Medical Malpractice Statute of Repose: An Unconstitutional Denial of Access to the Courts: 

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Medical Malpractice Statute of Repose: An Unconstitutional Denial of Access to the Courts


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1. Although the case of Carlson v. Dewey, 212 Neb. 132, 321 N.W.2d 458 (1982), accompanied Colton to the Nebraska Supreme Court, Carlson, containing essentially the same facts and issues of law, was summarily disposed of on the basis of Colton. Similarly, the recent case of Smith v. Dewey, 214 Neb. 605, 335 N.W.2d 530 (1983), reaffirmed the position of the court in Colton with regard to the constitutionality of Nebraska’s professional negligence statute of repose, Neb. Rev. Stat. § 25-222 (1979), without elaboration. Therefore, neither Carlson nor Smith is discussed in this Note.
STATUTE OF REPOSE

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Except in topsy-turvy land, you can’t die before you are conceived, or be divorced before ever you marry, or harvest a crop never planted, or burn down a house never built, or miss a train running on a non-existent railroad. For substantially similar reasons, it has always heretofore been accepted, as a sort of legal “axiom,” that a statute of limitations does not begin to run against a cause of action before that cause of action exists, i.e., before a judicial remedy is available to the plaintiff.2

I. INTRODUCTION

Statutes of limitations are generally considered to be procedural enactments which operate to cut off or bar a remedy of the plaintiff after a specified prescriptive period has run.3 It is logical, therefore, that a statute of limitations cannot commence against a remedy until the plaintiff’s cause of action has accrued—in other words, until he has a legally cognizable right to successfully assert his claim in court.4 Consistent with this logic is the generally accepted rule that, in tort actions where an element of the cause of

2. Dincher v. Marlin Firearms Co., 198 F.2d 821, 823 (2d Cir. 1952) (Frank, J., dissenting).
3. See, e.g., Davis v. Mills, 194 U.S. 451, 454 (1904) (stating that ordinary limitations of action are procedural, affecting the remedy only and not the right); Buscaino v. Rhodes, 385 Mich. 474, 480, 189 N.W.2d 202, 205 (1979) (statutes of limitation are procedural in nature); Loyal Order of Moose, Lodge 1785 v. Cavaness, 563 F.2d 143, 146 (Okla. 1977) (stating that a true statute of limitations works on the remedy and governs the time within which a legal proceeding must be instituted “after a cause of action accrues.”) (emphasis added). See generally Skinner v. Anderson, 38 Ill. 2d 455, 231 N.E.2d 588 (1967).
action is damages,\(^5\) the prescriptive period will not be allowed to run against the plaintiff's remedy until he has suffered some legally compensable injury.\(^6\) This rule has been adhered to even where a statute expressly states that the limitation shall run from the time of the negligent act or omission or upon some other event (omitting any mention of the prerequisite requirement of injury).\(^7\)


Of these cases, Raferty v. Construction Co., 291 N.C. 180, 230 S.E.2d 405 (1976), provides what is probably the most coherent statement of this general rule:

In no event can a statute of limitations begin to run until plaintiff is entitled to institute action. . . . Ordinarily, the period of the statute of limitations begins to run when the plaintiff's right to maintain an action for the wrong alleged accrues. The cause of action accrues when the wrong is complete . . . .

Id. at 183-84, 230 S.E.2d at 407 (emphasis in original). Raferty ultimately held that the negligence of the defendant confers no right of action upon the plaintiff until the plaintiff suffers an injury proximately caused by the negligent action. Id. at 186, 230 S.E.2d at 408.


6. One theory which is occasionally used to determine the commencement of a statute of limitation is that the prescriptive period should begin to run at the time of the negligent act or omission, at least where the act itself constitutes a legal injury to the rights of the plaintiff. \textit{See, e.g.}, Ogg v. Robb, 181 Iowa 145, 153-56, 162 N.W. 217, 220-21 (1917). However, in negligence actions for personal injury, where damages is an element of the cause of action, one must usually sustain a legally compensable injury before the statute of limitations is allowed to run. \textit{See, e.g.}, Saylor v. Hall, 497 S.W.2d 218, 225 (Ky. 1973); Dalton v. Dow Chem. Co., 280 Minn. 147, 154, 158 N.W.2d 580, 583 (1968); Rosenberg v. Town of North Bergen, 61 N.J. 190, 193, 393 A.2d 662, 666-67 (1972); Rosenthal v. Kurtz, 62 Wis. 2d 1, 9, 213 N.W.2d 741, 745 (1974); Locke v. Johns-Manville, 275 S.E.2d 900, 905 (Va. 1981). The underlying rationale for this rule is clear:

The right of action for negligence . . . , requires more than mere conduct before recovery can be attempted. Recovery is not possible until a cause of action exists. A cause of action does not exist until the conduct causes injury that produces loss or damage. The action for negligence evolved chiefly out of the old common-law form of action on the case, and it has always retained the rule of that action, that proof of damage was an essential part of the plaintiff's case. Saylor v. Hall, 497 S.W.2d 218, 225 (Ky. 1973). Also, it is not enough that forces which might ultimately lead to injury are set in motion, since it is only the injury itself which gives rise to a cause of action. Schwartz v. Heyden Newport Chem. Corp., 12 N.Y.2d 212, 216, 188 N.E.2d 142, 144, 237 N.Y.S.2d 714, 717 (1963). Furthermore, while a statute of limitations cannot begin to run until the accrual of a cause of action, ignorance of the fact that an action has accrued would not normally prevent the commencement of the statute. \textit{E.g.}, Riley v. United States, 231 F.2d 629, 635 (4th Cir. 1956); Adams v. Albany, 80 F. Supp. 876, 886 (S.D. Cal. 1949); Calabrese v. Monterey County, 251 Cal. App. 2d 131, 141, 59 Cal. Rptr. 224, 231 (1967).

Currently, however, there is a legislative movement to abrogate this general rule by imposing absolute statutes of repose on certain causes of action where the injury upon which the action is based may occur many years after the purported negligence. Statutes of repose, like ordinary statutes of limitations, specify a prescriptive period within which the plaintiff must bring his cause of action to the courts or lose his right to assert it thereafter; however, unlike statutes of limitations, the prescriptive period of a statute of repose begins upon the occurrence of a specified event regardless of when the injury results or when the cause of action accrues. Where the injury does not occur within the stated time period, the plaintiff is given no opportunity to recover on the claim since the repose effectively bars his right of action before his cause (holding that a six-year statute of limitations did not operate to bar plaintiff’s action for property damages resulting from the negligent installation of a lightning rod even though the injury occurred, and the action was brought, more than seven years after the negligent act).


of action accrues (i.e., before the plaintiff's right to maintain the
action is perfected). 10

Clearly, the effect of a statute of repose, at least in the medical
malpractice area, is to reduce the defendant's exposure to liability
by granting him an area of immunity from suit after the prescrip-
tive period has run. 11 While this protection may be justified on

eloquently disclosed the true effect of the statute of repose on a plaintiff's
potential right of action, stating:

Statutes of limitation proceed on the theory that a plaintiff has a full
opportunity to try his rights in the courts within certain time limits.
This statute [of repose] bars all recovery without allowing any time
for the commencement of an action, if the action accrues six years
following the completion of a building. No action by a plaintiff can
remedy the situation.

Thus, the plaintiff has been denied the full opportunity to pursue
her rights in the courts by this statute . . . .

Id. at 140. Distinguishing the effect of the repose from that of ordinary stat-
utes of limitations, one commentator writes:

In barring actions which have yet to accrue, these statutes are
unique, since a statute of limitations proceeds on the theory that a
right of action exists, with the limitation defining the period for pur-
suit of judicial redress. For a statute to bar an action which has not
accrued is anomalous; such a statute does not merely limit the rem-
edy, but bars the right of action from ever coming into existence.

. . . . While ostensibly statutes of limitations, they function to limit
actions in only certain instances, if at all. The form of the limitation of
actions statutes is utilized to abolish a right altogether.

Comment, supra note 4, at 372-74 (emphasis added).

11. Overland Const. Co. v. Sirmons, 369 So. 2d 572, 574 (Fla. 1979). See also Skin-
ner v. Anderson, 38 Ill. 2d 455, 459, 231 N.E.2d 588, 591 (1967); Howell v. Burk,
90 N.M. 688, 704, 568 P.2d 214, 226 (1977) (Sutin, J., dissenting). This immuniz-
ing effect of the statute of repose is especially disturbing when one considers
that this immunity does not operate solely in favor of a particular defendant
against a particular plaintiff; rather, the statute of repose operates to immu-
nize a broad range of activities or treatments of a given profession which typi-
cally do not result in injury until many years after the negligent act.

one example of a situation where an entire activity was exempt from liability.
The court in that case found that the short three-year statute of repose for all
actions involving claims of occupational disease was unconstitutional on the
ground that it amounted to "a practical denial" of a remedy in asbestos cases.
Id. at —, 426 N.E.2d at 425. In coming to this conclusion, the court took notice
of medical evidence which indicated that the gestation period between the
time of exposure and the contraction of asbestosis was twenty to thirty years,
Id. at —, 426 N.E.2d at 424-25 & n.7, and found that the three-year limitation
(commencing at the time of the last exposure) would, therefore, eliminate
employer liability in almost all cases of asbestos exposure.

While many similar examples could be found in the medical field, the one
most directly connected with the Colton case is that dealing with the negli-
gent exposure of a patient to X-ray particles. Studies indicate that radiogenic
"cancers resulting from fluoroscopic chest examinations, see Boice & Monsen,
strong claims of public policy and, therefore, easily pass muster under both the equal protection and due process clauses, it may still run afoul of the “access-to-the-courts” provision found in the Bill of Rights of the Nebraska Constitution.

In Colton v. Dewey, the Nebraska Supreme Court had the opportunity to test Nebraska's ten-year professional negligence statute of repose, contained in section 25-222 of the Nebraska Revised Statutes, against article I, section 13, of the Nebraska Constitution, guaranteeing access to the courts and a remedy for personal

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12. See infra notes 38-49 (reviewing the severity of the malpractice crisis which the repose was designed to alleviate), 55-56 (reviewing the general policy considerations for enacting a statute of repose) and accompanying text.

13. Comment, supra note 4, at 373. See also Overland Const. Co. v. Sirmons, 369 So. 2d 572, 575 (Fla. 1979) (finding that a majority of jurisdictions considering the constitutionality of statutes of repose have upheld them under the due process and equal protection clauses). See generally Redish, Legislative Response to the Medical Malpractice Insurance Crisis: Constitutional Implications, 55 Tex. L. Rev. 759 (1977) (giving the test of constitutionality under each clause and applying them to various forms of crisis legislation).

14. Neb. Const. art. I, § 13. Both the Kentucky and Florida courts have acknowledged that although the statute of repose may be upheld under both the equal protection and due process clauses, such legislation must be held unconstitutional if it fails to meet the more stringent requirements of the access-to-the-courts provision found in their state constitutions. See Overland Const. Co. v. Sirmons, 369 So. 2d 572, 575 (Fla. 1979); Saylor v. Hall, 497 S.W.2d 218, 225 (Ky. 1973).

15. 212 Neb. 126, 321 N.W.2d 913 (1982).

The court upheld the validity of the statute of repose, ruling that the statute did not violate the plaintiff's constitutionally guaranteed right of access to the courts. This Note will demonstrate that, in finding the ten-year repose to be a constitutional exercise of legislative power, the court disregarded its previous precedent and construction regarding the protection afforded by article I, section 13, and erred in its decision. In reaching this conclusion, this Note will: (1) survey the development and effect of the statute of repose in the medical malpractice area; (2) establish the true nature of the protection afforded by the guarantee of access to the courts by: (a) analyzing and categorizing the various interpretations given the access-to-the-courts provision in other states having the same or similar constitutional language; (b) placing Nebraska's pre-Colton interpretation of its access-to-the-courts provision within the context of other similarly construing jurisdictions; and (c) assessing the constitutionality of such statutes of repose under this pre-Colton interpretation to show that the Colton court indeed erred in its decision; and finally, this Note will (3) analyze the reasoning which the Colton court used in its attempt to circumvent its previous construction of article I, section 13, and show why that reasoning is improper.

II. THE COLTON DECISION

In 1961, when the plaintiff-appellant Dr. Sharon Colton was seventeen years of age, the defendant Dr. John L. Dewey began treating her for chronic asthma. Dr. Dewey's treatments consisted of taking numerous X-rays of her chest (apparently for observational purposes) and exposing her chest to numerous injections of X-ray radiation particles. She received these treatments until they were discontinued in 1965. The plaintiff alleged that these treatments subjected her to "known hazards or [sic] resultant malignancy, were experimental in nature, and were not recognized among competent medical practitioners as having any usefulness

17. Although most states have a constitutional provision similar to that contained in art. I, § 13, of the Nebraska Constitution, see infra note 86, some refer to them as "certain remedy" provisions. See, e.g., Oliver v. Travelers Ins. Co., 103 Wis. 2d 644, 650, 309 N.W.2d 383, 386 (1981). Most jurisdictions, however, use the term "access-to-the-courts" provision.
20. Plaintiff's Fourth Amended Petition at 1, Colton v. Dewey, 212 Neb. 126, 127, 321 N.W.2d 913 (1983). As a result of these treatments, a total of 4,500 rads of radiation were received by the appellant.
21. Id.
in treating of such ailments such as plaintiff presented.\textsuperscript{22} The plaintiff also alleged that the defendant affirmatively represented to her that she would experience no problems resulting from the therapy.\textsuperscript{23} On October 29, 1979, during a routine physical examination, symptoms of cancer were discovered in the plaintiff's breasts, and further tests confirmed this diagnosis. Thereafter, the plaintiff was required to undergo a bilateral simple mastectomy and node excision of the right axilla.\textsuperscript{24}

Dr. Colton filed a petition with the district court on December 12, 1980,\textsuperscript{25} seeking damages for her injuries.\textsuperscript{26} The defendant filed a general demurrer to the petition on the ground that the statutory period for bringing an action, under section 25-222, had run on her claim.\textsuperscript{27} In a hearing on the demurrer, the trial court sustained the demurrer and dismissed the case.\textsuperscript{28} The plaintiff appealed the dismissal to the Nebraska Supreme Court, alleging, \textit{inter alia},\textsuperscript{29} that the trial court erred in sustaining the demurrer because the com-

\textsuperscript{22} Id. The appellant alleged literature prior to 1942 had indicated the ineffectiveness of X-ray treatments for chronic asthma, that such treatments were experimental in nature and never formally adopted by the medical profession, and that the experimental use of X-rays became completely outmoded in 1945 with the advent of antibiotics which were proven effective for the treatment of infections. The appellant further alleged that Dr. Dewey knew or should have been aware of the high carcenenogenic risks associated with X-ray treatments as those risks were well publicized as early as 1952.

\textsuperscript{23} Appellant's Opening Brief at 7.

\textsuperscript{24} Colton v. Dewey, 212 Neb. 126, 127-28, 321 N.W.2d 913, 915 (1982). A "bilateral simple mastectomy and node excision of the right axilla" involves the surgical removal of the tissue of both breasts and removal of the lymph nodes under the right arm.

\textsuperscript{25} Although this was done more than fifteen years after the last treatment giving rise to the cause of action, the filing occurred less than one year after the discovery of the injury. Appellant's Opening Brief at 8. While no specific allegations were made as to when the cancer actually developed (thereby causing the action to accrue), the plaintiff's fourth amended petition does allege that the X-rays "caused breast cancer in 1979." Plaintiff's Fourth Amended Petition at 3 (emphasis added). Taking the plaintiff-appellant's allegations as being true, as the court is bound to do for the purpose of ruling on the demurrer, one must conclude that the injury occurred in 1979 and the action was brought one year thereafter.

\textsuperscript{26} The appellant's request for damages was in excess of one million dollars. Plaintiff's Fourth Amended Petition at 4. The threat of such a large award of damages may have engendered at least some judicial hostility toward the plaintiff's position and may serve as a partial explanation of the Colton court's evasive stance on the access to the courts issue. See infra notes 33-35 and accompanying text.


\textsuperscript{28} Id.

\textsuperscript{29} Although the appellant argued that the statute of repose contained in \textsection{25-222} "constitutes special legislation in violation of the Nebraska Constitution;" "violates the equal protection clause of the U.S. Constitution and [the] due process clause of the Nebraska Constitution; and . . . ," denies her the right of
mencement of the ten-year repose was in no way dependent upon the accrual of a cause of action and would, under certain circumstances, operate to bar a right of action before a cause of action had accrued, allegedly violating the access-to-the-courts provision of article I, section 13, of the Nebraska Constitution.30

Rather than directly confronting the question of whether the statute of repose, as a practical matter, unconstitutionally abrogated certain common law rights of action which are protected by article I, section 13, the supreme court skirted the issue by setting up a substantive/procedural distinction as the "test" of a statute's constitutionality under the state's access-to-the-courts provision.31

Adopting the language and reasoning of a New Jersey case,32 the Colton court held:

In the words of the Supreme Court of New Jersey in Rosenberg v. Town of North Bergen, 61 N.J. 190, 199-200, 293 A.2d 662, 667 (1972), considering the same arguments as made by appellant in the instant case, which held a similar statute valid as applied to an architect: "It does not bar a cause of action; its effect, rather is to prevent what might otherwise be a cause of action, from ever arising. Thus, [the] injury . . . responsible for the harm, forms no basis for recovery. The injured party literally has no cause of action. . . . The function of the statute is thus rather to define substantive rights than to alter or modify a remedy. The legislature is entirely at liberty to create new rights or abolish old ones as long as no vested right is disturbed."33

The effect of this language, as it was applied in Colton, is to establish a "test" of constitutionality under the access-to-the-courts provision which hinges on the court's definition of a particular piece of legislation (e.g., a statute of repose) as a substantive or procedural enactment. If the court finds the limitation to be substantive (i.e., an element of, or condition precedent to, a cause of action) and the plaintiff does not satisfy that element or condition, the limitation does not cut off an existing cause of action but merely prevents one from ever accruing; therefore, according to Colton, the statute must be held to be constitutional. However, if the limitation is defined as being procedural, cutting off the plaintiff's right to bring his claim before the cause of action has accrued, then the reasoning and language adopted in Colton implies that such a limitation

31. It is the position of the author that the substantive/procedural distinction set forth in Colton is not a workable test of the constitutionality of Nebraska's access-to-the-courts provision. See infra notes 190-99 and accompanying text.
must be found unconstitutional under article I, section 13.34

Obviously, the decision in *Colton* that Nebraska's statute of re-pose does not violate the access-to-the-courts provision implicitly rests on two major assumptions: (1) that the ten-year statute of repose is in fact substantive; and (2) that substantive limitations, which deprive the plaintiff of a cause of action altogether, are in some way less offensive to the concept of access to the courts than are procedural limitations which deprive the plaintiff of his right to bring his action once his cause of action has accrued. However, no rationale was given, or test employed, in *Colton* to support the court's conclusion that the ten-year statute of repose was a sub-stantive limitation. Nor did the court cite any Nebraska case to illustrate the test of a statute's constitutionality under article I, section 13.35

III. ANALYSIS

A plaintiff who has been denied all possibility of recovery for injuries suffered at the hands of a negligent tortfeasor, simply because those injuries were delayed in coming, would take little con-solation in knowing that the statute of repose operated to prevent her cause of action from ever existing, rather than barring it after it accrued, i.e., that the repose is substantive rather than procedural. The effect on the plaintiff's ability to seek redress is essentially the same in both situations: she is foreclosed from asserting a cause of action which, absent such legislation, would have been available to her under the common law. Given the highly artificial nature of the substantive/procedural distinction offered by the New Jersey Supreme Court in *Rosenberg*, it is suggested that the *Colton* court could have achieved a better reasoned result, meriting a greater respect for the law, had it taken the more realistic approach of ana-lyzing the nature and effect of the ten-year statute of repose on the one hand, and the protection afforded by the constitution on the other, and then made a determination as to whether the two conflict.36

34. See supra note 14 and accompanying text.
35. Although the *Colton* court cited several Nebraska cases in its discussion of the access-to-the-courts provision, none of the cases cited involved any claim of denial of access to the courts, and none of them contained any analysis of art. I, § 13, of the Nebraska Constitution. See infra note 116.
36. The creation of artificial distinctions in the law, such as that which was ap-plied by the *Colton* court in its reliance on *Rosenberg*, has been appropriately criticized by Justice Chitty in Lavery v. Pursell, 39 Ch. D. 508, 517 (1888), quoted in Howell v. Burk, 90 N.M. 688, 698, 568 P.2d 214, 225 (1977) (Sutin, J., dissenting), who said: "Courts of justice ought not to be puzzled by such old scholastic questions as to when a horse's tail begins and where it ceases. You are obliged to say, 'This is a horse's tail' at some time." Similarly, the rele-
A. The Development of the Statute of Repose

Generally, most authorities have agreed that in the early 1970's a serious medical malpractice crisis developed in the United States. The crisis was evidenced by the rapid exit of some of the country's major insurers from the medical malpractice liability field and the threat of many more to follow. This exodus was stimulated by an increase in the number of malpractice claims brought, an increase in the amount of judgments handed down by juries on malpractice claims, and a general inability on the part of insurers to predict with any certainty these variables. This situation resulted in an increased cost of liability insurance to medical personnel and a corresponding increase in the cost of medical care to patients. Legislators, physicians, and insurance
companies alike, became concerned that physicians would not be able to find insurance companies willing to offer adequate coverage against malpractice claims, or, if insurers could be found, that the premiums would be so high that many doctors would choose to move from the high risk speciality areas, begin to practice "defensive medicine" designed more to protect the practitioner than to help the patient, "go bare," or take down their shingles altogether, rather than pay exorbitant premiums. Thus, the question was not merely whether health care would be affordable, but whether adequate health care would be available at all.

Legislatures across the country, concerned with the development of the medical malpractice insurance crisis, began to study the problem and draft various forms of legislation designed to bring down the high cost of medical care and ensure the continued availability of malpractice insurance to practitioners. This legi-
lation took many forms, including, in numerous jurisdictions, the drafting of specific malpractice statutes of limitations, some of which contained absolute statutory periods of repose.

52. See Roth, The Medical Malpractice Insurance Crisis: Its Causes, the Effects and Proposed Solutions, 44 INS. COUNSEL J. 469, 491-93 (1977) (reviewing the various types of crisis legislation). Five of the most common legislative changes made in the substantive and procedural rules governing the adjudication of malpractice claims are:

(1) limiting either the amount of recovery by plaintiffs or the liability of individual health care providers; (2) reducing the statute of limitations applicable to medical malpractice actions; (3) abrogating the collateral source rule in medical malpractice actions; (4) establishing medico-legal screening panel plans; and (5) establishing either compulsory or voluntary arbitration plans.

Redish, supra note 13, at 761. See also Comment, supra note 37, at 660-91; Comment, supra note 38, at 249-49.


Prior to the 1970's, the limitation statutes of more than thirty states failed to include the word "malpractice," but now all but five states have specific malpractice statutes of limitations. See 1 D. LOUISELL & H. WILLIAMS, MEDICAL MALPRACTICE ¶ 13.1 (1981 & Supp. Dec. 1981) [hereinafter cited as LOUISELL & WILLIAMS]. In those five states, malpractice actions are covered by the general tort limitation of actions. See ALASKA STAT. § 09.10.070 (1973); D.C. CODE ANN. § 12-301 (1981); N.J. STAT. ANN. § 2A:14-2 (West 1952); 42 PA. CONS. STAT. ANN. § 1301.605 (Purdon 1980); W. VA. CODE § 55-2-12(b) (1981). All other states have specific malpractice statutes of limitations. These statutes vary greatly in terms of length, commencement, tolling, and preemptive periods between states. See LOUISELL & WILLIAMS, supra, at ¶ 13.14 (illustrating these differences by way of a matrix chart).

Inherent in the decision to enact a particular type of limitation on an action are considerations of conflicting policies. On the one hand, there are the policies of discouraging stale and fraudulent claims where the loss of evidence makes the case difficult, more costly, or impossible to prove, and of providing some absolute time limit (beyond which the plaintiff would be completely barred under all circumstances from bringing suit) so that the defendant can rest easy with the assurance that he will not be unexpectedly surprised by an old claim. On the other hand, there is also strong policy in favor of allowing a potential plaintiff, who has been as diligent as possible in discovering and bringing his meritorious claim to trial, to have access to the machinery of the courts so that

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55. See Peterson v. Roloff, 57 Wis. 2d 1, 6, 203 N.W.2d 699, 702 (1973); Lipsig, Statutes of Limitations in Medical Malpractice, Strict Products Liability, 188 N.Y.L.J., at 1, col. 1 (July 23, 1982). For a good review and discussion of the conflicting policies involved, see Comment, Opening Pandora's Box? An Extension of the Discovery Rule to Negligent Diagnosis in Idaho, 8 Idaho L. Rev. 370 (1972); Comment, Medical Malpractice Statutes of Limitations—Adoption of the Discovery Rule, 59 Ky. L.J. 990 (1971).


Although the policy of preventing stale claims brought against the defendant is probably the most frequently cited justification for statutes of limitations and statutes of repose, numerous courts have recognized the fact that the passage of time operates more to the disadvantage of the plaintiff who has the same problem producing witnesses and evidence and upon whom the burden of proof rests. E.g., Overland Const. Co. v. Sirmons, 369 So. 2d 572, 574 (Fla. 1979); Saylor v. Hall, 497 S.W.2d 218, 225 (Ky. 1973); Rosenthal v. Kurtz, 62 Wis. 2d 1, 8, 213 N.W.2d 741, 744 (1974).

he may seek redress for the wrongs committed against him.58 The weight accorded each of these considerations is ultimately reflected not only in the length of the prescriptive period employed, but, more importantly, in how strictly it is to be applied in particular cases.59 How strictly a limitation is to be applied, in turn, is reflected in the decision of whether the prescriptive period may be tolled (and if so, under what circumstances)60 and in the determination of the event or events which will trigger the commencement of the prescriptive period.61

58. See, e.g., McMacken v. State, 320 N.W.2d 131, 140 (S.D. 1982) (Dunn, J., dissenting); Peterson v. Roloff, 57 Wis. 2d 1, 6, 203 N.W.2d 699, 702 (1973); Comment, supra note 4, at 378.

59. As stated in Chase Sec. Corp. v. Donaldson, 325 U.S. 304, 314 (1945): “Statutes of limitations find their justification in necessity and convenience rather than in logic. They represent expedients, rather than principles. . . . They are by definition arbitrary . . . . They represent a public policy about the privilege to litigate.” Id. In the case of limitations on medical malpractice actions, legislatures have determined that “the privilege to litigate” should be very strictly controlled, and in some cases denied altogether, so that the crisis can be arrested.

60. Lipsig, supra note 55, at 2, col. 1. Among the more common situations for which statutes of limitations will be tolled are: “(1) the discovery of a foreign object left in the body as a result of medical negligence . . . ; (2) continuous medical treatment . . . ; (3) plaintiff’s infancy or insanity . . . ; (4) defendant’s absence from the state or residence under false name . . . ; (5) war . . . ; [and] (6) military service . . . .” Id. For an in depth discussion of the various tolling provisions and their effect on medical malpractice actions, see generally LOuISELL & WIllIAMS, supra note 53, at ¶ 13.11-12.

It should be noted that almost all legislatures which have enacted medical malpractice statutes of repose have also provided statutory provisions for tolling the repose under various circumstances. See id. at ¶ 13.14 (illustrating jurisdictional tolling by way of a matrix chart). While NEBR. REV. STAT. § 25-222 (1979) does not specifically provide for tolling, the court in Hatfield v. Bishop Clarkson Mem. Hosp., 679 F.2d 1258 (8th Cir. 1982) (construing Nebraska law), found that the “professional negligence” statute of repose was controlled by NEBR. REV. STAT. § 25-213 (1979), which provides in relevant part:

[I]f a person entitled to bring any action mentioned in this chapter . . . be, at the time the cause of action accrues, within the age of twenty years, insane or imprisoned, every such person shall be entitled to bring such action within the respective times limited by this chapter after such disability shall be removed.

The Hatfield decision, however, may have been implicitly overruled by the Colton court when it found the statute of repose to be a substantive limitation which operates to keep a cause of action from ever accruing. Colton v. Dewey, 112 Neb. 126, 129, 321 N.W.2d 913, 916 (1982). If an action is brought after ten years from the last treatment giving rise to the injury, then, under the Colton decision, there is no cause of action; and, therefore, the question of tolling is rendered moot.

61. For an in depth discussion of the four primary rules regarding the commencement of medical malpractice statutes of limitations, see LOuISELL & WIllIAMS, supra note 53, at ¶ 13.06-.09. The four rules, in order of least to most pro-plaintiff, are: (1) the “occurrence” rule, which begins the prescriptive period
Before the advent of the malpractice crisis, the Supreme Court of Nebraska clearly evidenced a pro-plaintiff bias in terms of allowing claimants to have access to the courts. Prior to section 25-222, the limitation of action was allowed to commence only “after the cause of action . . . accrued.” But, since no definition of what constituted the “accrual” of an action was provided by statute, the court was able, through a meticulous process of definition and redefinition of that term, to expand the requirements for accrual, ultimately adopting what has been labeled the “discovery rule.”

from the time of the negligent act or omission; (2) the “last treatment” rule, which begins the statutory period at the time of the last treatment which gave rise to the specific injury alleged; (3) the “end of the physician/patient relationship” rule, which starts the time running upon the severance of the fiduciary relationship; and (4) the “discovery” rule, which starts the prescriptive period running at the time of discovery, or facts reasonably leading to the discovery, of the negligent act which is alleged to be the proximate cause of the injury. 

Prior to the enactment of § 25-222 in 1972, the applicable statute of limitations was that contained in Neb. Rev. Stat. § 25-208 (1979), which was specifically amended in 1933 to provide a two year limitation for all malpractice actions. This limitation was controlled by Neb. Rev. Stat. § 25-201 (1979), which states in relevant part: “Civil actions can only be commenced within the time prescribed in this chapter, after the cause of action shall have accrued.” (emphasis added). However, the statutes do not contain any legislative definition of when an action is deemed to have “accrued.”

The general rule regarding the commencement of statutes of limitation is that the prescriptive period begins upon the occurrence of the negligent act
This rule, as stated in *Acker v. Sorensen*, provided that "in a malpractice action against a physician, the statute of limitations does not commence to run until the time the act of malpractice with resulting injury was, or by reasonable diligence could have been, discovered." While the definition of when an action "accrues" varies between jurisdictions, most states were expanding those definitions at the same time Nebraska was, and many of them also adopted the discovery rule.

As the malpractice crisis of the 1970's became evident, the open-endedness of the discovery rule was highly criticized as a major contributor to the dilemma. It was blamed for exposing the insurer to perpetual, or indefinite, periods of liability. This period of extended liability is commonly referred to by the insurance industry as the "long tail" effect.

or omission. See *Lousell & Williams*, supra note 53, at § 13.06. However, this general rule has never been adopted by the Nebraska court.

In *Williams v. Elias*, 140 Neb. 656, 663, 1 N.W.2d 121, 124 (1941), the court rejected the occurrence rule, holding instead that the statute of limitations did not begin until the time when the last treatment was given by the defendant doctor. Later, in *Spath v. Morrow*, 174 Neb. 38, 115 N.W.2d 581 (1962), the court carved out a narrow exception to the operation of the last treatment rule expressed in *Williams*, holding that in cases where a foreign object had been negligently left in the patient's body, the time limitation would not begin to run on the action "until the plaintiff discovered, or in the exercise of reasonable diligence, should have discovered, that a foreign object had been left in her body." *Id.* at 47, 115 N.W.2d at 585. In *Stacey v. Pantano*, 177 Neb. 694, 697, 131 N.W.2d 163, 165 (1964), the court's holding indicated that the discovery rule would apply in all cases of malpractice; however, it was not until the court's decision in *Acker v. Sorensen*, 183 Neb. 866, 871, 165 N.W.2d 74, 77 (1969), that this intent became clear.

66. *Id.* at 872, 165 N.W.2d at 77.
67. See supra note 60.
69. See *Sonenshein, A Discovery Rule in Medical Malpractice: Massachusetts Joins the Fold*, 3 W. New Eng. L. Rev. 433, 433 (1980-1981) ("By 1980, forty-one jurisdictions, either by court decision or legislation, had adopted some kind of 'discovery' rule regarding statutes of limitations in medical malpractice cases.").
70. See, e.g., *Abraham*, supra note 37, at 501-02; *Redish*, supra note 13, at 765; *Comment*, supra note 37, at 673; *Comment*, supra note 50, at 1429.
71. See *Malpractice*, supra note 37, at 394-95.
72. The "long tail" of liability is the period during which the insurance company may be held accountable for the malpractice of its insured. Comment, supra note 37, at 659 n.28. The more extended the period of liability becomes, the greater the elapsed time between the insured's premium payment and the ultimate pay-out by the insurer and the longer the "tail" of liability becomes for the insurance company. *Redish*, supra note 13, at 765. The effect of the "long tail" on the insurance industry is clear:

*The "long tail" effect* means that the industry is dealing with dispo-
that time was issued on an "occurrence" basis, insurers claimed that this long tail effect also exposed them to an indeterminate amount of liability, made rate-making virtually impossible, and forced them to maintain large reserves to protect themselves against possible claims arising many years in the future.\textsuperscript{73} Naturally of losses on the basis of perhaps twenty percent in the first year, perhaps thirty percent in the second year, maybe another thirty percent in the third year, etc. Thus, the pattern of payments stretches out over a period of several years, while the premium charge has been made two, three, four, or five years earlier. Premium charges have failed in the past to adequately reflect this so-called "long tail" or future payment pattern.

Segar, supra note 42, at 130.

Although the discovery rule has been singled out as the major cause of the "long tail" effect, see, e.g., Anderson v. Wagner, 79 Ill. 2d 295, 307, 402 N.E.2d 560, 565 (1980), and the corresponding decrease in the insurance companies' ability to predict future liabilities, id.; see also Redish, supra note 13, at 765, it has also been noted that other factors—including crowded dockets, lengthy trial preparations, and strategically planned delays by both plaintiff and defense attorneys—play a large role in extending the "long tail." See HEW REPORT, supra note 37, at 142; Abraham, supra note 37, at 501. Altering the statute of limitations will have no effect on these post-filing delays. Abraham, supra note 37, at 501.

The "long tail" effect on the insurance industry was exacerbated by the fact that prior to the crises, insurance was largely sold on an "occurrence" basis. Redish, supra note 13, at 765. One commentator, explaining the dilemma, states:

Until recently, medical malpractice liability insurance policies were written with relatively long periods of coverage. These policies protected the insured against claims arising from any treatment provided during the policy year, regardless of when the claim was made. Claims relating to treatment provided under this "occurrence" form of coverage can be made and paid years after issuance. . . . Thus, in order to set a price for occurrence coverage, insurance companies must predict the social and economic inflation in claims and recoveries that may occur between the issuance of the policy and the last date when a claim covered by it may be resolved.

Abraham, supra note 37, at 492-93.

With the frequency and amount of recovery on claims growing geometrically in recent years, Gray, supra note 38, at 123-24, it has become virtually impossible for insurance companies to accurately predict their potential future liability, making it impossible for them to set current premium rates at a level sufficient to cover future expenses. See Anderson v. Wagner, 79 Ill. 2d 295, 303, 402 N.E.2d 560, 565 (1980); Abraham, supra note 37, at 492-93; Gray, supra note 38, at 123-24; Redish, supra note 13, at 765. As a result, companies were forced to maintain huge reserves to cover possible future claims, see Comment, supra note 50, at 1423; see generally Roddis & Stewart, supra note 38, 1281, thereby reducing their investment potential and resulting in decreased profits. Because of the many unappealing aspects of the "occurrence" form of coverage, most insurance companies have now shifted to issuing policies on what is known as the "claims-made" basis. Under "claims-made" coverage:

the policy holder is insured only against claims made during the policy year, regardless of when the treatment out of which the claim
rally, this uncertainty made carrying other types of insurance more appealing to the insurer and was a major factor in the decision of at least some insurance carriers to pull out of the field.\(^7\)

Responding to these criticisms and the exigency of the crisis,\(^7\) the Nebraska legislature, seeking to abolish the discovery rule in this state, passed section 25-222, which contains three distinct limitations: (1) a two-year limitation commencing at the time of the negligent act or omission; (2) a short one-year limitation commencing from the time of discovery, or facts reasonably leading to discovery, if the negligent act or omission is undiscoverable within the two-year limitation; and (3) an absolute ten-year prescriptive period of repose, which operates independently of the first two limitations, commencing at the time of the last treatment giving rise to the action, and indiscriminately barring all claims arising ten years thereafter.\(^7\) Section 25-222 states, in relevant part:

\[
\text{(I)n no event may any action be commenced to recover damages for professional negligence or breach of warranty in rendering or failure to render professional services more than ten years after the date of rendering or failure to render such professional services which provides the basis for the cause of action.}\]

Although this repose does effectively eliminate the operation of the discovery rule after ten years have passed from the last treatment giving rise to the cause of action,\(^7\) it goes beyond this by operating to bar potential claims before they have had a chance to arise when the injury does not occur until after the ten year repose has run.\(^7\) In a sense, the legislature has granted the medical com-

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74. See supra note 37, at 493.
75. See Legislative History of L.B. 1132, 82 Leg., 2d Sess. (1972).
78. Interpreting the language of NEB. REV. STAT. § 25-222 (1979), the court in Smith v. Dewey, 214 Neb. 605, 335 N.W.2d 530 (1983), held that the ten-year period of repose begins to run when “the act complained of, and any resulting subsequent treatment therefor, is completed,” not when “the doctor-patient relationship between the parties is terminated.” Id. at 609-10, 335 N.W.2d at 533.
79. Rosenthal v. Kurtz, 62 Wis. 2d 1, 7, 213 N.W.2d 741, 744 (1974). See Note, supra note 9, at 1191-92. Had the legislature merely deleted the language of the discovery rule from NEB. REV. STAT. § 25-222 (1979), the general controlling
munity and its insurers an area of absolute immunity\(^8\) which cannot be said to exist at common law.\(^8\) While it has been recognized that the establishment of time limitations on various causes of action is a policy matter within the particular purview and competence of the legislature,\(^8\) it has also been recognized that such legislation must fall if it interferes with a plaintiff's constitutionally guaranteed right of access to the courts to assert his common law right of action.\(^8\)

**B. Constitutionality of the Statute of Repose Under Nebraska's Access-to-the-Court Provision**

Although the *Colton* court, in addressing the constitutionality of the repose contained in section 25-222, reached the conclusion that the statute did not violate the appellant's constitutionally guaranteed right of access to the courts, no definitive reason was given why this was so, and no analysis was made of article I, section 13. Instead, the court relied on language from a New Jersey case\(^8\) to supply the reasoning which formed the basis of the *Colton* decision—a practice which is itself questionable given the overwhelming confusion which pervades this area of constitutional

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81. *See supra* note 6 and accompanying text. It should also be noted that *Neb. Rev. Stat.* § 25-201 (1979), providing that a limitation of action can only commence after the accrual of an action, *see supra* note 2 and accompanying text, can be traced back to the beginnings of Nebraska statehood. *See infra* note 174.

82. Saylor v. Hall, 497 S.W.2d 218, 224 (Ky. 1973); Redish, *supra* note 13, at 790.

83. Overland Const. Co. v. Sirmons, 369 So. 2d 572, 575 (Fla. 1979); Saylor v. Hall, 497 S.W.2d 218, 224-25 (Ky. 1973). *See also* First Trust Co. of Lincoln v. Smith, 134 Neb. 84, 114, 277 N.W. 762, 777 (1938) ("[T]he so-called state police power is not an entity. . . . [T]he state police power is not superior to State Constitutions so that it may properly be said that, though an act of governmental agency may be unconstitutional, still it may be justified under the police power . . . ."); *Kelaher, supra* note 43, at 618 ("The inherent rights of individuals as granted by our constitutions should be of paramount importance in society today, eclipsing any financial inconvenience which may come to a singular professional group.").

law. The courts in states which have access to the courts provisions have given them various applications and interpretations and have been unable to reach any consensus as to their proper construction. Since the Federal Constitution contains no similar provision or guarantee, no uniform or guiding rule for the interpretation of these access-to-the-courts provisions has ever developed. Thus, it is important to distinguish between the various interpretations given these provisions in other states so that the Nebraska construction, when placed within the context of other similarly construing jurisdictions, can be clearly understood, and the validity of the statute of repose under the Nebraska access-to-the-courts provision can be accurately assessed.


A careful reading of the decisions handed down by the various jurisdictions interpreting their access-to-the-courts provisions reveals three distinct patterns or theories of judicial construction. These differences in construction have a profound affect on the test of constitutionality to be applied, the degree of restriction which will be placed on legislation tending to deny access to the courts, and the amount of protection which is afforded common law or statutory rights of action predating their constitutions. For the purpose of this Note, these theories will be labeled the "No

85. See Note, supra note 43, at 319 (discussing the "haphazard and non-definitive" constructions made of access-to-the-courts provisions). See also Overland Const. Co. v. Sirmons, 369 So. 2d 572, 575 (Fla. 1979) (expressing concern with the practice of relying on decisions from other jurisdictions given the different interpretations which have been made of the access-to-the-courts provisions); Twin Falls Clinic & Hosp. Bldg. v. Hamill, 103 Idaho 19, 24, 644 P.2d 341, 346 (1982) (acknowledging the split in authority regarding the construction of access-to-the-courts provisions).


87. See infra notes 85-115 and accompanying text.

Restriction," the "Due Process," and the "Constitutional Incorporation" theories of construction.

a. "No Restriction" Theory

The first theory of construction is that a State's access-to-the-courts provision does not place any restriction on the power of the legislature to abolish, or severely impair, common law rights of action. This result has been achieved by: (1) construing the access-to-the-courts provision as applying only to the judiciary, not to the legislature; (2) construing the provision as preserving and protecting from legislative impairment only those procedural rights created by statute or at common law, which were in existence at the time the constitution was adopted; or (3) refusing, without construction, to acknowledge any possible limitation on the legislative power to alter or abolish any common law right. This "no


90. Tennessee is probably the best example of a jurisdiction which follows this approach, using it to uphold the validity of a three-year medical malpractice statute of repose, Harrison v. Schrader, 569 S.W.2d 822 (Tenn. 1978), and a four-year improvement to realty statute of repose, Harmon v. Angus R. Jessup Assoc., Inc., 619 S.W.2d 522 (Tenn. 1981). Specifically, the court in Harrison, considering whether the three-year statute of repose unconstitutionally barred the plaintiff's action for negligent performance of a vasectomy operation, stated that the access-to-the-courts provision, TENN. CONST. art. I, § 17, serves only "as a mandate to the judiciary and not as a limitation upon the legislature." 569 S.W.2d at 827 (Tenn. 1978). In reaching this conclusion, the court found that the access-to-the-courts provision was only designed to protect those causes of action in existence at the time the action accrued, leaving the legislature free to abolish causes of action not yet accrued. Id.

91. In upholding a Massachusetts no-fault insurance law against the claim that the statute unconstitutionally abrogated the plaintiff's common law right of action, the court in Pinnick v. Cleary, 360 Mass. 1, 271 N.E.2d 592 (1971), held: "Article 11 of the Declaration of Rights guarantees 'a certain remedy, by having recourse to the laws, for all injuries or wrongs ... [one] may receive ... . This article is clearly directed toward the preservation of procedural rights and has been so construed." Id. at 13, 271 N.E.2d at 600 (citation omitted). Since the right to instigate an action for negligence is substantive, no protection is afforded under this interpretation against legislative abrogation of such a right.

92. See, e.g., O'Quinn v. Walt Disney Productions, Inc., 177 Colo. 191, 493 P.2d 344, 346 (1972) (holding that Colorado's access-to-the-courts provision does not prevent the legislature from changing the law which creates a right; rather, it simply provides that if a right does accrue under the law, the courts must be available to afford redress); Twin Falls Clinic & Hosp. Bldg. v. Hamill, 103 Idaho 19, 24, 644 P.2d 341, 346 (1982) (holding that an eight-year improve-
restrictions" position has been reached largely out of reliance on statements made by the United States Supreme Court in considering how the Federal Constitution limits legislative action. The position of the Supreme Court in this regard was expressed in *Silver v. Silver*,94 where the Court stated that "the Constitution does not forbid the creation of new rights, or the abolition of old ones recognized by the common law, to obtain [a] permissible legislative objective."95 However, the practice of citing federal cases construing the Federal Constitution that contains no equivalent to the states' access-to-the-court provision96 has been justly criticized.97 Clearly, the Supreme Court, in finding that the United States Constitution does not prohibit the abolition of recognized rights, did not intend to give state legislatures *carte blanche* to disregard restrictions contained in their own constitutions.98 Still, this theory

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93. Saylor v. Hall, 497 S.W.2d 218, 222 (Ky. 1973). See supra notes 89-90 (cases cited indicate a heavy reliance on federal cases to support their construction of the access-to-the-courts provision).
94. 280 U.S. 117 (1929).
95. *Id.* at 122.
98. In fact, the Supreme Court indicated just the opposite in *Munn v. Illinois*, 94 U.S. 113 (1876), which is also heavily cited as support for the "no restriction" construction of the access-to-the-courts provision:

A person has no property, no vested interest, in any rule of common law. . . . Rights of property which have been created at com-
has its adherents.99

b. "Due Process" Theory

The second theory of construction is that the level of protection afforded under a state's access-to-the-courts provision depends upon the nature of the substantive right being asserted.100 This theory has also developed out of heavy reliance on federal cases which have found some limited constitutional protection of a person's right to access to the courts where such access is necessary to protect or secure some other constitutionally protected fundamental right.101 In judging the constitutionality of statutory limita-

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99. See cases cited supra notes 90-92.

100. Discussing this theory of construction, one commentator states:

Most frequently, the level of protection which the courts will afford the constitutional [access-to-the-courts] provision depends on the nature of the substantive right being asserted in the underlying claim. If the substantive right is deemed to be "fundamental," statutory restrictions will be examined very closely under the strict scrutiny test; only the presence of a compelling state interest will justify the restriction or denial of access to the courts. If, on the other hand, the substantive right being asserted is not the subject of a specific constitutional protection and is therefore not fundamental, then the rational basis test provides that access to the courts may be restricted if a rational or reasonable basis for the restriction is shown.

101. Id. The Louisiana court in Everette v. Goldman, 359 So. 2d 1256 (La. 1978), provides a good example of the operation of the due process construction of the access-to-the-courts provision and its reliance upon federal cases. Interpreting Louisiana's access-to-the-courts provision, the Everette court found:

This provision, like the fourteenth amendment to the United States Constitution, protects fundamental interest [sic] to a greater extent than interests that are not considered of fundamental constitutional importance. See Bounds v. Smith, 430 U.S. 817, 97 S. Ct. 1491, 52 L. Ed. 2d 72 (1977); United States v. Kras, 409 U.S. 434, 93 S. Ct. 631, 34 L. Ed. 2d 625 (1973); Boddie v. Connecticut, 401 U.S. 371, 91 S. Ct. 750, 28 L. Ed. 2d 113 (1971); Douglas Public Service Corp. v. Gaspard, 225 La. 972, 74 So. 2d 182 (1954). When a claimant is asserting a right not subject to special constitutional protection, however, access to the courts may be restricted if there is a rational basis for that restriction. Ortwein v. Schwab, 410 U.S. 656, 93 S. Ct. 1172, 35 L. Ed. 2d 572 (1973) (upheld appellate court filing fee requirement for litigant seeking increase in welfare payments); United States v. Kras, supra (upheld state statute which required payments of court costs and
tions against the access to the courts provision, jurisdictions following this theory not only apply what is essentially a federal due process test\textsuperscript{102} but also look to the federal law for the definition of what constitutes a vested or fundamental right.\textsuperscript{103} It should be recognized that the definitions of these rights need not necessarily be the same under the state constitution as under the federal constitution, and logical arguments can be made for the proposition that, in states which contain an access-to-the-courts provision, the right to assert a common law cause of action is both vested and fundamental.\textsuperscript{104} However, since states following this

\footnotesize{\textsuperscript{102} Compare Griswold v. Connecticut, 381 U.S. 479, 497 (1965), with Everett v. Goldman, 359 So. 2d 1256, 1268 (La. 1978).}

\footnotesize{Jurisdictions which construe their access-to-the-courts provision as providing essentially the same protection as that afforded under the fourteenth amendment have upheld the validity of legislation which abrogates common law causes of action on the grounds that: (1) no vested property right is infringed, since no person has a vested right in the continuation of the common law per se, see, e.g., Anderson v. Fred Wagner & Roy Anderson, Jr., Inc., 402 So. 2d 320, 324 (Miss. 1981) (upheld an improvement to realty statute of repose); Reeves v. Ille Elec. Co., 170 Mont. 104, 115, 551 P.2d 647, 653 (1976) (upheld the validity of an improvement to realty statute of repose); Ellerbe v. Otis Elevator Co., 618 S.W.2d 870, 872 (Tex. Civ. App. 1981) (upheld the validity of a wrongful death statute of repose); or (2) no fundamental right of access to the courts exists and there is sufficient justification for such legislation to satisfy the rational basis test. See, e.g., Bazadar v. Koppers Co., 524 F. Supp. 1194, 1203 (N.D. Ohio 1981); Rohrbaugh v. Wagoner, — Ind. —, —, 413 N.E.2d 891, 893 (1980); Everett v. Goldman, 359 So. 2d 1256, 1268-69 (La. 1978).}

\footnotesize{Note, supra note 43, at 321.}

\footnotesize{It could be argued that the access-to-the-courts provision constitutionally protects and holds inviolate all causes of action in existence at the time the constitution was enacted. See infra notes 111-13 and accompanying text. If this construction were to be adopted, then it could be further argued that those causes of action have become vested through the operation of the constitution and that the abolition of such actions must be justified by some compelling state interest or be held unconstitutional.

Similarly, it could be argued that the right of access to the courts is a fundamental right under state constitutions having an access-to-the-courts provision since the state constitution specifically provides for such a right. See Lankford v. Sullivan, Long & Hagerty, 416 So. 2d 996, 999-1000 (Ala. 1982) (holding that legislation which abolishes or alters a common law cause of
theory have not been inclined to listen to such arguments, and since the right to bring a common law action is not considered either vested or fundamental under federal law,105 the potential plaintiff, at best, will be forced to bear the heavy burden of showing that there was no conceivable rational basis for the legislation which denied such a right.106 Against the backdrop of the malpractice crisis, this burden constitutes a nearly insurmountable barrier to a plaintiff contesting the validity of a malpractice statute of repose;107 to be sure, no case could be found where the court has failed to find a rational basis in such legislation.

c. "Constitutional Incorporation" Theory

Finally, some states follow what might be termed the "constitutional incorporation" theory of construction.108 Jurisdictions em-
ploying this construction interpret their access-to-the-courts provisions in such a manner as to invalidate legislation which serves to abolish, or severely impair, common law or statutory remedies existing at the time the constitution was adopted, unless a reasonable substitute, or quid pro quo, is provided for the remedy which is lost. The theory is that the access-to-the-courts general courts in construing the seventh amendment to constitutionally protect and preserve the scope of the right to jury trial as it existed at the time of its adoption:

The federal Constitution and most state constitutions do not "create" a right to jury trial. Rather, they "preserve" the right as it existed at common law, either in 1791, the date of the Seventh Amendment's ratification, or, in the case of some states, as of the time the state constitution was adopted. Because the Seventh Amendment was assumed to incorporate the jury-trial practices of 1791, federal judges frequently have been called upon to determine the actual availability of jury trial as of that date.


110. One of the best statements of the constitutional incorporation theory of construction is contained in Gentile v. Altermatt, 169 Conn. 267, 363 A.2d 1, 12 (1976) (discussing the constitutionality of Connecticut's no-fault insurance plan):

The limitation previously referred to upon the legislature's ability to abolish common-law rights arises from the incorporation of those rights into our constitution by virtue of the adoption of [the access-to-the-courts provisions]. Simply stated, all rights derived by statute and the common law extant at the time of the adoption of [the provision] are incorporated in that provision by virtue of being established by law as rights the breach of which precipitates a recognized injury, thus being exalted beyond the status of common-law or statutory rights of the type created subsequent to the adoption of that provision.

Id. (citation omitted; emphasis added.) As for the specific limitation which the access-to-the-courts provision placed on the legislature, the court commented:

The adoption of article first, § 10, recognized all existing rights and removed from the power of the legislature the authority to abolish those rights in their entirety. Rather the legislature retains the power to provide reasonable alternatives to the enforcement of such rights. Where such reasonable alternatives are created, the legislature may then restrict or abolish the incorporated common-law or statutory rights.

Id. The Florida court has modified this general statement of the constitutional incorporation doctrine by providing a narrow harbor under which it can abolish common law rights of action without providing a substitute remedy and still not violate the constitution; that harbor being where "the [l]egislature can show an overpowering public necessity for the [abolition] of such right, and no alternative method of meeting such public necessity can be shown."
provision was adopted with the intention of preserving and protecting all rights of action then in existence from subsequent legislative abrogation or diminution,\(^\text{111}\) and, that any rights of action existing at that time were incorporated in that provision (i.e., raised to constitutionally protected status).\(^\text{112}\) Clearly, this theory does not protect causes of action which were not in existence at the time the constitution was adopted, but were created thereafter through subsequent legislative or judicial efforts.\(^\text{113}\) Also, it does not prohibit the legislature from enacting reasonable limitations on those preexisting causes of action, so long as the right to assert the action is not, even in a practical sense, foreclosed altogether.\(^\text{114}\)

\(^{111}\) Saylor v. Hall, 497 S.W.2d 218, 222 (Ky. 1973).


\(^{114}\) In the words of the Florida District Court of Appeals:

The Constitution does not require a substitute remedy unless legislative action has abolished or totally eliminated a previously recognized cause of action.

[N]o substitute remedy need be supplied by legislation which reduces but does not destroy a cause of action... [L]egislative changes in the standard of care required, making recovery for negligence more difficult, impede but do not bar recovery, and so are not constitutionally suspect... Similarly, shortening the period in which a litigant may sue, as opposed to barring his cause of action entirely, does not trigger the substitute remedy requirement. Nor does elimination of one possible ground for relief require the legislature to provide some replacement.
In determining whether a particular statutory enactment extinguishes rather than limits a cause of action, courts following this theory look to whether a particular plaintiff, who would have been able to assert his cause of action at the time the constitution was adopted, is now precluded from asserting such a claim by the statute. If so, the statute violates that plaintiff's access to the courts and must be held unconstitutional.115 This is true even though the basic cause of action itself may still exist.

2. Nebraska's Construction of Article I, Section 13

Notwithstanding the language in Colton,116 Nebraska has never accepted the "no restriction" or "due process" theories of construction.117 Instead, Nebraska has consistently interpreted its access-to-the-courts provision to incorporate and constitutionally protect


115. See, e.g., Saylor v. Hall, 497 S.W.2d 218, 222-23 (Ky. 1973).

116. The court in Colton cites four Nebraska cases to support its construction of Nebraska's access-to-the-courts provision; however, in none of the cases was the constitutionality of legislation under the access-to-the-courts provision even at issue. See Campbell v. City of Lincoln, 195 Neb. 703, 240 N.W.2d 339 (1976); Educational Service Unit No. 3 v. Mamel, O., S., H., & S., Inc., 192 Neb. 431, 222 N.W.2d 125 (1974); Drainage Dist. v. Chicago, B. & Q.R. Co., 96 Neb. 1, 146 N.W. 1055 (1914); State v. Heldenbrand, 62 Neb. 136, 87 N.W. 25 (1901). In fact, in only one of these cases is art. I, § 13, even referred to—and then only in dicta. See Drainage Dist. v. Chicago, B. & Q.R. Co., 96 Neb. 1, 6, 146 N.W. 1055, 1057 (1914). This highly questionable use of support cannot be passed off as the result of mere inadvertence since the briefs submitted to the court more than adequately disclosed and discussed nearly all of the numerous Nebraska cases which have actually interpreted Nebraska's access-to-the-courts provision.

117. Early on, the court in First Trust Co. of Lincoln v. Smith, 134 Neb. 84, 277 N.W. 762 (1938), considered and implicitly rejected both of these theories of construction. Striking down Nebraska's moritorium law as being, inter alia, an unconstitutional exercise of legislative power under art. I, § 13, the court in Smith held that: "Sections 13, 16, and 26, article 1 of our Constitution, are definite limitations on the power of the Legislature, and invalidate all legislative action that exceeds the limitation they define or impairs the exercise of powers they declare." Id. at 115, 277 N.W. at 777-78. This statement is in clear contravention of the so-called "no restriction" theory of construction. See supra notes 89-92 and accompanying text. Furthermore, the court held that no emergency or matter of public policy will justify legislation which oversteps the bounds of the access-to-the-courts provision. First Trust Co. of Lincoln v. Smith, 134 Neb. 84, 114-15, 277 N.W. 762, 777 (1938). This statement negates the "due process" theory of construction since even a compelling state interest for such legislation would not save it from the confines of the art. I, § 13.

Aside from the language found in Colton v. Dewey, 212 Neb. 126, 130, 321 N.W.2d 913, 916 (1982) ("It has long been the law of this state that the Legislature is free to create and abolish rights so long as no vested right is disturbed."), no case could be found which would support the existence of either
from legislative abrogation, common law or statutorily created
rights of action in being at the time of the constitution's adop-
tion.\textsuperscript{118} To gain an appreciation for the scope and underlying pur-
pose of article I, section 13, as interpreted by the Nebraska court,
some exploration of its development, construction, and application
to particular situations is necessary.

\textit{a. Development of Constitutional Incorporation in
Nebraska}

The Nebraska access-to-the-courts provision has been traced to
the limitations on governmental power found in the Magna Carta
of 1215,\textsuperscript{119} which are said to have been “expressly incorporated into
our legislation by the Nebraska territorial act, approved March 16,
1855” and “adopted by the suffrage of the people in section 9, arti-
cle I of the Constitution of this state in 1866, and . . . re-adopted by
the electorate as section 13, article I of the Constitution of 1875.”\textsuperscript{120}
Article I, section 13, reads: “All courts shall be open, and every
person, for any injury done him in his lands, goods, person or repu-
tation, shall have remedy by due course of law, and justice admin-
istered without denial or delay.”\textsuperscript{121} Early on, the Supreme Court of
Nebraska construed this provision to apply not only to the courts,
but to the legislature as well,\textsuperscript{122} and, in this regard, article I, section
13, serves as an “obligatory direction to the courts of all jurisdic-
tions” to see that the fundamental protections which it affords are
not laid waste.\textsuperscript{123} While the courts have been given broad powers
to fulfill this obligation,\textsuperscript{124} the exercise of those powers is not
merely discretionary, as it has also been held that the directives of

\textsuperscript{118} See infra notes 119-37 and accompanying text.
\textsuperscript{119} Sullivan v. Storz, 156 Neb. 177, 181, 55 N.W.2d 499, 502 (1952). See also State ex
rel. Cardinal Glennon Mem. Hosp. for Children v. Gaertner, 583 S.W.2d 107, 110 (Mo. 1979) (tracing Mo. CONST. art. I, § 14, back to its origins in the Magna
Carta). The relevant language of the Magna Carta is set out in First Trust Co. 
\textsuperscript{120} First Trust Co. of Lincoln v. Smith, 134 Neb. 84, 116, 277 N.W. 762, 778 (1938).
\textsuperscript{121} NEB. CONST. art. I, § 13.
\textsuperscript{122} Burnham v. Bennison, 121 Neb. 291, 297, 236 N.W. 745, 748 (1931). See also 
Gilbert v. Bryant, 125 Neb. 731, 734, 251 N.W. 823, 825 (1933) (indicating that
even a practical denial of access to the courts resulting from legislative re-
strictions might do violence to the protections afforded under art. I, § 13).
\textsuperscript{123} See Burnham v. Bennison, 121 Neb. 291, 297, 236 N.W. 745, 748 (1931) (Discuss-
ing the court's constitutional obligation to see that the rights protected under
art. I, § 13, are not infringed, the court states: “In this connection, it is to be
remembered that 'when a constitution gives a general power, or enjoins a
duty, it also gives, by implication, every particular power necessary for the
exercise of the one or the performance of the other.' ").
article I, section 13, are "controlling, paramount, and mandatory." The foundation for the constitutional incorporation construction of article I, section 13, was established in the case of Carlsen v. State. The appellant in Carlsen had been tried and convicted of forgery in the district court. After several unsuccessful attempts to have his conviction reversed, the defendant applied to the trial court for an "ancient common-law writ of error coram nobis." The trial court dismissed the application on demurrer for failure to state sufficient facts to justify its issuance. On appeal, the Supreme Court of Nebraska first addressed the issue of whether any such writ could be said to exist in this jurisdiction.

The court in Carlsen noted that the writ was well established in the common law of England but that Nebraska law was silent as to its existence. However, the court found that the writ was brought into being in this jurisdiction through the operation of two statutes: the present section 40-101, which provides that the English common law is adopted as the law of this state where "not inconsistent with...the organic laws of this state, or with any law passed or to be passed by the legislature of this state..." and the present section 25-2224, which provides that if a case ever arises in which there would be a failure of justice under the Nebraska Revised Statutes, so much as is necessary of the practice previously followed may be used to resolve the case. The court

126. 129 Neb. 84, 261 N.W. 339 (1935).
127. Id. at 86, 261 N.W. at 341. The common law writ of coram nobis was created as a procedural devise to enable the defendant to bring to the attention of the court errors of fact which were hidden from the court through duress, fraud, or excusable mistake, and if presented before the court, would have prevented the judgement which was eventually rendered. People v. Tuthill, 32 Cal. 2d 819, 821, 198 P.2d 505, 506 (1948).
129. Id. at 86, 261 N.W. at 341, 342.
130. REV. STAT. OF TERR. OF NEB. ch. 7, § 1 (1866), cited in Carlsen v. State, 129 Neb. 84, 261 N.W. 339 (1935), provides:
So much of the common law of England as is applicable, and not inconsistent with the Constitution of the United States, with the organic law of this territory, or with any law passed or to be passed by the legislature of this territory, is adopted, and declared to be law within said territory.
Id. This statute has remained essentially unchanged and presently can be found in NEB. REV. STAT. § 49-101 (1978).
131. CODE OF CIV. P. tit. 29, ch. 6, § 901, REV. STAT. OF TERR. OF NEB. (1866), provides:
If a case ever arise in which an action for the enforcement or protection of a right, or the redress or prevention of a wrong, cannot be had under this code, the practice heretofore in use may be adopted so far as may be necessary to prevent a failure of justice.
was unable to find any subsequent legislation which would be inconsistent with the remedy afforded by the writ, or which would prevent a failure of justice in this case;\textsuperscript{132} therefore, the court concluded that the writ was, in fact, in existence in Nebraska at the time the constitution was adopted.\textsuperscript{133} More importantly, though, \textit{Carlson} has been read to stand for the proposition that, after the adoption of the constitution, the right to assert the writ was preserved and protected by the access-to-the-courts provision, at least in situations where no adequate alternative remedy was afforded.\textsuperscript{134} Indeed, the court in that case found that this provision, as well as the statutes, evidence "a continuing determination to provide a remedy for every wrong"\textsuperscript{135} and concluded:

\begin{quote}
The necessity for this state to provide a corrective judicial remedy available to one wrongfully convicted is made imperative by section 13, art. I, of the Constitution . . . . The right to apply for a pardon to an administrative board does not meet the requirement of the constitutional provision . . . .\textsuperscript{136}
\end{quote}

In the words of the court: "[T]he Constitution retain[s] common-law remedies unless the statute provides another one."\textsuperscript{137} Although this finding in \textit{Carlson} could be considered merely dicta since the court eventually determined that the appellant was not entitled to claim the writ under the facts of the case,\textsuperscript{138} its construction of article I, section 13, has been followed in subsequent

\begin{footnotesize}
\textsuperscript{134} See Note, supra note 133, at 105 (interpreting \textit{Carlson}'s application of the access-to-the-courts provision to the writ of error \textit{coram nobis} as indicating that common law rights of action in existence at the time art. I, § 13, was adopted are constitutionally protected against subsequent legislative abrogation); Note, \textit{Alienation of Affections—Validity of Legislative Acts Abolishing Such Actions}, 26 \textit{Neb. L. Rev.} 423, 429 (1946-1947) (Interpreting the application of art. I, § 13, in \textit{Carlson}, the writer states that "[t]he position of the Nebraska Supreme Court appears to be that this clause preserves certain remedies in spite of legislative enactments to the contrary.").
\textsuperscript{135} \textit{Carlson} v. State, 129 Neb. 84, 89, 261 N.W. 339, 342 (1935).
\textsuperscript{136} \textit{Id.} at 97, 261 N.W.2d at 346.
\textsuperscript{137} \textit{Id.}
\textsuperscript{138} The court found that \textit{Carlson}'s petition for writ of error \textit{coram nobis} alleged as its basis, facts which were known to \textit{Carlson} at trial before judgment was rendered, and held: "\textit{Coram nobis} does not lie to bring into the record facts known to the petitioner before judgment . . . . If one negligently and intentionally fails to challenge the court's attention to facts within his knowledge, he cannot expect to be relieved of the consequences." \textit{Id.} at 100, 261 N.W. at 347.
\end{footnotesize}
Nebraska cases and has been used to invalidate legislation which abolishes common law rights of action. These later cases can be divided into two categories: (1) those cases where the plaintiff would have had either a common law or statutory right of action to maintain his suit at the time the constitution was adopted; and (2) those cases where the plaintiff would have not been allowed to bring his cause of action when the constitution was adopted because some disability, immunity, or other restriction prevented its assertion. The application of the access-to-the-courts provision under each of these categories will now be discussed in turn.

b. Where Plaintiff Could Have Maintained His Action When the Constitution Was Adopted

The general rule followed by those states which have adopted the constitutional incorporation theory is: where a right of action existed at common law or by statute at the time the constitution was adopted, it is constitutionally protected by the access-to-the-courts provision from subsequent legislative action tending to abrogate or impair that right without affording a reasonable substitute.\(^{139}\) The four most common subjects of litigation under this heading are state guest statutes, workmen's compensation statutes, no-fault insurance statutes, and statutes or court-made rules which establish charitable immunities.

Jurisdictions which adhere to this rule have upheld the constitutionality of guest statutes where they have been found to merely alter the degree of negligence that must be proven to allow recovery\(^{140}\) rather than to abolish the guest's right of action altogether.\(^{141}\) Similarly, workmen's compensation and no-fault insurance statutes are generally upheld as constitutional, but only because they are seen as providing a reasonable substitute for the common law right of action in negligence which they abrogate.\(^{142}\)

\(^{139}\) See supra note 110.

\(^{140}\) See, e.g., McMillian v. Nelson, 149 Fla. 334, 5 So. 2d 867 (1942) (upholding the constitutionality of a guest statute based on the court's finding that it did not abolish a right of action completely but merely increased the degree of negligence which must be shown to successfully assert a claim).

\(^{141}\) See, e.g., Ludwig v. Johnson, 243 Ky. 533, 49 S.W.2d 347 (1932) (holding that a statute which absolutely barred a passenger's right of action against the driver for negligence was unconstitutional under the access-to-the-courts provision); Stewart v. Houk, 127 Or. 589, 271 P. 998 (1928) (holding an Oregon guest statute unconstitutional as absolutely barring a passenger's right to bring a negligence claim against the driver under all circumstances).

\(^{142}\) For example, the Florida court in Walker & LaBerge, Inc. v. Halligan, 344 So. 2d 238, 244 (Fla. 1977), upheld the constitutionality of the Florida Workmen's Compensation Act, granting subcontractors immunity for the negligent injury of another subcontractor's workers, on the ground that it provided a reasonable alternative for the right abrogated (i.e., certain compensation
On the other hand, statutes creating areas of immunity from suit for charitable organization are usually found to be in violation of the access-to-the-courts provisions, since they afford no alternative remedy for that which is abrogated.\textsuperscript{143} It would appear from these cases that the underlying purpose of the access-to-the-courts provision is to protect the common law right of action from being completely abolished and to ensure that relief, in some form, will persist.\textsuperscript{144}

In Nebraska, there have been few cases where the constitutionality of legislation affecting common law rights of action has been challenged under the access-to-the-courts provision. Those decisions which do address the issue tend to abide by the general rule and philosophy stated above. For example, in \textit{Gilbert v. Bryant}, the court upheld the validity of Nebraska's guest statute,\textsuperscript{145} stating:

\begin{quote}
When the Nebraska Guest Law of 1931 was enacted, a remedy for negligence resulted in personal injuries to a motorist's guest existed \textit{under the constitutional provision}. . . . Const. art. 1, sec. 13. The Lawmakers did not intend to destroy entirely the civil restrictions that would prevent recovery for damages in a proper case. They did not define "gross negligence" or use in connection with those words any such terms as "abandoned, monstrous and approximately wanton disregard of safety" or without the need to prove negligence). However, in Sunspan Eng'g & Const. Co. v. Spring-Lock Scaffold Co., 310 So. 2d 4, 7 (Fla. 1975), the court struck down a similar provision of the workmen's compensation act which granted the claimant's employer immunity from indemnity actions brought by third-party tortfeasors on the ground that no reasonable alternative remedy was provided to third-parties for the one which the statute abrogated.

Similarly, in the area of no-fault insurance, jurisdictions following the constitutional incorporation construction have upheld the constitutionality of no-fault insurance acts where a reasonable substitute for the common law negligence action was provided. \textit{See, e.g., Gentile v. Altermatt, 169 Conn. 267, 292-94, 363 A.2d 1, 14-15 (1976); Lasky v. State Farm Ins. Co., 296 So. 2d 9, 14-15 (Fla. 1974).} However, where no substitute remedy is afforded, or where the substitute is found to be inadequate, these jurisdictions have been quick to hold that such legislation violates the plaintiff's constitutionally protected right of access to the courts. \textit{E.g., Dillon v. Chapman, 404 So. 2d 354 (Fla. 1981); Kluger v. White, 281 So. 2d 1 (Fla. 1973).}

\textsuperscript{143.} \textit{See, e.g., Noel v. Menninger Foundation, 175 Kan. 751, 763-64, 267 P.2d 934, 943 (1954).}
\textsuperscript{144.} \textit{See, e.g., Kluger v. White, 281 So. 2d 1, 4 (Fla. 1973).}
\textsuperscript{145.} 125 Neb. 731, 251 N.W. 823 (1933).
\textsuperscript{146.} 1931 Neb. Laws ch. 105, § 1 (codified at Neb. Rev. Stat. § 39-740 (1943)). The guest statute has remained essentially unchanged since its enactment and states in relevant part:

\begin{quote}
The owner or operator of a motor vehicle shall not be liable for any damages to any passenger or person riding in such motor vehicle as a guest or by invitation and not for hire, unless such damage is caused by the driver of such motor vehicle being under the influence of intoxicating liquor or because of the gross negligence of the owner or operator in the operation of such motor vehicle.
\end{quote}
"intentional indifference to the danger." They intended, of course, to increase beyond want of ordinary care or slight negligence, the degree of negligence essential to the right of a motorist's guest to recover damages for personal injuries. 147

A later case dealing with the guest statute, Rogers v. Brown, 148 also indicates that the legislature is free to place reasonable restrictions on a right of action as long as those restrictions do not destroy a common law remedy or, as a practical matter, make it impossible for a potential plaintiff to obtain redress. 149 However, if the legislature exceeds these boundaries, the language of Gilbert clearly implies that such legislation would be held to be unconstitutional under article I, section 13. 150

The Nebraska Supreme Court has also had the opportunity to pass on the constitutionality of a court-made rule that impinged on the common law right to bring a negligence action against charitable organizations. In Muller v. Nebraska Methodist Hospital, 151 the court, apparently laboring under the mistaken impression that no right of action to sue charitable organizations existed at common law at the time the constitution was adopted, upheld the immunity under article I, section 13, stating:

This provision of the Constitution does not create any new rights but is merely a declaration of general fundamental principle. It is primarily the duty of the courts to safeguard this declaration of right and remedy but where no right of action is given or remedy exists, under either the common law, or some statute, this constitutional provision creates none . . . . 152

However, the court corrected itself in Myers v. Drozda 153 where it noted that the rule of charitable immunity was first judicially adopted in 1912 154 and went on to hold the doctrine of charitable immunity unconstitutional under the access-to-the-courts provision, expressly overruling its previous position in Muller. 155

These cases, upholding the right to assert causes of action existing at the time the constitution was adopted, clearly demonstrate the working of the constitutional incorporation theory of construction in Nebraska and stand for the principle that the legislature should not be allowed to take away what the people have so

148. 129 Neb. 9, 260 N.W. 794 (1935) (upholding the constitutionality of Nebraska's Guest Statute).
149. Id. at 12, 260 N.W. at 796.
150. See supra note 147 and accompanying text.
152. 160 Neb. at 288, 70 N.W.2d at 91.
154. Id. at 184, 141 N.W.2d at 853.
155. Id. at 186, 141 N.W.2d at 854.
carefully preserved for themselves in the constitution. The cases involving situations where the plaintiff has attempted to assert a cause of action which could not have been brought at the time the constitution was adopted reaffirm that principle.

c. Where Plaintiff Could Not Have Maintained an Action When the Constitution Was Adopted

Generally, jurisdictions following the constitutional incorporation theory of construction hold that in cases where the plaintiff would not have had a right to bring his action at common law, either because no cause of action existed or because some immunity or disability prevented its assertion, the cause of action is not constitutionally incorporated by the adoption of the access-to-the-courts provision; if the plaintiff received a subsequent right of action, through legislation or judicial abrogation of the immunity or disability, the legislature may abrogate that right of action without affording a reasonable substitute. The theory behind this rule is that the access-to-the-courts provision does not require the fashioning of new remedies that did not exist at the time of the adoption of the constitution. Therefore, any right of action created subsequent thereto exists only as a matter of judicial or legislative grace and may be withdrawn at any time. This rule has been traditionally applied to uphold three separate types of immunities which existed at common law: (1) immunity from suits brought after the death of one of the parties, e.g., wrongful death and survival actions; (2) immunity of governmental agencies from suit; and (3) immunity of one spouse from suit by the other spouse.

156. See supra note 114 and accompanying text. See also Gentile v. Altermatt, 169 Conn. 267, 286, 363 A.2d 1, 12 (1976) (indicating that, while statutory and common law rights of action created prior to the adoption of the constitution are incorporated in, and protected from, legislative abrogation by the access-to-the-courts provision, “common law and statutory rights of the type created subsequent to the adoption of that provision” are not so protected).


159. See, e.g., Hall v. Gillins, 13 Ill. 2d 26, 147 N.E.2d 352 (1958) (holding that a wrongful death statute which fixes a maximum recovery does not violate the state’s access-to-the-courts provision in view of the fact that no action for wrongful death was provided for at common law and that the legislature took away no right when it enacted the statute).


161. See, e.g., Alfree v. Alfree, 410 A.2d 161 (Del. 1979), appeal dismissed, 446 U.S.
Nebraska, on the other hand, has upheld the right to bring an action in negligence in each of the above three situations on the grounds that such a right is constitutionally protected and ensured by article I, section 13. At first glance, this result may seem to run against the basic tenets of the constitutional incorporation doctrine; but, upon closer examination, it is apparent that Nebraska has simply applied the doctrine to the fullest extent possible and has maintained consistency by doing so.

The case of *Wilfong v. City of Omaha & Council Bluffs St. Ry. Co.* provides the best illustration of the approach which the court used when considering tort immunities. In *Wilfong*, the question was whether the father, as administrator of the estate of his nine-year-old son (who was severely injured and eventually died as a result of being run over by a street car owned by the defendant), could bring suit to recover for the pain and suffering sustained by the defendant while he was still alive. Prior to *Wilfong*, Nebraska had followed the English common law maxim of *actio personalis moritur cum persona*, that is, that the right of action for a tort dies upon the death of either party. Thus, the plaintiff in this case would not have been able to maintain such an action at common law at the time the constitution was ratified; but, as explained below, it does not follow *a fortiori* that the cause of action did not exist.

To determine whether a tort action surviving the death of one of the parties could be said to exist under Nebraska law, the court appears to have applied a bifurcated analysis. Utilizing much the same strategy as was applied in *Carlsen v. State* to find that the writ of error *coram nobis* existed in Nebraska, the court held that both the “right” to bring a tort action, as well as the English common law “restriction” of *actio personalis moritur cum persona*, came into the laws of this jurisdiction through what is now section 49-101 of the Nebraska Revised Statutes. When the constitution

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164. *Id.*

165. *Id.* at 606, 262 N.W. at 540.

166. See infra notes 126-33 and accompanying text.

167. For the complete text of § 49-101, see supra note 130. Although the court did not specifically state that both the common law right of action in tort and the restriction on that right were brought into the laws of this jurisdiction through § 49-101, this is implicit in the reasoning of the case. Indeed, after discussing the operation and effect of this statute, the court focused its atten-
was adopted, the self-executing\textsuperscript{168} access-to-the-courts provision elevated the right to constitutionally protected status,\textsuperscript{169} whereas the restriction was left to the rigors of section 49-101 which states that only so much of the common law of England which is “not inconsistent with . . . the organic law of this state, or with any law passed or to be passed by the legislature of this state, is adopted and declared to be law within the State of Nebraska.”\textsuperscript{170} The restriction, therefore, is subject to being declared void \textit{ab initio} when it falls into disrepute, as the court in \textit{Wilfong} ultimately held,\textsuperscript{171} whereas the right is constitutionally protected from abrogation.\textsuperscript{172} When the restriction was lifted in \textit{Wilfong}, the right was finally exposed, and the plaintiff was allowed to assert his cause of action.

The key to the bifurcated approach seems to be in the acknowledgement that the cause of action existed at the time of the adoption of the constitution, but that the right to assert such an action was blocked by some common law restriction (e.g., some common law immunity granted to the defendant or some disability which was placed on the plaintiff). The cases upholding a right of action to sue governmental subdivisions for torts committed in the operation of motor vehicles and the right of one spouse to bring a civil action against the other in tort, while less explicit in their analysis, indicate that the court used the same type of process to reach these conclusions as was followed in \textit{Wilfong}.\textsuperscript{173}
Thus, it is obvious that Nebraska has not only adhered to the constitutional incorporation doctrine, but has actually afforded greater protection of rights of action than most similarly construing jurisdictions. Considering the development and the broad application which has been given the access-to-the-courts provision in Nebraska, it is impossible to escape the conclusion that the Nebraska court, prior to Colton, applied the philosophy that the legislature should not be allowed to abolish a right which was in existence of the adoption of the constitution since such a right was already reserved by, for, and to the people through the passage of article I, section 13, of the Nebraska Constitution.

3. Validity of the Repose Under “Constitutional Incorporation” Theory

Considering the line of pre-Colton cases interpreting Nebraska's access-to-the-courts provision as constitutionally incorporating and protecting common law rights of action, it would seem that this precedent, correctly applied, would have lead the Colton court to the conclusion that the ten-year professional negligence statute of repose is in contravention of article I, section 13. The action for negligence, which serves as the basis for today's medical malpractice actions, was well established in the common law prior to the adoption of the Nebraska constitution. It was also well established at the time the constitution was enacted that a limitation of action could not begin running against an action before one had accrued. While no strict definition of what constituted the accrual of a cause of action for medical malpractice appeared until

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1. NEB. REV. STAT. § 25-201 (1979), which provides that no statute of limitations may commence to run prior to the “accrual” of a cause of action, can be traced back to the first codification of the laws of this state. See STATUTES OF NEBRASKA § 5, at 395 (1867).
some time later, it is commonly recognized that, at a minimum, a plaintiff must be able to maintain his action in the courts before the action can be said to accrue. In an action in tort for malpractice, this means that the plaintiff must have at least suffered some legally compensable injury resulting from the negligent act or omission before the limitation is allowed to run against that action. At common law, therefore, if no injury was sustained until eleven years after the negligent act, the plaintiff would still have a right of action at the time of injury notwithstanding the statute of limitations.

Statutes of repose alter this basic relationship between statutes of limitation and the accrual of a right of action by providing an absolute prescriptive period, commencing at a time unrelated to the time of injury. This aspect of the statute of repose has caused many jurisdictions to refuse to recognize the statute of repose as a statute of limitations at all and other states to severely criticize the statute’s operation and issue warnings of possible constitutional infirmity. Where the injury does not occur (and the right of action does not accrue) within the prescriptive period, the effect of the repose is to abolish the plaintiff’s right

175. See supra note 64 and accompanying text.
176. See supra note 4 and accompanying text.
177. See supra notes 4-6 and accompanying text. As stated by the court in Olson v. St. Croix Mem. Hosp., Inc., 55 Wis. 2d 628, 632, 201 N.W.2d 63, 64 (1972): "[I]n a malpractice case the date of the negligent act is not necessarily the benchmark for the commencement of a period of limitations. Only in the event the injury occurs on the same date [as the negligent act] can it be said that the cause of action then ‘accrues.’"
178. See supra note 9 and accompanying text.
179. See, e.g., Loyal Order of Moose, Lodge 1785 v. Cavaness, 563 P.2d 143, 146 (Okl. 1977) (“A true statute of limitations works on the remedy rather than the right and governs the time within which a legal proceeding must be instituted after a cause of action accrues. The [statute of repose] . . . is not a true statute of limitation but rather an absolute bar to a cause of action ever arising.” (Emphasis in original.)); McMacken v. State, 320 N.W.2d 131, 134 (S.D. 1982) (Henderson, J., dissenting, stated: “The statute in question is not a statute of limitations; it is a statute of nullification which rends the very soul of tort law: the allowance of an innocent injured to recoup damages from a negligent party.”).
181. For example, the Wisconsin court has warned on three separate occasions that it may hold the state’s improvement to realty statute of repose in violation of Wisconsin’s access-to-the-courts provision if it is ever presented with a factual situation where the statute extinguished the plaintiff’s claim before some injury resulted. Rod v. Farrell, 96 Wis. 2d 349, 356, 291 N.W.2d 568, 571 (1980); Kallas Millwork Corp. v. Square D. Co., 66 Wis. 2d 382, 383, 225 N.W.2d 454, 455 (1975); Rosenthal v. Kurtz, 62 Wis. 2d 1, 8, 213 N.W.2d 741, 744 (1974).
of action altogether182 (i.e., he is literally given no opportunity to bring his action in tort once he has sustained injury).183 In essence, this abolition grants the negligent practitioner an area of absolute immunity from suit at the expense of the plaintiff's constitutionally guaranteed right of access to the courts.184

Since the true effect of the statute of repose contained in section 25-222 is to abolish a common law right of action which existed at the time the constitution was adopted, and since the legislature provided no reasonable alternative remedy for the one which it has abrogated, the court, according to its previous construction of article I, section 13, was obligated185 to hold the statute of repose unconstitutional in Colton. All other constitutional incorporation jurisdictions, which have had the opportunity to test the validity of a statute of repose against their access-to-the-courts provision, have uniformly found such statutes to be unconstitutional.186 The

182. See, e.g., Loyal Order of Moose, Lodge 1785 v. Cavaness, 563 P.2d 143, 146 (Okla. 1977) ("The statute of repose operates as an "absolute bar to a cause of action ever arising."); McMacken v. State, 320 N.W.2d 131, 141 (S.D. 1982) (Henderson, J., dissenting, quoting Comment, supra note 4, at 374: "While ostensibly statutes of limitations, [statutes of repose] ... function to limit actions in only certain instances, if at all. The form of the limitation of actions statutes is utilized to abolish a right altogether."); Rosenthal v. Kurtz, 62 Wis. 2d 1, 8, 213 N.W.2d 741, 744 (1974) (The court found that the statute of repose "not only bars a suit before the injured party is aware of his right to do so, but goes further and bars the right to sue before it arises."). See also Note, supra note 9, at 1192 (After the prescriptive period has elapsed, the cause is barred in any event regardless of when discovery occurred or even when the injury itself occurred.").

183. Discussing the effect of the statute of repose, one court stated:

In our view the application of these statutory expressions to the claims here asserted destroys, pro tanto, a common-law right of action for negligence that proximately causes personal injury or death, which existed at the times the statutes were enacted. The statutory expressions as they relate to actions based on negligence perform an abortion on the right of action, not in the first trimester, but before conception.


184. See supra notes 10 & 11 and accompanying text.

185. The Nebraska court has found that "the obligatory direction to the courts ... as expressed by the provisions of section 13, art. 1 of our Constitution, is controlling, paramount and mandatory," Burnham v. Bennison, 121 Neb. 291, 297, 236 N.W. 745, 748 (1931), and that "[i]t is a primary duty of the courts to safeguard this declaration of right and remedy ... ." Pullen v. Novak, 169 Neb. 211, 216, 99 N.W.2d 16, 19 (1959) (emphasis added).

Nebraska court, however, was able to avoid addressing the inherent conflict between article I, section 13, and Nebraska's professional negligence statute of repose, and thereby avoid holding the statute in violation of the access-to-the-courts provision, by applying what has been termed a "substantive/procedural test" of constitutionality to that provision.\(^{187}\) This substantive/procedural test must now be explored to determine its merit, or lack thereof.

C. The Substantive/Procedural Distinction as a "Test" of Violation of Access to the Courts

To establish its substantive/procedural test of constitutionality, the *Colton* court borrowed language from the New Jersey case of *Rosenberg v. Town of North Bergen*,\(^ {188}\) which provides:

> [The improvement to realty statute of repose] does not bar a cause of action; its effect, rather, is to prevent what might otherwise be a cause of action, from ever arising. Thus injury occurring more than ten years after the negligent act allegedly responsible for the harm, forms no basis for recovery. The injured party literally has no cause of action. The harm that has been done is *damnum absque injuria*—a wrong for which the law affords no redress. The function of the statute is thus rather to define substantive rights than to alter or modify a remedy. . .\(^ {189}\)

According to this language, as it was applied in *Colton*, the test of whether a statute of repose violates the state's access-to-the-courts provision is seemingly clear-cut: if the court finds the legislation to be a substantive limitation on the plaintiff's cause of action, then the statute must be found to be constitutional; but if the court finds the limitation to be procedural, cutting off a remedy or right of action before a cause of action has accrued, the repose must be declared unconstitutional. This test, however, simply serves to beg the question. Under the pre-*Colton* construction of article I, section 13, the issue is not whether the statute of repose merely prevents a cause of action from accruing, as opposed to cutting off the right of action before a cause of action has accrued; rather, the issue is whether the statute abrogates a constitutionally protected right of action at all regardless of the form that that abrogation may take.\(^ {190}\) Therefore, the substantive/procedural test which was

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218 (Ky. 1973) (holding improvement to realty statute of repose unconstitutional).
187. *See supra* notes 31-34 and accompanying text.
188. 61 N.J. 190, 293 A.2d 662 (1972).
189. *Id.* at 199, 293 A.2d at 667 (emphasis in original). The court in Canton Lutheran Church v. Sovik, 507 F. Supp. 873 (1976), criticized the language and reasoning contained in this statement, saying: "If this, in fact, is the effect of the statute, it would be inconsistent with existing case law of the United States Supreme Court, the Eighth Circuit Court of Appeals, and the South Dakota Supreme Court." *Id.* at 876 (footnote omitted).
190. *See* First Trust Co. of Lincoln v. Smith, 134 Neb. 84, 115, 277 N.W. 762, 778
used by the court in Colton to uphold the constitutionality of the professional negligence statute of repose is inconsistent with Nebraska's precedent construing the access-to-the-courts provision as constitutionally incorporating and protecting common law rights of action from any type of legislative abrogation. In light of this, the court's reliance on the reasoning and language of Rosenberg as the basis for the Colton decision was mistaken. Why, then, did the Colton court adopt such a position?

Discounting politics, public pressure, and the like, there are at least two reasonable explanations for the court's error. The first is that the court simply did not examine Nebraska's construction of its access-to-the-courts provision closely enough to distinguish it from the dissimilar constructions given the provision by other jurisdictions. This contention is supported by the fact that the language in Rosenberg, upon which the Colton court's construction of article I, section 13, was based, was written by the New Jersey court in response to an argument that New Jersey's statute of repose protecting architects from suit after ten years violated the due process clause—not an access-to-the-courts provision.191 In fact, the New Jersey constitution does not even contain an access-to-the-courts provision.192 Thus, while the Rosenberg language may make sense under a due process analysis,193 it can hardly...
serve as Nebraska's statement as to the constitutionality of a re-
pose under article I, section 13.194

The second possible explanation for the Colton court's adoption
of the substantive/procedural test is that some relationship does
exist between the types of legislation which would, or would not,
violate Nebraska's access-to-the-courts provision, as construed
prior to Colton, and the types of legislation which would tradition-
ally be labeled procedural or substantive. The traditional require-
ments which must be met for a statute of limitations to be defined
as a substantive enactment are: (1) the limitation must be con-
tained in, or at least make reference to, the statute that defines the
right; and (2) the statute which defines the right, must also have
"created" it.195 If, on the other hand, the cause of action was "cog-

194. As interpreted under the constitutional incorporation theory, the require-
ments placed on legislation under the access-to-the-courts provision are more
stringent than those of the due process clause. The access-to-the-courts pro-
vision prohibits all legislation which would effectually abolish any common
law or statutorily created right of action (vested or not) in existence at the
time the constitution was adopted, unless a reasonable substitute is provided
in place of the remedy abrogated. See supra note 110. In the words of the
Florida court: "[T]he unique restriction imposed by our constitutional guar-
antee of a right of access to courts makes it irrelevant that this 'statute of repose' may be valid under state or federal due process or equal protection

195. Davis v. Mills, 194 U.S. 451 (1904). The Supreme Court explains the require-
ments as follows:

[T]he ordinary limitations of actions are treated as laws of procedure
... affecting the remedy only and not the right. But in cases where
it has been possible to escape from that qualification by a reasonable
distinction courts have been willing to treat limitations of time as
standing like other limitations and cutting down the defendant's lia-
bility wherever he is sued. The common case is where a statute cre-
ates a new liability and in the same section or in the same act limits
the time within which it can be enforced, whether using words of
condition or not. ... But the fact that the limitation is contained in
the same section or the same statute is material only as bearing on
construction. It is merely a ground for saying that the limitation goes
to the right created and accompanies the obligation everywhere.
The same conclusion would be reached if the limitation was in a different
statute, provided it was directed to the newly created liability so spe-
cifically as to warrant saying that it qualified the right.

Id. at 454. Similarly, in Kahn v. Trans World Airlines, Inc., 82 A.D.2d 696, 443
N.Y.S.2d 79 (N.Y. App. Div. 1981), the court faced the issue of whether a time
limitation for bringing an action for tort (contained in art. 29 of the Warsaw
Convention) was a condition precedent which absolutely barred the claims of
minors after two years, or a statute of limitations which was subject to tolling.
The Kahn court stated:

[T]he general rule in New York for distinguishing between condi-
tions precedent and Statutes of Limitation may be stated as follows: If the statute containing the time limitation creates the cause of ac-
nizable at common law or [was] made such by virtue of another or different statute, then the validly enacted time limitation will generally be regarded as a mere [procedural] Statute of Limitations . . . ."196 Since most legislatively created causes of action postdate the adoption of the constitution, the substantive limitations contained in such legislation would rarely violate the plaintiff’s right of access to the courts. Conversely, since procedural limitations are usually placed on causes of action which are not legislatively created, most would be placed on common law causes of action which existed at the time the constitution was adopted and therefore would stand a greater chance of being held unconstitutional under article I, section 13. However, the relationship between the constitutionality of a limitation and its meeting the criteria for definition as substantive or procedural would not hold true in all cases. For instance, if in 1980 the legislature enacted a limitation on, and severely impaired, a legislatively created cause of action which was in existence prior to the adoption of the constitution, such a limitation would likely violate the access-to-the-courts provision even though it could be defined as a substantive enactment. The access-to-the-courts provision, as construed under the constitutional incorporation theory protects all causes of action which were in existence at the time the constitution was adopted—regardless of whether they were created through the common law, or legislatively.197

Given the fact that the substantive/procedural distinction would not in all cases accurately identify those pieces of legislation that were enacted to create substantive rights, then the limitation will generally be regarded as an ingredient of the cause of action and, thus, a [substantive] condition precedent to suit. If, on the other hand, the cause of action was cognizable at common law or was made such by virtue of another or different statute, then a validly enacted time limitation will generally be regarded as a mere [procedural] Statute of Limitations, which may, if pleaded, preclude enforcement of the remedy, but does not extinguish the right.

Id. at 699, 443 N.Y.S.2d at 82 (citation omitted; emphasis in original).

For other cases supporting the general rule that limitations placed on statutorily created causes of action are deemed substantive, whereas those placed on common law causes of action are deemed procedural, see, e.g., Hatfield v. Bishop Clarkson Mem. Hosp., 679 F.2d 1258, 1260-61 n.2 (8th Cir. 1982); Herm v. Stafford, 663 F.2d 669, 681 (6th Cir. 1981); Swaney v. Gage County, 64 Neb. 627, 629, 90 N.W. 542, 543 (1902); Ramono v. Ramono, 19 N.Y.2d 444, 448, 227 N.E.2d 389, 393, 280 N.Y.S.2d 570, 574 (1967); Ocampo v. Racine, 28 Wis. 2d 506, 513, 137 N.W.2d 477, 481 (1965). But see Bolick v. American Barmag Corp., 306 N.C. 364, 369, 293 S.E.2d 415, 419-20 (1982) (holding that substantive limitations do not necessarily have to be created in the same statute as created the right, and that the legislature has the authority to establish a condition precedent to what originally was a common law cause of action). 196. Kahn v. Trans World Airlines, Inc., 82 A.D.2d 696, 699-700, 443 N.Y.S.2d 79, 82 (N.Y. App. Div. 1981).

which would, or would not, violate article I, section 13, it should not be used as a test of constitutionality under that provision. This is especially true given the fact that the Nebraska court in Colton did not even apply the criteria of a substantive limitation in making its determination of what to label the ten-year statute of repose. Unless such criteria is applied, this substantive/procedural distinction cannot even serve as a rule of thumb to indicate a statute's possible constitutional infirmity under the access-to-the courts provision.

Had the court in Colton realized the illusory nature of the substantive/procedural "test," it might not have been so willing to come to the erroneous conclusion that the professional malpractice statute of repose contained in section 25-222 is a substantive limitation and is not in violation of article I, section 13, of the Nebraska constitution.

IV. CONCLUSION

The general and pervasive confusion that has developed between jurisdictions as to the proper interpretation and application of the access-to-the-courts provision contained in most state constitutions can, to some extent, be alleviated by classifying jurisdictions according to the theory of construction which they employ. In doing so, three predominant theories of construction can be discerned: the "no restriction," "due process," and "constitutional incorporation" theories. The theory of construction, which a jurisdiction employs, dictates the test of constitutionality to be applied, the degree of restriction which will be placed on legislation tending to deny access to the courts, and the amount of protection which will be afforded common law or statutory causes of action predating the constitution.

Prior to Colton v. Dewey, Nebraska's precedent evidenced a

198. See supra note 195 and accompanying text.
199. The failure to provide any analysis which would indicate that the repose contained in § 25-222 is, in fact, substantive, is especially troublesome given the fact that the court in Cedars Corp. v. Swoboda, 210 Neb. 180, 313 N.W.2d 276 (1981), found the statute of repose to be a procedural enactment which would apply retroactively to all actions accruing before the statute's effective date which had not been barred by the ten-year prescriptive period of repose. Id. at 181, 313 N.W.2d at 277. See also Hatfield v. Bishop Clarkson Mem. Hosp., 679 F.2d 1258, 1260 n.2 (8th Cir. 1982) (indicating that the repose contained in § 25-222 was procedural, distinguishing it from the substantive limitation contained in Swaney v. Gage County, 64 Neb. 627, 90 N.W. 542 (1899)). Since no explanation for this discrepancy was given by the court in Colton, one must conclude that the Nebraska court is either confused about the nature of the repose, or the Nebraska court has resolved itself to construe the statute according to the result which it wishes to achieve in any given case.
strong adherence to the constitutional incorporation theory of con-
struction. Under this theory, the access-to-the-courts provision is
construed as constitutionally protecting all causes of action in
existence at the time the constitution was adopted from subse-
quent legislative abrogation or diminution, unless an adequate
substitute remedy is afforded for the one which is lost. Under this
interpretation, Nebraska’s professional negligence ten-year statute
of repose would seem to be in direct violation of the state’s access-
to-the-courts provision since it legislatively abrogates a potential
plaintiff’s malpractice cause of action where the injury does not oc-
cur, and the action does not accrue, within ten years after the last
negligent treatment giving rise to the injury. The Colton court,
however, ignored this past precedent and construction and errone-
ously upheld the validity of the statute of repose. It is urged that
the holding in Colton not only does violence to plaintiff’s constitu-
tionally guaranteed right of access to the courts, but also flies in
the face of the traditional concept that statutes of limitations can-
not operate to bar a cause of action until one has accrued, and,
therefore, should be abandoned at the earliest opportunity.

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