATES, *supra* note 115, at 630-1. (Remarks of Mr. Cuyler) The amendment was rejected. *Id.* at 631.

117. There were some very minor grammatical and punctuation changes from 1838 to 1874. In the latter, the word “the” in the phrase “the due course of law” was removed, as were both commas in the phrase “. . . and in such cases as the legislature may, by law, direct.” Thus, the wording and punctuation of Section 11 became exactly as it is today.

118. See, e.g., *Seymour v. Rossman*, 297 A.2d 804 (Pa. 1972); *Singer v. Sheppard*, 346 A.2d 897 (Pa. 1975); *Freezer Storage v. Armstrong Cork Co.*, 382 A.2d 715 (Pa. 1978); *Smith v. City of Philadelphia*, 516 A.2d 306 (Pa. 1986); *Mascaro v. Youth Study Center*, 523 A.2d 1118 (Pa. 1987); *Griffin v. SEPTA*, 757 A.2d 448 (Pa. Cmwlth. 2000). See also Robert F. Williams, *Foreword: Tort Reform and State Constitutional Law*, 32 RUTGERS L. J. 897, 898 (2001) (hereafter, “Williams, Tort Reform”) noting that Kentucky and Arizona have similar constitutional provisions, as does Wyoming, see Wyoming Constitution, Section 97-10-004.

119. Jonathan M. Hoffman, *Questions Before Answers: The Ongoing Search to Understand the Origins of the Open Courts Clause*, 32 RUTGERS L.J. 1005 (2001) [hereafter, “Hoffman, Questions Before Answers”].

120. Reputation is an independent and fundamental right under Article I, Section 1, of the Pennsylvania Constitution. *R. v. Department of Public Welfare*, 636 A.2d 412, 149 (Pa. 1994). Compare *Paul v. Davis*, 424 U.S. 693 (1976).

121. There is “nothing approaching a uniform approach” about the remedy clause. FRIESEN, *supra* note 3, at 6-2. The “remedy clause has not occasioned a coherent body of case law leading to anything that could be called an ‘interpretation.’” Schuman, *Oregon’s Remedy Guarantee*, *supra* note 3, at 36. Interpretations of the open-courts provisions have been “disparate,” for reasons which are “essentially inexplicable.” Phillips, *supra* n. 2, at 1314, 1315-1317.

122. U.S. Constitution, art. V.

123. Under Article XI, Section 1(a), the legislature proposes amendments, but they must be “approved by a majority of those voting thereon. . . .” See also Williams, *STATE CONSTITUTIONAL LAW PROCESSES*, *supra* note 20, at 196.

124. Williams, *STATE CONSTITUTIONAL LAW PROCESSES*, *supra* note 20, at 196. “Constitutional provisions . . . must be given the ordinary, natural interpretation the ratifying voter would give them.” *Commonwealth ex rel. Paulinski v.*

Isaac, 397 A.2d 760, 765 (Pa. 1979). Accord, *Mayle v. Pennsylvania Dept. of Highways*, 388 A.2d 709, 719 (Pa. 1978); *Woodside*, supra note 69, at 58-9; *Wood*, supra note 71 at 924; *Buckalew*, supra note 49, at v-vi; *White*, supra note 12, at 1-31; Hon. Russell M. Nigro, Foreword: The Importance of Interpretive Theory in State Constitutional Law, 73 TEMP. L. REV. 905 (2000).

125. E.g., *Carroll v. County of York*, 437 A.2d 394, 396 (Pa. 1981); *James*, 477 A.2d at 1305.

126. E.g., *Commonwealth ex rel. Paulinski v. Isaac*, 397 A.2d at 766.

127. “Constitutional provisions are not to be read in a strained or technical manner. Rather, they must be given the ordinary, natural interpretation the ratifying voter would give them.” *Id.* at 765.

128. *Kelly v. Brenner*, 175 A. 845, 847 (Pa. 1934).

129. *James*, 477 A.2d at 1305-06.

130. *Freezer Storage v. Armstrong Cork Co.*, 382 A.2d 715, 718 (Pa. 1978).

131. Pa. Const., art. I, preamble.

132. *Petition of Daily Item*, supra, 456 A.2d at 586 (Beck, J. concurring). One state supreme court has identified “three separate constitutional guarantees” emanating from its open-courts provision: “1) courts must actually be open and operating; 2) the Legislature cannot impede access to the courts through unreasonable financial barriers’ and 3) the Legislature may not abrogate well-established common law causes of action unless the reason for its action outweighs the litigants’ constitutional right of redress.” *Central Appraisal District v. Lall*, 924 S.W.2d 686, 689 (Texas 1996). The first and least controversial of those guarantees is implicated discussed in *Commonwealth ex rel. Girard v. Sanson*, 67 Pa. 322 (1871) (statute restricting use of interpreters could effectively shut down the courts in some cases) and *Commonwealth ex rel. Chase v. Harding*, 87 Pa. 343 (1878) (temporary organization of courts in newly created county necessary to keep courts functioning).

133. Pa. R.Civ.P. 240 (courts of common pleas); Pa. R.C.P.D.J. 206 (district justice courts); Pa. R.A.P. 551 et seq. (appellate courts); Pa. R. Crim. P. 85 (C)(1) (payment of criminal fines in installment); Pa. R.Crim.P. 1407 (no imprisonment for failure to pay a fine or costs “unless it appears after hearing that the defendant is financially able to pay the fine or costs.”).

134. *Andrews*, supra note 36, at 568-570. See also *Boddie v. Connecticut*, 401 U.S. 371, (1971); *United States v. Kras*, 409 U.S. 434 (1973); *Ortwein v. Schwab*, 410 U.S. 656 (1973).

135. In *Schade v. Luppert*, 17 Pa. C.C. Reports 460, 461-62 (Lycoming Co. 1896), the court held that the plaintiff in a libel case need not give security for costs where he did “not have sufficient property to secure payments of the costs if he were to become liable to pay the same,” stating that it would be unconstitutional under the open courts provision. Accord, *Willis v. Willis*, 20 Pa. C.C. Rep. 720, 721 (Erie Co. 1911). For similar cases involving security for costs, see *Lutz v. Heasley*, 12 District Rep. 139 (Clarion Co. 1899); *Jack v. McClure*, 26 Pa. C.C. Reports 59, 62 (Clarion Co. 1901). See also *Cunha v. Cunha*, 42 D. & C. 2d 230, 232 (Lebanon Co. 1968) and *Noland v. Noland*, 69 D. & C. 6, 8 (Philadelphia Co. 1949), both granting waiver of costs in divorce case on the basis of Article I, Section 11.

136. *M.L.B. v. S.L.J.*, 519 U.S. 102, 113 (1996). A “constitutional requirement to waive court fees in civil cases is the exception, not the general rule.” *Id.* at 114.

137. The “form of action should not be inquired into.” *Cunha*, 44 D. & C. 2d at 232. In addition, relief from costs is available to plaintiffs as well as defendants. See, e.g., *Frankhouser v. Harding*, 3 D. & C. 3d 233 (Somerset Co. 1977); *Jack*, 26 Pa. C.C. Rep. at 59; *Lutz*, 12 District Rep. at 139.

138. Pennsylvania courts have also held that indigent persons have a right of access to courts on the basis of the Statute of 1495, 11 Henry VII, chapter 12, which “established the right of poor civil plaintiffs to proceed without payment of costs or security and with appointed counsel. That statute . . . has been adopted in Pennsylvania: Report of the Judges, 3 Binney 593, 617 (Pa. 1808).” *Community Legal Services, Inc.*, 43 D. & C. 2d 51, 75-76 (Philadelphia Co. 1967). See, e.g., *Thompson v. Garden Court, Inc.*, 419 A.2d 1238, 1240 (Pa. Super. 1980); *Mitek v. Ste-Mel Signs*, 294 A.2d 813, 814 (Pa. Super. 1972); *Madden v. City of York*, 59 D. & C. 2d 367, 368-9 (York Co. 1972) (quoting statute in full); *Eakert v. McCord*, 21 Pa. C. C. Rep. 333, 336 (1898).

139. See, e.g., *E. W. Scripps Co. v. Fulton*, 125 N.E. 2d 896, 907 (Ohio App. 1955) (Hurd, J. concurring); *Detroit Free Press v. Recorder’s Court*, 294 N.W. 2d 827, 832 (Mich. 1980); *KFGO Radio, Inc. v. Rothe*, 298 N.W. 2d 505, 510-1 (N.D. 1980); *Virmiani v. Presbyterian Health Services Corp.*, 493 S.E. 2d 310, 317-8 (N.C. App. 1997).

140. See, e.g., *Gannett Co., Inc. v. DePasquale*, 443 U.S. 368, 386 n. 15, 424 & 426 (1979); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 567-8, 590 (1980).

141. For a general overview of this subject, see FRIESEN, supra note 3, at 6-49 to 6-55. See also Stuart Wilder, All Courts Shall Be Open: The Public’s Right to View Judicial Proceedings and Records, 52 TEMP. L. Q. 311 (1979); Michael Spake, Public Access to Physician and Attorney Discipline Proceedings, 21 J. NAALJ 289 (2001).

142. See, e.g., *Penn’s Concessions and Agreement of West New Jersey*, 6 SOURCES AND DOCUMENTS, supra note 25, at 408, and the Laws Agreed Upon in England, *Id.* at 259; *Commonwealth v. Fenstermaker*, 530 A.2d 414, 417 (Pa. 1987); *Commonwealth v. Contakos*, 453 A.2d at 579-80.

143. *Commonwealth v. Hayes*, 414 A.2d 318, 321 (Pa. 1980).

144. The right of access to courts has been linked to a defendant's right to a "speedy public trial" in Article I, Section 9. See, e.g., *Contakos*, 453 A.2d at 579; *Hayes*, 414 A.2d at 322.

145. The right of access has also been linked to the right of a free printing press to "examine the proceedings of . . . any branch of government," in Article I, Section 7. See, e.g., *Commonwealth v. French*, 611 A.2d 175, 180 n. 12 (Pa. 1992); *Petition of Daily Item*, 456 A.2d at 587.

146. *All Courts Shall Be Open*, 30 PITTSBURGH L.J. 362 (1883).

147. *Id.* Thus, a member of the public, including an attorney not involved in the case before the court, can rightfully be barred from entering a courtroom that is "so crowded [sic] that other persons cannot be admitted without producing disorder and inconvenience. . . ." *Id.*

148. *Commonwealth v. Cavell*, 138 A.2d 246 (Pa. Super. 1958). *Accord*, *E. W. Scripps Co. v. Fulton*, 125 N.E. 2d 896, 903 (Ohio App. 1955).

149. *Philadelphia Newspapers, Inc. v. Jerome*, 387 A.2d 425, 435 (Pa. 1978).

150. *Id.* The interests of the media and the public are related but not identical. The fact that members of the media are present during a proceeding closed to the rest of the public "does not satisfy the requirement of openness." *Contakos*, 453 A.2d at 580. The public and the media each have a right of access independent of the other, since each serves a separate interest. *Id.* at 582. *Accord*, *KFGO Radio, Inc. v. Rothe*, 298 N.W. 2d 505, 511 (N.D. 1980).

151. *Id.* at 433.

152. *Id.* at 434.

153. *Id.* at 434-5.

154. *Petition of Daily Item*, 456 A.2d at 590 (Beck, J. concurring). The strength of the "presumption in favor of a right to public access to [all] adjudicative proceedings" is subject to argument. See *Matter of Seegrist*, 539 A.2d 799, 803 n.16 (Pa. 1988) (explaining the position of various court members at the time).

155. *Hayes*, 414 A.2d at 322, 323-4.

156. *Fenstermaker*, 530 A.2d at 420.

157. *Id.* at 417-9.

158. A defendant is entitled to examine relevant pre-trial statements of prosecution witnesses. *Commonwealth v. French*, 611 A.2d 175 (Pa. 1992). The Court "strongly condemn[ed] the sealing of the record" in the case, citing Article I, Section 11 and Article I, Section 7, granting the right to examine the "proceedings . . . of any branch of government." *Id.* at 180 n.12. See also *Virmiani v. Presbyterian Health Services Corp.*, 493 S.E.2d 310 (N.C. App. 1997) (state open-courts provision guarantees right to access of public and press to the record in a civil case involving a doctor's challenge to the suspension of his hospital privileges, including access to peer-review records deemed confidential under state statute).

159. *Fenstermaker*, 530 A.2d at 420-1.

160. *Gannett Co., Inc., v. DePasquale*, 443 U.S. 368, 386 (1979).

161. In the plurality opinion in *Hayes*, 414 A.2d at 322, Justice Robert Nix found no basis to hold that Article I, Section 11 provided greater access rights than the First Amendment. Justice Bruce Kauffman disagreed—to construe Section 11 as Justice Nix suggested would "relegate it to a simple redundancy." *Id.* at 332 n.10. Justice John Flaherty read the mandate that "all courts shall be open" to admit of "no exceptions and no discretion to be exercised . . ." *Id.* at 328. Two years later the Court cited the unique history of Section 11, and reversed the trial court's closure order, stating that "[c]losed trials are the mechanics of tyranny." *Contakos*, 453 A.2d at 579-82, 582. Justice Nix dissented, objecting to the Court's "historicizing" in recounting issues relating to William Penn's trial, which he found inapposite. *Id.* at 585.

162. For example, the right to public access can be overcome only by a contrary interest that is "compelling," *Hayes*, 414 A.2d at 322, or "overriding," *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 9 (1986). Limitations on public access must be "carefully drawn," *Hayes*, 414 A.2d at 323, or "narrowly tailored" to serve that interest, *Press-Enterprise*, 478 U.S. at 9. The threat to the protected interest must be "serious," *Hayes*, 414 A.2d at 322, or "there must be a 'substantial probability' of prejudice to the right of a fair trial," *Press-Enterprise*, 478 U.S. at 14.

163. See, e.g., *Detroit Free Press v. Recorder's Court Judge*, 294 N.W.2d 827, 837 n.21 (Mich. 1980), citing standard for courts in Michigan, Arkansas, Arizona, Florida, and Hawaii.

164. Chapter 39 of Magna Carta "has been interpreted as a universal guarantee of impartial justice to high and low. . . ." MCKECHNIE, *supra* note 42, at 398. "Equal treatment at law is specifically provided by Chapter 40 of Magna Carta: 'To no one will we sell, to none will we deny or delay, right or justice.' It makes no distinctions among classes of persons. It requires that all be treated equally." John Vail, *A Common Lawyer Looks at State Constitutions*, 32 RUTGERS L.J. 977, 991 (2001) (emphasis in original).

165. Coke said that the Charter guaranteed "every subject of this realme" a remedy "for injury done to him . . . by any other subject, be he ecclesiastical, or temporall, free or bond, man or woman, old, or young, or be he outlawed,

excommunicated, or any other without exception. . . . , for the law is the surest sanctuary, that a man can take, and the strongest fortress to protect the weakest of all. . . .” COKE, *supra* note 37, at 55.

166. Blackstone said that “every Englishman” had the right of “applying to the courts of justice for redress of injuries,” and that local courts brought “justice home to every man’s door.” BLACKSTONE, *supra* note 10, at 114, 130, 1020.

167. The Constitution of 1776 emphasized equality. 8 SOURCES AND DOCUMENTS, *supra* note 25, at 278. “The Pennsylvania Constitution of 1776 made explicit the connection between commitment to the common good and suspicion of special privilege. . . .” TARR, *supra* note 8, at 80. See also Marritz, *supra* note 111, at 166 n.19.

168. E.g., *Bagg’s Appeal*, 43 Pa. 512, 517 (1863).

169. Hans Linde, Without “Due Process”, 49 OR. L. REV. 125 (1970). See also *Laney v. Fairview City*, 57 P.3d 1007, 1018-9 (Utah 2002).

170. Linde, *supra* note 170, at 137; *Craig & Blanchard v. Kline*, 65 Pa. 399, 413 (1870).

171. *Bagg’s Appeal*, 43 Pa. 512 (1863).

172. *Id.* at 515, 517.

173. *Menges v. Dentler*, 33 Pa. 495, 498 (1859).

174. The “making of law and the application of them to cases, as they arise, are clearly and essentially different functions. . . . [O]ne of them is allotted by the constitution to the legislature, and the other to the courts. . . .” Reiser v. The William Tell Saving Fund Assoc., 39 Pa. 137, 146 (1861).

175. *Thirteenth and Fifteenth Street Passenger Railway v. Boudrou*, 92 Pa. 475, 482 (1880). Such actions have also been held to violate the principle of separation of powers. See *Brown v. Hummel*, 6 Pa. 86, 90, 91 (1847); *Ervine’s Appeal*, 16 Pa. 256 (1851); *Richards v. Rote*, 68 Pa. 248 (1871).

176. Judicial review is “that remarkable American practice by which judges in the ordinary courts of law have the authority to determine the constitutionality of acts of the state and federal legislatures.” Wood, *supra* note 71 at 925. Even as late as 1850 judicial review was a “rare, extraordinary event.” FRIEDMAN, *supra* note 96 at 311. The remedies clause is “clearly in tension with the separation of powers doctrine which is the genius of the American system.” Phillips, *supra*, n. 2, at 1340.

177. In 17th century England, “Parliament was effectively a supreme judicial as well as a supreme legislative body. . . .” BAILYN, *supra* note 36, at 179. This structure was exported to colonial America, where “the same people made laws, enforced them, decided cases, and ran the colony.” FRIEDMAN, *supra*, note 96, at 37-8. See also Andrews, *supra* note 36, at 609-611.

178. See, e.g., *De Chastellux v. Fairchild*, 15 Pa. 18 (1850), striking down a law granting a new trial in a case which had been tried and the decision affirmed by the Supreme Court. The Court described the legislative invasion of its functions as a “revolution” and “despotism” and exhorted itself to “temporize no longer, but to resist, temperately, though firmly, any invasion of its province, whether great or small.” *Id.* at 20.

179. *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 219 (1995). The Pennsylvania legislature offered perhaps the most notorious and well publicized example of such intermingling, in the Report of the Council of Censors. *Id.* at 221.

180. See, e.g., *Commonwealth v. Sutley*, 378 A.2d 780 (Pa. 1977).

181. The Ohio Supreme Court characterized a tort reform statute as an attempt to “convert . . . the drive for civil justice reform into an attack on the judiciary as a coordinate branch of government.” *State ex rel. Ohio Academy of Trial Lawyers v. Sheward*, 715 N.E. 2d 1062, 1071 (Ohio 1999).

182. See, e.g., *Rustad & Koenig*, *supra* note 13 at 66 n. 410; *Werber*, *supra* note 9, at 1053; *McGovern*, *supra* note 13 at 580 n. 3, 625, 632, 638 (1981); Patricia J. Chupkovich, Comment: Statutory Caps: An Involuntary Contribution to the Medical Malpractice Insurance Crisis or a Reasonable Mechanism for Obtaining Affordable Health Care?, 9 J. CONTEMP. H. L. & POL’Y 337, 338 n. 10. (1993).

183. Penn’s Laws Agreed Upon in England included the provision that “all courts shall be open, and justice shall neither be sold, denied nor delayed.” 8 SOURCES AND DOCUMENTS, *supra* note 25, at 259.

184. *Id.*, Section IX. There was a similar provision in the Frame of Government of 1696, stating that a sheriff should perform his duties “taking such fees only as thou oughtest to take by the laws of this government, and not otherwise.” 8 SOURCES AND DOCUMENTS, *supra* note 25, at 269-70.

185. *Leed’s Appeal*, 75 Pa. 75, 78 (1874).

186. *Boyle v. O’Bannon*, 458 A.2d 183, 184 (Pa. 1983). But see 42 Pa.C.S. § 6601 et seq., the Prisoner Litigation Reform Act, upheld in *Payne v. Dept. of Corrections*, 813 A.2d 918 (Pa. Cmwltth. 2002), in which no open-courts claim was made.

187. *Boyle*, 458 A.2d at 185. The Court rejected the dissent’s position that a summary dismissal was justified by the particular defendant’s history of “groundless litigation” *Id.*

188. *Donoghue’s License Appeal*, 5 Pa. Super. 17 (1897).

189. *Id.* at 15.

190. *Masloff v. Port Authority of Allegheny County*, 613 A.2d 1186, 1190 (Pa. 1992).

191. *Id.* See also *Teamsters Local 115 v. PLRB*, 619 A.2d 382 (Pa. Cmwlth. 1993) (Court employees' right to organize and bargain collectively would be illusory without corresponding right to a forum to hear a claim of violation, despite the general right of a court to control its employees).

192. *G.C. Murphy Co. v. UCBR*, 471 A.2d 1295 (Pa. Cmwlth. 1984).

193. *Commonwealth ex rel. Duff v. Keenan*, 33 A.2d 244, 249 (Pa. 1943).

194. *Exton Drive-In, Inc. v. Home Indemnity Co.*, 261 A.2d 319, 322 (Pa. 1970). It is likely that the aphorism comes from the Magna Carta itself. *Strachan v. Colon*, 941 F.2d 128, 129 (2d Cir. 1991) ("the clause of Magna Carta providing that 'justice be to none denied or delayed . . . has been capsulized in the expression 'justice delayed is justice denied'").

195. *Hall v. Bank of U.S.*, 6 Whart. 585, 596-7 (Pa. 1840) (Stroud, J. (statute suspending recovery on a banknote violates the open courts provision and is "at variance with common justice.")). In *Mattos v. Thompson*, 421 A.2d 190, 195 (Pa. 1980), the Supreme Court held that a mandatory pre-trial arbitration system in medical malpractice cases involved "lengthy and "intolerable" delays that did "in fact burden the right to a jury trial with 'onerous conditions . . . which . . . make the right practically unavailable.'"

196. See *McGovern*, supra note 13, at 580 n. 3 and 622-641; *Rustad & Koenig*, supra note 13, at 66-7, nn. 410-412 and accompanying text; *Trombetta*, supra note 14, at 397-399, nn. 4-6; *Turkington*, supra note 14, at 1317-1320 nn. 52, 53.

197. See, e.g., *FRIESEN*, supra note 3, Chapter 6; *Schwartz and Lorber*, supra note 14, at 939-951, 952-975; *Stephen H. Presser, Separation of Powers and Civil Justice Reform: A Crisis of Legitimacy of Law and Legal Institutions*, 31 *SETON HALL L. REV.* 657 n. 30; *McGovern*, supra note 13, at 622-624; *Hicks*, supra note 9, Appendix, at 657-663; *Turkington*, supra note 14, at 1317-1320, nn. 52-53 and accompanying text.

198. In addition to the articles listed in this chapter and throughout chapter 6 of Professor Friesen's treatise, supra note 3, see, e.g., *State ex rel. Ohio Academy of Trial Lawyers v. Sheward*, 715 N.E.2d 1062, 1072 n. 3 (Ohio 1999)(citing articles). See also *David Schuman, The Right to a Remedy*, 65 *TEMP. L. REV.* 1197, 1203 n. 40 (1992); *McGovern*, supra note 13, at 584 n.27 (listing articles about product liability statutes of repose); *Bauman*, supra note 7, at 237 n. 3.

199. "The current national debate about tort law is hopelessly partisan" *John S. Baker, Jr., Respecting a State's Tort Law, While Confining its Reach to That State*, 31 *SETON HALL L. REV.* 698 (2001). The language on both sides is often hyperbolic and shrill, illustrating the truth of the statement that "perhaps more than any other branch of law, the law of torts is a battleground of social theory." *WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS* §3 (3rd ed. 1964).

200. Although virtually every state has some sort of remedy clause, they are worded and interpreted differently, "prompting considerable debate and confusion as to their meaning." *Andrews*, supra note 36, at 608 n.167. "Nothing like a uniform approach exists." *FRIESEN*, supra note 3 at 6-2. See generally *Schuman, The Right to a Remedy*, supra note 199, at 1203; *Bauman*, supra note 7, at 284. State courts decisions have resulted in "[w]idely divergent outcomes. . . ." *Phillips*, supra, n. 2, at 1333.

201. See, e.g., *Williams, Tort Reform*, supra note 119, at 904; *Baker*, supra note 200, at 706-8.

202. *FRIESEN*, supra note 3, at 6-3, 6-15 to 6-23. The following articles discuss many issues which have been paired with open-courts questions: *Chupkovich*, supra note 183; *Hicks*, supra note 9; *McGovern*, supra note 13; *Turkington*, supra note 14; *Matthew W. Light, Note: Who's the Boss?: Statutory Damage Caps, Courts, and State Constitutional Law*, 58 *WASH. & LEE L. REV.* 315 (2001); *James E. Magleby, The Constitutionality of Utah's Medical Malpractice Damages Cap Under the Utah Constitution*, 21 *J. CONTEMP. L.* 217 (1995).

203. Courts "have split almost evenly on whether remedy guarantees impose significant substantive limits on legislative power to alter common law remedies." *FRIESEN*, supra note 3, at 6-3. Some take the view that a remedy clause "can secure both substantive and procedural types of rights related to civil justice," including the preservation of a remedy for an injured party. *Id.* at 6-6. This is consistent with *Coke's* statement that the right to a remedy should "not be disturbed . . . though it be commanded . . . either from the king, or any other" person or body with law-making power. *COKE*, supra note 37, at 55. *Accord, Richards & Riley*, supra note 18, at 1652; *Koch*, supra note 11, at 437. Other commentators differ, e.g., *Bauman*, supra. note 7, at 283; *Lewis*, supra note 2, at 966; *W.A. Heindl, Note: A Remedy for All Injuries?*, 25 *CHICAGO-KENT L. REV.* 90, 96 (1945).

204. *Williams, STATE CONSTITUTIONAL LAW PROCESSES*, supra note 20, at 208.

205. See, e.g., 71 *U.S. LAW WEEK* 2586-7 (March 18, 2003), discussing a bill which would limit noneconomic damages, punitive damages, and attorneys' fees in health care lawsuits.

206. If a federal tort statute were enacted, the supremacy clause of the United States Constitution would likely negate much if not all of the state statutes and jurisprudence in this area. "The supremacy of federal law is absolute. Any level of federal law, even an administrative regulation, overrides every form of state law, even a state constitution." *Developments in the Law: The Interpretation of State Constitutional Rights*, 95 *HARV. L. REV.* 1324, 1334 (1982). See also *Betsy J. Grey, The New Federalism Jurisprudence and National Tort Reform*, 59 *WASH & LEE L. REV.* 475, 503-4 (2002).

207. See, e.g., Grey, *supra* note 207 at 528-9; Olson, *supra* note 200 at 746; Trombetta, *supra* note 14, at 406 n.38-41, 415; Hicks, *supra* note 9, at 634, nn. 54-59 and accompanying text; Peter Zablotsky, From a Whimper to a Bang: The Trend Toward Finding Occurrence Based Statutes of Limitations Governing Negligent Misdiagnosis of Diseases with Long Latency Periods Unconstitutional, 103 DICK. L. REV. 455, 457-8, 484 (1999) (“legion of authority . . . that there was never a medical malpractice crisis”); Werber, *supra* note 9 at 1033-1045 (questioning reality of the insurance crisis and litigation explosion); Peter Linzer, Why Both with State Bills of Rights?, 68 TEX. L. REV. 1573, 1592 n. 136 (1990) (discussing “perceived malpractice insurance crisis”); Robert S. Peck, Richard Marshall, Kenneth D. Kranz, Tort Reform 1999: A Building Without a Foundation, 27 FLA. ST. U. L. REV. 397, 399 (2000) (“overwhelming evidence” that there has been no litigation explosion or spate of irrational jury awards); Jan Allen Baughman, Comment: The Statute of Repose: Ohio Legislators Attempt to Lock the Courthouse Doors to Product-Injured Persons, 25 CAP. U. L. REV. 671 n. 29-51 and accompanying text (1996); R. Brittain Virden, COMMENT: TORT REFORM AND THE MISSISSIPPI CONSTITUTION OF 1890, 63 MISS. L. J. 797, 798 n. 3 (1994).

208. For an encyclopedic discussion of remedies, see FRIESEN, *supra* note 3, at 6-2 to 6-44. For a good synopsis of the “daunting variety of remedy guarantee interpretations,” see Schuman, The Right to a Remedy, *supra* note 199 at 1203-1217. See also Bauman, *supra* note 7, at 258-284.

209. Kelly v. Brenner, 175 A. 845, 847 (Pa. 1934).

210. Ayala v. Philadelphia Board of Public Education, 305 A.2d 877, 882 (Pa. 1973).

211. Flagiello v. Pennsylvania Hospital, 208 A.2d 1893, 203 (Pa. 1965).

212. Neiderman v. Brodsky, 261 A.2d 84, 85 (emphasis omitted). See also notes 1-4 and accompanying text, *supra*. As one commentator has said, the “best understanding of the [open-courts/remedies] provision is that, for the kind of injury described”—i.e., harm to lands, goods, person or reputation—“it grants a right to a remedy.” Vail, *supra* note 164, at 981. “[A]lthough statutory and common law remedies may be changed, they must maintain some comparable degree of protection for those interests’ named in the constitutional text.” FRIESEN, *supra* note 3 at 6-8. It is generally accepted that “long-established causes of action and damage remedies in tort involve special kinds of personal interest and liberties that warrant greater constitutional protection than other economic or property interests. This special status of common law personal injury tort claims plays a central role in state constitutional law jurisprudence that is developing around tort reform legislation.” Turkington, *supra* note 14, at 1333-4 (1987). See also Carroll v. County of York, 437 A.2d 394, 400 (Pa. 1981) (Larsen, dissenting).

213. Schuylkill Navigation Company v. Loose, 19 Pa. 15, 18, 19 (1852). “Nothing less than the full amount of pecuniary damage which a man suffers from an injury to him in his lands, good, or person, fills the measure secured to him in the Declaration of Rights.” Thirteenth & Fifteenth Street Passenger Railway v. Boudrou, 92 Pa. 475, 482 (1880).

214. Mayle v. Department of Highways, 388 A.2d 709, 715, 710 (Pa. 1978).

215. James, 477 A.2d at 1305. Classifications that affect a suspect class or fundamental rights must further a compelling government interest. Those which implicate important but not fundamental rights must advance an “important” governmental interest, and the classification must be closely related to the objectives of the legislation. Under these two tests, statutory classifications are generally not upheld. Douglas R. Widin, Comment: Suspect Classifications: A Suspect Analysis, 87 DICK. L. REV. 407, 415-423 (1983). All other classifications—the vast majority—must be upheld if there is “any rational basis” for them. James, 477 A.2d at 1305-1307; Smith v. City of Philadelphia, 516 A.2d 306, 310-312 (Pa. 1986). Use of the rational basis test is “tantamount to a reflexive validation of the challenged classification,” because it “incorporates a theory and practice of extreme deference to the [legislative] judgment.” Lawrence G. Sager, Fair Measure: The Legal Status of Underenforced Constitutional Norms, 91 HARV. L. REV. 1212, 1215 (1978).

216. James, 477 A.2d at 1305-06 (The Court “concluded that there is no fundamental right at issue” and that the plaintiff’s interest in “access to the courts to sue the Commonwealth where the Commonwealth has consented to suit” is only an “important” right).

217. In a number of important open-courts cases, the Court has used the very lenient rational basis test. See, e.g., Freezer Storage v. Armstrong Cork Co., 382 A.2d 715, 718 (Pa. 1978); Carroll v. County of York, 437 A.2d 394, 397 (Pa. 1981); Tsarnas v. Jones & Laughlin Steel Corp., 412 A.2d 1094, 1098-9 (Pa. 1980).

218. Mascaro v. Youth Study Center, 523 A.2d 1118, 1127 (Pa. 1987) (Larsen, dissenting).

219. The Court upheld a \$500,000 aggregate damage limit against a city and its gas works in a case where a gas explosion killed seven people and seventy-two more were seriously injured and maimed. Smith, 516 A.2d 306. See also Carroll, 437 A.2d at 395; Griffin v. SEPTA, 757 A.2d 448 (Pa. Cmwlth. 2000), appeal denied, 775 A.2d 810 (Pa. 2001) (\$2 million verdict against government entity molded to \$250,000 pursuant to statute.)

220. Singer v. Sheppard, 346 A.2d 879, 902-03 (Pa. 1975).

221. Freezer Storage v. Armstrong Cork Co., 382 A.2d 715, 720 (Pa. 1978).

222. *Id.* at 721.

223. Kline v. Verner, 469 A.2d 158, 160 (Pa. 1983).

224. Carroll, *supra* note 217, at 397.

225. FRIESEN, *supra* note 3, at 6-9. This method gives the legislature “the broadest power to alter common law rights and remedies by redefining the notion of legal injury. In decisions adopting this theory, the clause essentially places no restraint on legislatures.” *Id.*

226. Most courts take positions “which afford the legislature a significant amount of flexibility in altering established means of protecting the named interests, but, in most cases, require preservation of some form of remedy for harms done to them.” *Id.* at 6-10. This is accomplished through one of two approaches: a) the “historically-tied” approach holds that the open courts/remedies clause protects “only common law causes of action that existed at the time of the adoption of the constitutional clause, which are preserved unless the legislature substitutes another adequate remedy or ‘quid pro quo’ for the affected litigants.” *Id.* at 6-9. Oregon, Texas, Connecticut, Arizona and Wisconsin apply this approach or variations of it. *Id.*; b) the “public policy approach” “permits the legislature to limit any cause of action and remedy if it creates a reasonable alternative, but, even without creating a substitute, it may alter former rights if it acts for a very important reason or it is responding to an overwhelming public need.” *Id.* at 6-9. Florida, Utah, and West Virginia apply this approach.

227. *Jackman v. Rosenbaum*, 106 A.2d 238 (Pa. 1919), *aff’d*, 260 U.S. 22 (1922). *Jackman* is cited in *Singer v. Sheppard*, 346 A.2d 897, 902 n. 11, 903 (Pa. 1975); *Freezer Storage*, 382 A.2d at 721; *Carroll*, 437 A.2d at 397, 399; *Tsarnas v. Jones & Laughlin Steel Corp.*, 412 A.2d 1094, 1098 (Pa. 1980).

228. *Id.* at 239-40.

229. *Id.* at 240, 244.

230. *Id.* at 1241.

231. *Id.* at 1244.

232. *Carroll*, 437 A.2d at 399; *Freezer Storage*, 382 A.2d at 720; *Singer*, 346 A.2d at 902; *Tsarnas*, 412 A.2d at 1098.

233. “If a thing has been practised for two hundred years . . . it will need a strong case . . . to affect it. . . .” *Jackman*, 260 U.S. at 31.

234. *Sherwood v. Elgart*, 117 A.2d 899 (Pa. 1954).

235. They include money, bank notes, jewelry, articles of gold and silver, precious stones, personal ornaments, railroad tickets, negotiable papers, and bullion. *Sherwood*, 117 A.2d at 900.

236. *Id.* 900.

237. *Id.* at 901.

238. *Id.* at 902.

239. *Carroll*, 437 A.2d at 400 and n. 5 (Larsen, dissenting).

240. *Sherwood* is cited in *Singer*, 346 A.2d at 902, 904, 910 (dissent); *Carroll*, 437 A.2d at 397, 399 (dissent); *Freezer Storage*, 382 A.2d at 720.

241. *Freezer Storage*, 382 A.2d at 720.

242. *Carroll*, 437 A.2d at 397.

243. *Thirteenth and Fifteenth Street Passenger Railway v. Boudrou*, 92 Pa. 475 (1880). *Thirteenth Street* is cited in *Dolan v. Linton’s Lunch*, 152 A.2d 887, 893 (Pa. 1959); *Freezer Storage*, 382 A.2d at 721 n.5; *Seymour v. Rossman*, 297 A.2d 804, 808 (Pa. 1972).

244. *Id.* at 481-82. This decision is presumably based on Article I, Section 11, since the Court talks only about the Declaration of Rights. The Court did not discuss Article III, Section 21 of the Constitution of 1874 (Section 18 in the current Constitution), which prohibited the General Assembly from limiting recoveries in personal injury or wrongful death cases. Section 21 is discussed in more detail, *supra*.

245. *Dolan v. Linton’s Lunch*, 152 A.2d 887, 893 (Pa. 1959).

246. In *Seymour*, 207 A.2d at 808, the Court upheld a distribution of damages “in a manner other than in direct proportion to the pecuniary loss actually suffered.” The Court said that the *Thirteenth Street* argument was “inapposite” because the statute at issue, unlike the one in *Thirteenth Street*, set no statutory ceiling on damages.” *Id.* Similarly, in *Singer*, 346 A.2d 896, the Court approved a no-fault motor vehicle insurance law which eliminated recovery for pain and suffering where medical expenses were less than \$750 by finding that the right to full damages for an injury applies only to a “legal injury . . . [I]f the right to a remedy is eliminated by the legislature,” then the principle enunciated in *Thirteenth Street* “is not violated.” *Id.* at 902.

247. *Dolan*, 152 A.2d 887 (Pa. 1959). *Dolan* is cited in *Singer*, 346 A.2d at 904, 909; *Greer v. U.S. Steel Corp.*, 380 A.2d 1221, 1223 (Pa. 1977); *Kline*, 469 A.2d at 160-62; *Freezer Storage*, 378 A.2d at 721.

248. *Dolan*, 152 A.2d at 889-90.

249. Article III, Section 21 is now Section 18.

250. *Dolan*, 152 A.2d at 892.

251. *Id.* at 892-3, citing *Thirteenth Street*, 92 Pa. 475.

252. *Greer*, 380 A.2d at 1223 n. 6.

253. *Freezer Storage*, 382 A.2d 715. “A statute of repose is a form of statute of limitations that runs from a point in time which disregards the date of injury.” *Werber*, *supra* note 9, at 989. Such a statute can run from the time a product is sold or a medical operation performed rather than the date at which the product or a physician’s negligence causes an

injury. Thus, a statute of repose can “cut off a right of action before the injured party is either (a) injured, or (b) becomes aware of the relationship between an injury and its cause.” *Id.*

254. *Id.* at 721. A later case also rejected the remedy language in *Dolan*, stating the decision “rested comfortably on the language of the [Workmen’s Compensation] Act,” without the need to resort to the Constitution. *Kline*, 469 A.2d at 160. Nonetheless, the Court discussed the fact that the claimant got “some statutory remedy” and held that was enough to satisfy the Constitution, citing language from *Dolan* to support its opinion. *Id.*

255. In its recent jurisprudence, the Court has failed to mention a number of other landmark open-courts cases which contain broad remedy language. See, e.g., *Brown v. Hummel*, 6 Pa. 86, 90 (1847); *Schuylkill Navigation Company v. Loose*, 19 Pa. 15, 18 (1852); *Bagg’s Appeal*, 43 Pa. 512, 517 (1863); *Longbine v. Piper*, 70 Pa. 378, 380 (1872); *Flagiello v. Pennsylvania Hospital*, 206 A.2d 193 (Pa. 1965); *Niederman v. Brodsky*, 261 A.2d 84, 85 (Pa. 1970); *Ayala v. Philadelphia Board of Public Education*, 305 A.2d 877, 882 (Pa. 1973).

256. The following cases address both Article I, Section 11 and Article III, Section 18: *Jackman*, 106 A. at 241-42; *Dolan*, 152 A.2d at 892-3; *Seymour*, 297 A.2d at 808; *Singer*, 346 A.2d at 900-3; *Freezer Storage*, 378 A.2d at 720-21; *Tsarnas*, 412 A.2d at 1096-8; *Kline*, 469 A.2d at 159,162-63; *Smith*, 516 A.2d at 309; *Mascaro*, 523 A.2d at 1127-8; *Griffin v. SEPTA*, 757 A.2d at 450.

257. Article III, Section 18, was passed in response to special legislative treatment of one type of tort defendant (railroads) different from all others, by limiting damages for personal injuries or death and by allowing plaintiffs a shorter period in which to file suit against railroads. The debates which took place in the Constitutional Convention of 1873 eerily presage contemporary discussions about tort reform. II *Debates*, supra note 115, at 719-743. Advocates for the amendment decried unequal treatment as a “great evil” and a “monstrous injustice” and said that the amount of damages should not depend on the identity of the person who caused the injury. *Id.* at 727, 731 & 735. They also argued that “excessive damages are always within the control of the court.” *Id.* at 735.

Opponents complained of the “wild verdicts of juries,” which were liable to have their “passions and feelings . . . inflamed the last possible degree” by the “lash of [a plaintiff’s] counsel’s eloquence” and persuasion. *Id.* at 732-33 & 741. They said that businesses needed consistency and protection from the “wild and uncertain injustice” of jury verdicts, since there was “no standard by which . . . damages can be estimated.” *Id.* at 738, 741.

258. *Seymour v. Rossman*. 207 A.2d 804 (Pa. 1972).

259. The Court said her Thirteenth Street argument was “too tenuous because the Wrongful Death Act sets no statutory ceiling on damages.” *Id.* at 808.

260. The Court was “not convinced . . . that the distribution of wrongful death damages according to the law of intestate succession may be equated with a maximum limitation on damages.” *Id.*

261. *Singer*, 346 A.2d 896 (Pa. 1975).

262. *Freezer Storage*, 382 A.2d 715 (Pa. 1978).

263. *Id.* at 720 (a trespass today may not be so tomorrow) (quoting *Jackman*, 106 A. at 244); *Singer*, 346 A.2d at 903 (no vested right to an “immutable body of negligence law”).

264. It would be “senseless” to hold that the Legislature can abolish a cause of action, but hold such abolition void “because it constitutes a diminution of recovery for a harm inflicted in violation of Article III, Section 18. . . .” *Freezer Storage*, 382 A.2d at 721, citing *Jackman*, 106 A. 238. See also *Carroll*, 437 A.2d 394; *Kline*, 469 A.2d at 158-60.

265. *Smith v. City of Philadelphia*, 516 A.2d at 309.

266. *Id.* (emphasis added).

267. In “no other cases” than workmen’s compensation matters “shall the General Assembly limit the amount to be recovered. . . .”

268. *Smith*, 516 A.2d at 309. *Accord*, *Carroll*, 437 A.2d at 396; *Lyles v. Department of Transportation*, 516 A.2d 701 (Pa. 1986); *Griffin v. SEPTA*, 757 A.2d 448 (Pa. Cmwlth. 2000).

269. For discussions of damage caps under various state provisions, see *FRIESEN*, supra note 3, chapter 6, passim; *Chupkovich*, supra note 182; *Light*, supra note 203; *Magleby*, supra note 202.

270. See note 215. Since at least 1981, Pennsylvania courts have held that the “meaning and purpose” of Pennsylvania equality provisions such as Article III, Section 32 (prohibition against special laws) and Article I, Section 26 (no discrimination by Commonwealth or its political subdivisions) are sufficiently similar to the federal 14th Amendment to warrant like treatment. See, e.g., *Laudenberger v. Port Authority of Allegheny County*, 436 A.2d 147, 155 n. 13 (Pa. 1981).

271. *Kelly v. Brenner*, 175 A. at 847.

272. *Freezer Storage*, 382 A.2d at 720 (elimination of judicially recognized remedy, without providing some other remedy in its place, “might well” violate Article I, Section 11).

273. *Carroll*, 437 A.2d at 397 (legislature has the power to “limit liability on the basis of a defendant’s status”).

274. *Freezer Storage*, 382 A.2d 715.

275. *Singer*, 346 A.2d at 902. (The limitation or abolition of a remedy “speaks . . . to the reasonableness of the classifications” and not to their validity under the Constitution).

276. Seymour, 297 A.2d at 808.

277. This test was applied at least from 1972-1981. See Singer, 346 A.2d at 904-5; Freezer Storage, 382 A.2d at 718-19; Tsarnas, 412 A.2d at 1099; Carroll, 437 A.2d 397.

278. As has been its recent practice, the Court's analysis of plaintiff's equality claims—both state and federal—was based on the federal three-tier equality construct. The Court said that the United States Supreme Court recently defined “fundamental rights” in that way, referring to *Plyler v. Doe*, 457 U.S. 202, 216 n.15 (1982). James, 477 A.2d at 1306.

279. James, 477 A.2d at 1306. The Court said that this “power [under Article I, Section 11], in turn, is derived from the Eleventh Amendment to the United States Constitution, permitting the states to exercise sovereign immunity, should they choose so to do.” The Eleventh Amendment prohibits a citizen, under certain circumstances, from suing a state in federal court. Its relevance to suits in state court is therefore puzzling. See also *Mayle v. Dept. of Highways*, 388 A.2d at 718 (Pennsylvania legislature “refused both to recommend a constitutional amendment to deprive federal courts of this jurisdiction [concerning suits against states in federal court] and to ratify the eleventh amendment when proposed by Congress.”).

280. *Id.* (emphasis added).

281. *Id.* at 1307.

282. *Id.* The lower court in James listed the decisions from other states upholding notice-of-claim statutes, *James v. SEPTA*, 459 A.2d 338, 348 (Pa. Super. 1983) (Wieand, dissenting).

283. *Id.* The James equality analysis was affirmed in *Smith*, 516 A.2d at 311, where the Court upheld an aggregate damage cap of \$500,000 in a case against the city gas works. Citing James, the Court said that the plaintiffs had an “important interest” but that “[n]o fundamental rights are implicated because the right to a full recovery against the Commonwealth or its political subdivisions is expressly limited by our interpretation of Article III, Section 18, and Article I, Section 11. . . .”

284. James, 477 A.2d at 1306. See also *Marritz*, supra note 110 at 209-213. For other equality analyses of various state tort reform statutes, See, e.g., *FRIESEN*, supra note 3 at 6-18 n. 83, 6-22 to 6-23 nn. 106-119; *Chupkovich*, supra note 182 at 343-352; *Hicks*, supra note 9, at 635-643; *McGovern*, supra note 13, at 606-612; *Turkington*, supra note 14; *Light*, supra note 202 at 352-357; *Magleby*, supra note 202 at 238-243. For other state equality decisions involving open-courts clauses, see *Carson v. Maurer*, 424 A.2d 825 (N.H. 1980); *Condemarin v. Univ. Hospital*, 775 P.2d 348 (Utah 1989); *Butler v. Flint Goodrich Hospital*, 607 So. 2d 517 (La. 1992); *Kenyon v. Hammer*, 688 P.2d 961 (Ariz. 1984); *Farley v. Engleken*, 740 P.2d 1058 (Kan. 1987); *Mominee v. Sherbarth*, 503 N.E. 2d 717, 728 n. 13 (Ohio 1986).

285. See, e.g., *Hicks*, supra note 9 at 628.

286. *Freezer Storage*, 382 A.2d 715 (Pa. 1978). As of this writing, there are no reported cases under another statute of repose, Section 513 of the Medical Care Availability and Reduction of Error (MCARE) Act, No. 13 of 2002, Act of March 20, 2002, P.L. 154, 41 P.S. §1301.513, which specifies certain general limits and exceptions in medical malpractice cases and special rules for foreign objects, wrongful death actions, and minors.

287. Those policies are set out in *Kenyon v. Stewart*, 44 Pa. 179, 191 (1863), where the Court said that it is “not unreasonable for the community to insist that its remedies or security shall be sought with diligence—within a reasonable and prefixed period—whilst witnesses and papers are likely to survive. It is a great public evil that estates should be for ever in jeopardy, and that no end should be put to stale controversies.”

288. *Wilson v. Iseminger*, 185 U.S. 55, 61 (1902). A statute that denies a claimant the “full opportunity . . . to try his right in the courts . . . would not be a statute of limitations, but an unlawful attempt to extinguish rights arbitrarily, whatever might be the purpose of its provisions.” *Id.* at 62.

289. *Ayers v. Morgan*, 154 A.2d 788, 791 (Pa. 1959). See also *Brenner*, supra note 10, at 422 (dismissing “doctrinal manipulations” that support statutes of repose, which are termed “inherently unfair and biased toward the interests of a select group at the expense of the general public.”).

290. *Ayers*, 154 A.2d at 791. *Accord*, *Hayward v. Medical Center*, 608 A.2d 1040, 1042-3 (Pa. 1992). See also *FRIESEN*, supra note 3, at 6-32 n. 163, 6-40 to 6-43; *Trombetta*, supra note 14 at 403-4; *Susan C. Randall*, *Due Process Challenges to Statutes of Repose*, 40 S.W. L.J. 997, 998 n.6 (1986); *Patrick E. Sullivan*, Note; *Medical Malpractice Statute of Repose: An Unconstitutional Denial of Access to the Courts*, 63 NEBRASKA L. REV. 150, 166 n. 69 (1983).

291. See, e.g., *Werber*, supra note 9, at 1006, 1053; *Lewis*, supra note 2, at 981; *Zablotsky*, supra note 208; *McGovern*, supra note 13, at 584 n. 27 (listing articles); *Hicks*, supra note 9, at 657-663; *Koch*, supra note 11, at nn. 621-626 and accompanying text; *Robert W. George*, Comment: *Prognosis Questionable: An Examination of the Constitutional Health of the Arkansas Medical Malpractice Statute of Repose*, 590 ARK. L. REV. 691 (1998).

292. *FRIESEN*, supra note 3, at 6-32. For cases upholding and striking down statutes of repose, see *FRIESEN* at 6-34 to 6-40; *Hicks*, supra note 9, at 657-663; *McGovern*, supra note 13, at 601-04 n. 133, 604 n. 139, 605-06 nn. 140-148; *Trombetta*, supra note 14, at 397-99 nn. 4-8; *Koch*, supra note 72, at 441-3 nn. 621-626; *Randall*, supra note 291, at 1006-1010; *Corkill, v. Knowles*, 955 P.2d 438, 446-47 (Wyo. 1998) (Thomas, concurring specially). For the validity of statutes of repose concerning minors, see, e.g., *Mominee v. Maumee Valley Hospital*, 503 N.E.2d 717 (Ohio 1986).

293. *Agostin v. Pittsburgh Steel Foundry Corp.*, 47 A.2d 680, 683 (Pa. 1946); *Greer v. U.S. Steel Corp.*, 380 A.2d 1221, 1222-3 (Pa. 1977); *Ducjai v. Dennis*, 656 A.2d 102, 104-5 (Pa. 1995).

294. *Dolan v. Linton's Lunch*, 152 A.2d 887, 892 (Pa. 1959).

295. *Singer*, 346 A.2d at 904.

296. *Freezer Storage*, 382 A.2d at 721. *Accord*, *Sherwood*, 117 A.2d at 899.

297. *Kline v. Verner*, 469 A.2d 158 (Pa. 1983).

298. "During the time that appellant was disabled . . . he in fact did apply for and did receive benefits [for lost wages]. . . . However, since . . . appellant . . . has not sustained a loss of his earnings as a result of the impotence [he] does not qualify for compensation. . . ." *Id.* at 161 (Nix, J. concurring).

299. "We said there [in *Dolan*] only that a denial of right of access to the courts for existing common law action might violate Article I, Section 11 without providing some statutory remedy. . . . As this Court stated in *Dolan*, 'the substituted remedy need not be the same.'" *Id.* at 160 (emphasis in original).

300. It is "plausible to read these [open-courts/remedies] guarantees as promising that, 'although statutory and common law remedies may be changed, they must maintain some comparable degree of protection for those interests' named in the constitutional text." FRIESEN, *supra* note 3 at 6-8. For cases from other jurisdictions containing quid pro quo analysis, see *id.* at 6-8, 6-10, 6-12, 6-13, & 6-19; *Koch*, *supra* note 11, at 438-9 nn. 609-613 and accompanying text; *Richards & Riley*, *supra* note 18, at 1666-67 nn. 130-135 and accompanying text; *Turkington*, *supra* note 14 at 1331-1334. See also *Linzer*, *supra* note 207 at 1593-94 (discussing Texas cases requiring an individualized quid pro quo instead of a general societal one) *Phillips*, *supra*, n. 2 at 1335-1336. Compare *Singer*, 346 A.2d at 904 and *Kline*, 469 A.2d at 160, discussing some people's loss of rights for the "general good" to "benefit of many."

301. The common law of negligence consists of "guides of conduct," but they "are not beyond alteration by legislation in the public interest. No person has a vested interest in any rule of law entitling him to insist that it shall remain unchanged for his benefit." *New York Central Railroad Co. v. White*, 243 U.S. 188, 198 (1917). "[N]egligence is merely the disregard of some duty imposed by law, and the nature and extent of the duty may be modified by legislation, with corresponding change in the test of negligence." *Id.* *Accord* *Duke Power Co. v. Carolina Environmental Study Group*, 438 U.S. 59, 88 n. 32 (1978). Nor does a person have a "vested right in any given mode of procedure" under the federal Constitution. *Crane v. Bd. of Assessments*, 258 U.S. 142, 147 (1922).

302. *Duke Power Co.*, 438 U.S. at 88. See also *Crane*, 258 U.S. at 147 (no vested right in a given mode of procedure and due process not denied "so long as a substantial and efficient remedy remains or is provided. . . ."). See also *John Vail*, *A Common Lawyer Looks at State Constitutions*, 32 RUTGERS L.J. 977, 982, 990 (2001); *Jeffrey DeGraffenreid*, *Testing the Constitutionality of Tort Reform With a Quid Pro Quo Analysis: Is Kansas' Judicial Approach an Adequate Substitute for a More Traditional Constitutional Requirement?* 31 WASHBURN L.J. 314 (1992).

303. *Duke Power*, 438 U.S. at 85, 90-91; *New York Central*, 243 U.S. at 201, 206. See also *Shannon M. Roesler*, *Comment, The Kansas Remedy by Due Course of Law Provision: Defining a Right to a Remedy*, 47 KAN. L. REV. 655, 667-669 (1999).

304. The Court declined to consider the issue when it refused to grant review in *Fein v. Permanente Medical Group*, 474 U.S. 842 (1985). See also FRIESEN, *supra* note 3, at 6-43 to 6-45.

305. At least as early as 1937, the Commonwealth had been subject to suits in contract, pursuant to statute. Act of May 20, 1937, P.L. 728, No. 193, Section 1 (now 72 P.S. § 4651-1). "Revolutionary and post-Revolutionary Pennsylvania was [sic] hostile to the notion that the Commonwealth . . . should be immune from paying its just debts." *Mayle*, 388 A.2d at 717. In addition, the government does not have sovereign immunity in suits involving declaratory and injunctive relief from illegal government acts. *Fawber v. Cohen*, 532 A.2d 429 (Pa. 1987).

306. *O'Connor v. Pittsburgh*, 18 Pa. 187, 190 (1851). The loss in the case was "immense" and the denial of a remedy worked an "injustice" but the loss was "unavoidable."

307. *Mayle*, 388 A.2d at 710-11, & 718. Sovereign immunity was "[c]onceived in the Dark Ages, born and bred in Toryism. . . ." It "flourish[ed] . . . for over two centuries by judicial servility to stare decisis and by legislative inertia. . . ." *Brungard v. Hartman*, 405 A.2d 1089, 1096 (Pa. Cmwlth. 1979) (*Crumlish, J. concurring and dissenting*), vacated, 419 A.2d 1171 (Pa. 1980).

308. *Bell Telephone Co. v. Lewis*, 169 A. 571 (Pa. 1934). *Accord*, *Biello v. Pennsylvania Liquor Control Bd.*, 301 A.2d 849, 851 (Pa. 1973); *Brown v. Commonwealth*, 305 A.2d 868, 870 (Pa. 1973); *Freach v. Commonwealth*, 370 A.2d 1163, 1167 n. 7 (Pa. 1977).

309. *Mayle*, 388 A.2d at 710.

310. *Flagiello v. Pennsylvania Hospital*, 208 A.2d 193 (Pa. 1965).

311. *Falco v. Pados*, 282 A.2d 351 (Pa. 1971).

312. *Ayala v. Philadelphia Board of Education*, 305 A.2d 877 (Pa. 1973).

313. *Mayle*, 388 A.2d at 718-9. See *Woodside*, *supra* note 69 at 156-160.

314. *Mayle*, 388 A.2d at 717.

315. *Id.* at 716.

316. The clause said that “[s]uits may be brought against the Commonwealth as well as against other bodies corporate and individual.” PROCEEDINGS OF 1776 AND 1790, supra note 71 at 282.

317. The last phrase, according to the Mayle Court read “. . . and in such cases as the legislature shall, by law direct.” Mayle, 388 A.2d at 717. That version was, indeed, approved at one point in the Convention of 1790. 8 SOURCES AND PROCEEDINGS, supra note 25 at 292. However, the final version adopted by the Convention read “may” instead of “shall.” Id. at 293. Accord, PROCEEDINGS OF 1776 AND 1790, supra note 71 at 304.

318. The procedural view is most fully expressed in the dissent of Justice Nicholas Papadakos in Smith, 516 A.2d at 316, adopting the reasoning of Justice Louis Mandarino’s dissent in Brown v. Commonwealth, 305 A.2d 868, 876 (1973).

319. Mayle, 388 A.2d at 717.

320. 1 Pa.C.S § 2310.

321. See 42 Pa.C.S. § 8522 (state entities) and 42 Pa.C.S. § 8542 (local government bodies).

322. Macaro v. Youth Study Center, 523 A.2d 1118, 1123 (Pa. 1987).

323. Trombetta, supra note 14, at 427. Accord, Carson v. Maurer, 424 A.2d 825, 837 (N.H. 1980) (It is “simply unfair and unreasonable to impose the burden of supporting the medical care industry solely upon those who are most severely injured and therefore most in need of compensation.”).

324. Spangler, 153 A.2d at 492.