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THE ONCE AND FUTURE PROMISE OF ACCESS TO JUSTICE IN WASHINGTON’S ARTICLE I, SECTION 10

Justice Debra Stephens*

INTRODUCTION

As a judge, I am committed to the idea that access to justice is a fundamental right. This right ensures a court system that is open, honest, and accessible to all. Courts and scholars have struggled in their attempts to uncover the historical roots of this right, to find its clear expression in the provisions of our state and federal constitutions, and to give it effect in concrete situations. This paper does not add to the existing scholarship in terms of historical research or new theory. I am not a historian, nor an academic. What I hope to set out in these pages is a sufficient “working knowledge” of the provenance of the right of access to courts to justify reliance on Washington’s article I, section 10 as an expression of this right. More broadly, I consider whether courts might better effectuate access to justice by focusing less on article I, section 10 as an individual right and more on its systemic, institutional value.

Part I reviews the adoption of article I, section 10 in the 1889 Washington State Constitution, tracing its origins to Magna Carta in 1215 and to legal philosophies well known to the drafters of our federal and state constitutions. Part II considers judicial interpretations of article I, section 10 relevant to access to justice principles. Finally, Part III ponders whether we might better effectuate the promise of article I, section 10 by looking beyond the dominant individual rights focus of most cases and appreciating that access to justice also expresses a collective or systemic value in our democratic system. This Part returns to a theme identified in the first Washington State Supreme Court case to cite article I, section 10, which recognized it as a mandatory obligation of government. Focusing greater attention on access to justice in its collective expression emphasizes the special role courts play in

*Justice, Washington State Supreme Court. I owe a debt of gratitude for their insights and assistance to Thomas Glassman, William Goodling, Diego Rondón Ichikawa, Judy Vandervort, Devra Cohen, and Hugh Spitzer.

preserving democracy, and the special claim they have on public confidence and resources.

I. A BRIEF REVIEW OF ARTICLE I, SECTION 10 AND ITS ORIGINS

When Constitutional Convention delegate, Allen Weir, delivered a proposed bill of rights to the Washington State Constitutional Convention on July 11, 1889, article I, section 8 read:

No court shall be secret but justice shall be administered openly and without purchase, completely and without delay, and every person shall have remedy by due course of law for injury done him in his person, property or reputation.¹

This open courts clause was a verbatim copy of the Oregon Constitution at the time.² Fourteen days later, the Committee on Preamble and Bill of Rights presented new language³ to the Committee as a whole, which adopted it.⁴ Article I, section 8 was moved to article I, section 10:

Administration of Justice: Justice in all cases shall be administered openly, and without unnecessary delay.⁵

There is no indication as to why the language was changed.⁶ Some have surmised that the truncated language denotes a truncated right.⁷

1. THE JOURNAL OF THE WASHINGTON STATE CONSTITUTIONAL CONVENTION 1889 51 (Beverly Paulik Rosenow ed., 1999) [hereinafter JOURNAL].

2. See OR. CONST. art. I, § 10.

3. JOURNAL, *supra* note 1, at 19. A group which included Messrs. Warner, Hicks, Comegys, Henry, Dallam, Kellog, and Sohns but did not include Mr. Weir, who had originally delivered the language fourteen days earlier.

4. *Id.* at 154. It was not only the open courts clause that changed, but the entire Bill of Rights. Further, it was stretched from twenty-five sections to thirty-one.

5. WASH. CONST. art. I, § 10. This is the language as it stands today. See JOURNAL, *supra* note 1, at 499.

6. Janice Sue Wang, *State Constitutional Remedy Provisions and Article I, Section 10 of the Washington State Constitution: The Possibility of Greater Judicial Protection of Established Tort Causes of Action and Remedies*, 64 WASH. L. REV. 203, 215 (1989) (quoting JOURNAL, *supra* note 1, at 51). The verbatim notes of the Constitutional Convention have been lost or destroyed. Further, a search of the Washington State Archives revealed only two saved documents, both handwritten, from the committee on Preamble and the Bill of Rights, neither of which offer any explanation for the textual changes. No other documents relating to the preamble or bill of rights exist at the Washington State Archives. The minutes, contained on microfiche at the Washington State Law Library and printed in Rosenow's book, do not reveal any of the committee discussion on the Washington State Bill of Rights but rather only the votes and the initial and final versions of article I, section 10.

7. See, e.g., Gregory C. Sisk, *The Constitutional Validity of the Modification of Joint and Several*

Indeed, in *Shea v. Olson*⁸ in 1936 the Washington State Supreme Court stated that Washington's constitution, unlike the constitutions in Oregon and some other states, contains no right-to-access remedy provision.⁹ Notably, the court in *Shea* made no mention of article I, section 10. Given the absence of any stated intent, however, it seems unwise to read too much into the particular language. A purely textual approach fails to account for the historically-grounded meaning of clauses such as article I, section 10, which was quite familiar to the framers of the Washington State Constitution.

Article I, section 10 expresses principles traceable to chapters 39 and 40 of the original Magna Carta of 1215. This document, recognized as embodying the "rule of law," emerged out of the conflict between King John and rebellious barons who insisted on putting to paper a declaration of fundamental rights "that had heretofore been vaguely understood," to "make it more difficult for the king to ignore or evade them."¹⁰ The original language read:

No freeman shall be taken or imprisoned or disseised or exiled or in any other way destroyed, nor will we go upon him nor send upon him, except by the lawful judgment of his peers or by the law of the land. To no one will we sell, to no one will we refuse or delay, right or justice (translated from Latin to English).¹¹

The Magna Carta was reissued several times, and eventually chapters 39 and 40 reemerged as chapter 29 of the charter published in 1297:

No freeman shall be taken, or imprisoned, or be disseised of his freehold, or liberties, or free customs, or be outlawed, or exiled,

Liability in the Washington Tort Reform Act of 1986, 13 U. PUGET SOUND L. REV. 433, 449 n.75 (1990) ("It is a quantum leap from that 'open access' provision to guarantee a right to a particular tort remedy or substantive rule of law."). *But see* Wang, *supra*, note 6, at 225–26 (article I, section 10 of the Washington State Constitution "can also become a guarantee of the right to a remedy, protecting tort victims from future inroads by the legislature into their right to recover").

8. 185 Wash. 143, 53 P.2d 615 (1936).

9. *Id.* at 160–61, 53 P.2d at 622 ("In this state, the Constitution contains no such [remedy] provision, but only the general 'due process' and 'equal protection' clauses. There is, therefore, no express, positive mandate of the Constitution which preserves such [tort] rights of action from abolition by the Legislature."). *But see* King v. King, 162 Wash. 2d 378, 388, 174 P.3d 659, 664 (2007) ("We have generally applied the open courts clause in one of two contexts: 'the right of the public and press to be present and gather information at trial and the right to a remedy for a wrong suffered.'" (citing ROBERT F. UTTER & HUGH D. SPITZER, *THE WASHINGTON STATE CONSTITUTION: A REFERENCE GUIDE* 24 (G. Alan Tarr ed., 2002)).

10. William C. Koch, Jr., *Reopening Tennessee's Open Courts Clause: A Historical Reconsideration of Article I, Section 17 of the Tennessee Constitution*, 27 U. MEM. L. REV. 333, 349–50 (1997).

11. *Id.* at 350 (quoting generally accepted translation, based on WILLIAM S. MCKECHNIE, *MAGNA CARTA, A COMMENTARY ON THE GREAT CHARTER OF KING JOHN* 49 (2d ed. 1914)).

or any otherwise destroyed; nor will we not pass upon him, nor condemn him, but by lawful judgement of his peers, or by the law of the land. We will sell to no man, we will not deny or defer to any man either justice or right.¹²

In his *Second Institute*, Lord Edward Coke found that chapter 29 of the 1297 Magna Carta was the root from which “many fruitfull [sic] branches of the law of England have sprung.”¹³ One such branch grew into modern due process, while another is seen as the seedling for a right of all citizens to a remedy in their private relations with one another.¹⁴ The link between the words of the Magna Carta and article I, section 10 was established by Coke, who described chapter 29 as confirming that:

[E]very subject of this realm, for injury done to him in goods, lands, or person, by any other subject, be he ecclesiastical, or temporall, . . . or any other without exception, may take his remedy by the course of the law, and have justice, and right for the injury done to him, freely without sale, fully without any deniall, and speedily without delay . . . [J]ustice must have three qualities; it must be . . . free; for nothing is more odious than justice let to sale; full, for justice ought not to limp, or be granted piece-meal; and speedily, for delay is a kind of denial; and then it is both justice and right.¹⁵

It is well recognized that Lord Coke’s teachings were highly influential in the American colonies, and his view of chapter 29’s meaning prevailed among the drafters of colonial and state charters.¹⁶

More broadly, the philosophy of natural rights or natural law also resonated with constitutional framers, including the delegates to the Washington State Constitutional Convention.¹⁷ Certainly by 1889, Sir

12. EDWARD COKE, *THE SECOND PART OF THE INSTITUTES OF THE LAWS OF ENGLAND* 45 (London, W. Clarke and Sons 1817) (1641).

13. *Id.*

14. Thomas R. Phillips, *The Constitutional Right to a Remedy*, 78 N.Y.U. L. REV. 1309, 1320 (2003).

15. *Id.* at 1320–21 (translating portions of Latin in COKE, *supra* note 12, at 55).

16. See Edward S. Corwin, *The “Higher Law” Background of American Constitutional Law*, 42 HARV. L. REV. 149, 175–76 (1928); David Schuman, *Oregon’s Remedy Guarantee: Article I, Section 10 of the Oregon Constitution*, 65 OR. L. REV. 35, 39 (1986) (“While commentators generally agree that Coke’s interpretation of the Magna Carta is more enthusiastic than accurate, no one doubts its influence, particularly in America.” (citation omitted)).

17. See James A. Bamberger, *Confirming the Constitutional Right of Meaningful Access to the Courts in Non-Criminal Cases in Washington State*, 4 SEATTLE J. SOC. JUST. 383, 392–93, 427 n.28 (2005) (explaining natural law theory expressed in Washington State Constitution); *id.* at 424 n.43 (referencing influence of non-delegate W. Lair Hill, whose contemporaneous writings in the Oregonian newspaper confirm the natural rights philosophy embraced by the framers); W. Lair Hill,

William Blackstone's commentaries were widely read and accepted.¹⁸ Blackstone described the right to a remedy drawn from the Magna Carta as a critical portion of his triune rule for absolute rights: "The right of personal security, the right of personal liberty, and the right of private property."¹⁹ He distinguished these rights from "relative" rights which arose only through a free society where people have relationships with others.²⁰ "But in vain would these rights be declared, ascertained, and protected by the dead letter of the laws, if the constitution had provided no other method to secure their actual enjoyment."²¹ Absolute rights "could not be protected simply by declaratory law; individuals required means of vindicating them" including the "right to a remedy."²²

Recognizing the theory of law embraced by Washington's constitutional framers, and the direct lineage connecting article I, section 10 to chapter 29 of the 1297 Magna Carta, it is difficult to justify a crabbed reading of this provision. We should not focus so narrowly on the precise phrasing that we miss the significance of the framers' insistence upon including this well-understood statement in the first place. In fact, the framers altered and deleted much of the language proposed in the initial July 11 draft of the bill of rights. For example, changes were made to article I, section 1 which originally read:

All men are possessed of equal and unalienable natural rights, among which are life, liberty and the pursuit of happiness. All power is inherent in the people, and all free governments are founded on their authority and instituted for their peace, safety and happiness; and they have at all times the right to alter or reform the government as they may think proper.²³

No one would suggest that because the delegates saw fit to remove the

Washington: A Constitution Adapted to the Coming State, MORNING OREGONIAN, July 4, 1889, at v–vi.

18. See Koch, *supra* note 10, at 357–65.

19. 1 WILLIAM BLACKSTONE, COMMENTARIES *129. Blackstone's commentaries were published between 1765 and 1769.

20. *Id.* at *422.

21. *Id.* at *140–41.

22. Phillips, *supra* note 14, at 1321–22; see BLACKSTONE, *supra* note 19, at *141–44. In his third volume of commentaries, Blackstone observed: "for it is a settled and invariable principle in the laws of England, that every right when withheld must have a remedy, and every injury its proper redress." 3 BLACKSTONE, *supra* note 19, at *109; see also *Marbury v. Madison*, 5 U.S. 137, 163 (1803) (citing 3 BLACKSTONE, *supra* note 19) ("The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right.").

23. JOURNAL, *supra* note 1, at 51.

clause that all men are possessed of “equal and unalienable natural rights” this signified their rejection of the natural rights theory.²⁴ Applying this logic to the removal of other provisions such as the “right to alter or reform the government” or that Washington was “an inseparable part of the American Union” is nonsensical.²⁵ No one would suggest this intimated a separatist movement was afoot.

Additional confirmation that the drafters did not intend to diminish rights by trimming the wording of particular bill of rights provisions can be found in article I, section 30, which expressly recognizes that “[t]he enumeration in this Constitution of certain rights shall not be construed to deny others retained by the people.”²⁶ The State Supreme Court understood this early in Washington’s history:

[T]he expression that the declaration of certain fundamental rights belonging to all individuals and made in the bill of rights shall not be construed to mean the abandonment of others not expressed, which inherently exist in all civilized and free states. Those expressly declared were evidently such as the history and experience of our people had shown were most frequently invaded by arbitrary power, and they were defined and asserted affirmatively. Consistently with the affirmative declaration of such rights, it has been universally recognized by the profoundest jurists and statesmen that certain fundamental, inalienable rights under the laws of God and nature are immutable, and cannot be violated by any authority founded in right.²⁷

Further evidence of the framers’ commitment to natural rights and natural law theory is their decision to include article I, section 32: “*Fundamental principles*: A frequent recurrence to fundamental principles is essential to the security of individual right and the perpetuity of free government.”²⁸

This cursory overview barely scratches the surface of what is known about the meaning and origins of Washington’s article I, section 10 and comparable provisions in other state constitutions.²⁹ Many excellent

24. *See id.* at 51, 154.

25. The “right to alter or reform the government” and “The State of Washington is an inseparable part of the American Union” were removed. *Id.*

26. WASH. CONST. art. I, § 30; *see also id.* art. I, § 1 (noting “governments . . . are established to protect and maintain individual rights”).

27. *State v. Clark*, 30 Wash. 439, 443–44, 71 P. 20, 21 (1902).

28. WASH. CONST. art. I, § 32; *see also* ROBERT F. UTTER & HUGH D. SPITZER, *THE WASHINGTON STATE CONSTITUTION* 57 (2d ed. 2013).

29. Most notably, I do not address the significant movements in history beyond the Magna Carta

works provide a far more thorough review.³⁰ For one thing, they confirm that, by most counts, forty states have parallel provisions traceable to chapter 29 of the 1297 Magna Carta.³¹ The interpretation of these provisions by state courts varies greatly, not generally based on textualist approaches, and sometimes even among decisions within a single state.³² Moreover, the concepts embodied in article I, section 10 are not easily compartmentalized, as they encompass notions of due process, privileges and immunities, equal protection, the right to trial by jury, and more generally the very role of a justice system.³³

Despite the fact that many unanswered questions remain, I resist the suggestion that courts should hold back in attempting to broadly effectuate an access-to-courts principle because we know too little.³⁴ The origin of article I, section 10 reveals quite a lot, not the least of which is

and its interpretation by Lord Coke and Blackstone that shape our modern legal understanding. Themes drawn from American political history and thought, and more broadly the experience of effectuating natural rights in a democratic society, all help shape our present understanding of the interconnected principles expressed in part in article I, section 10 and related provisions. *See generally* Judith Resnik, *Constitutional Entitlements to and in Courts: Remedial Rights in an Age of Egalitarianism: The Childress Lecture*, 56 ST. LOUIS U. L.J. 917 (2012).

30. *See* John H. Bauman, *Remedies Provisions in State Constitutions and the Proper Role of the State Courts*, 26 WAKE FOREST L. REV. 237 (1991); JENNIFER FRIESEN, *STATE CONSTITUTIONAL LAW: LITIGATING INDIVIDUAL RIGHTS, CLAIMS AND DEFENSES* (4th ed. 2006 & Supp.); H.D. Hazeltine, *The Influence of Magna Carta on America Constitutional Development*, 17 COLUM. L. REV. 1 (1917); Jonathan M. Hoffman, *Questions Before Answers: The Ongoing Search to Understand the Origins of the Open Courts Clause*, 32 RUTGERS L.J. 1005 (2001); Resnik, *supra* note 29, at 917; Schuman, *supra* note 16, at 35; David Schuman, *The Right to a Remedy*, 65 TEMP. L. REV. 1197 (1992); Wang, *supra* note 6, at 205–18.

31. Phillips, *supra* note 14, at 1310; *see* FREISEN, *supra* note 30, at 6-65 to 6-67 (separating different versions of article I, section 10 type clauses). For a recently prepared appendix of state provisions, *see* Resnik, *supra* note 29, at 1021–54 (appendix).

32. *See* Phillips, *supra* note 14, at 1326–39 (reviewing various approaches); *id.* at 1314 (“There is no correlation between the words of a particular guarantee and how expansively the courts of that state have applied it.”); Bauman, *supra* note 30, at 244 (noting varying interpretations of identical texts); *see, e.g.*, *Hale v. Port of Portland*, 783 P.2d 506, 518 (Or. 1989) (Linde, J., concurring) (observing the Oregon Supreme Court “has written many individually tenable but inconsistent opinions” about the right to a remedy); Koch, *supra* note 10, at 436 (suggesting one explanation for the plurality of state court interpretations is “the absence of the unifying effect of the United States Supreme Court decisions supplying the states with a convenient decision-making paradigm”).

33. For this reason, I disagree somewhat with Koch’s observation about the absence of a federal article I, section 10 parallel. Numerous United States Supreme Court decisions have informed state court interpretations concerning access to justice, regardless of the rights rubric a court invokes. *See, e.g.*, *Tennessee v. Lane*, 541 U.S. 509 (2004); *Lassiter v. Dep’t of Soc. Servs.*, 452 U.S. 18 (1981); *Boddie v. Connecticut*, 401 U.S. 371 (1971).

34. *See* Hoffman, *supra* note 30, at 1005 (positing history to date can confirm only original intent of chapter 29 Magna Carta clause was to protect against the king’s interference with local courts). I agree, however, with the author’s conclusion that courts should clearly articulate the grounds, historical or otherwise, for the analysis of open courts clauses.

the interconnectedness of the constitutional principles emanating from chapter 29 of the 1297 Magna Carta. For a sense of how these principles shape the promise of access to justice in Washington, it is helpful to briefly consider the areas in which article I, section 10 has been addressed in Washington State Supreme Court decisions.

II. SOME THOUGHTS ON JUDICIAL INTERPRETATION OF ARTICLE I, SECTION 10 RELEVANT TO ACCESS TO JUSTICE PRINCIPLES

Washington appellate decisions have cited article I, section 10 hundreds of times, most often with respect to the right to open, public court proceedings and records.³⁵ It is now well established that article I, section 10 secures this right for the general public as well as individual litigants.³⁶ And, there is a recognized link between this aspect of article I, section 10 and the First Amendment to the United States Constitution, as well as the public criminal trial guarantees in article I, section 22 and the Sixth Amendment to the United States Constitution.³⁷ This aspect of article I, section 10 is also reflected in the Judiciary article of the Washington Constitution, providing that courts will remain open except on nonjudicial days.³⁸

A separate line of decisions considers whether article I, section 10 guarantees an individual a right to meaningfully participate in litigation, including to seek particular substantive remedies. In this vein, decisions have largely involved challenges to legislative changes to remedial mechanisms or court processes, with Washington cases arising in areas familiar to other state courts.³⁹ Importantly, these decisions are not limited to consideration of open courts clauses, but also involve, among others, constitutional guarantees of due process, equal protection, privileges and immunities, jury trial, vested rights and the principle of

35. See, e.g., *Dreiling v. Jain*, 151 Wash. 2d 900, 93 P.3d 861 (2004) (records); *Seattle Times Co. v. Ishikawa*, 97 Wash. 2d 30, 640 P.2d 716 (1982) (proceedings).

36. *Allied Daily Newspapers of Wash. v. Eikenberry*, 121 Wash. 2d 205, 209–10, 848 P.2d 1258, 1260–61 (1993) (public’s right); *In re Det. of Morgan*, 180 Wash. 2d 312, 325, 330 P.3d 774, 781 (2014) (individual right in civil proceeding).

37. See generally Anne L. Ellington & Jeanine Blackett Lutzenhiser, *In Washington State, Open Courts Jurisprudence Consists Mainly of Open Questions*, 88 WASH. L. REV. 491, 494–95 (2013); Jeanine Blackett Lutzenhiser, *An Open Courts Checklist: Clarifying Washington’s Public Trial and Public Access Jurisprudence*, 87 WASH. L. REV. 1203 (2012).

38. WASH. CONST. art. IV, § 2 (Supreme Court of Washington); *id.* § 6 (superior courts).

39. See Phillips, *supra* note 14, at 1335–39 (categorizing waves of decisions).

separation of powers.⁴⁰ Commentators often group them according to the type of legislation challenged or the test devised by the court to measure constitutional compliance.⁴¹ Thus, it is possible to compare decisions considering the abolition of common law actions in favor of workers compensation laws,⁴² the abolition of heart balm actions,⁴³ the validity of guest/host statutes,⁴⁴ enactment of statutes of repose in the construction field,⁴⁵ and waves of legislative reform affecting product liability and medical malpractice actions.⁴⁶

As commentators recognize, access to courts per se has not always been the guiding principle in these cases.⁴⁷ Notions of due process, equal protection and “vested rights” may shape the particular lens for judicial review, which has been largely deferential to the legislative prerogative to make policy. Thus, Washington decisions have sustained the legislative abolition of rights of action if an adequate substitute remedy is given, or if the legislation is justified by substantial public necessity.⁴⁸ These decisions, implicating access to justice, whether under article I, section 10 or other constitutional provisions, bring into stark relief the inherent tension between recognition of an individual right to litigate and the legislative prerogative to make policy.⁴⁹

40. See *id.*; Charles K. Wiggins et al., *Washington's 1986 Tort Legislation and the State Constitution: Testing the Limits*, 22 GONZ. L. REV. 193, 196–204 (1986–87) (surveying constitutional doctrines involved in challenges to tort reform legislation).

41. See Phillips, *supra* note 14, at 1335–39 (noting groups of cases across states); Wiggins et al., *supra* note 40, at 226–54 (analyzing tort reform provisions under various constitutional tests).

42. See *State ex rel. Fletcher v. Carroll*, 94 Wash. 531, 162 P. 593 (1917); Wiggins et al., *supra* note 40, at 211–12.

43. See Phillips, *supra* note 14, at 1331; Rotwein v. Gersten, 36 So. 2d 419 (Fla. 1948) (upholding repeal of action for alienation of affections).

44. See *Shea v. Olson*, 185 Wash. 143, 53 P.2d 615 (1936).

45. See *1519-1525 Lakeview Blvd. Condo. Ass'n v. Apartment Sales Corp.*, 144 Wash. 2d 570, 29 P.3d 1249 (2001).

46. See *Lowy v. PeaceHealth*, 174 Wash. 2d 769, 280 P.3d 1078 (2012); *Putman v. Wenatchee Valley Med. Ctr., P.S.*, 166 Wash. 2d 974, 216 P.3d 374 (2009); Phillips, *supra* note 14, at 1332–24.

47. See Wiggins et al., *supra* note 40, at 196–204 (overview). Ironically, Washington boldly proclaimed a “right of access to the courts” based on article I, section 4 in *Carter v. University of Washington*, 85 Wash. 2d 391, 398, 536 P.2d 618, 623 (1975), only to reverse itself the next year in *Housing Authority v. Saylor*, 87 Wash. 2d 732, 742, 557 P.2d 321, 327 (1976), which recognizes “[a]ccess to the courts is amply and expressly protected by other provisions,” but does not say which provisions. See Wiggins et al., *supra* note 40, at 201–02.

48. See *Godfrey v. State*, 84 Wash. 2d 959, 530 P.2d 630 (1975); *Blanchard v. Golden Age Brewing Co.*, 188 Wash. 396, 423, 63 P.2d 397, 408–09 (1936); *State ex rel. Fletcher v. Carroll*, 94 Wash. 531, 162 P. 593 (1917); *Kluger v. White*, 281 So. 2d 1 (Fla. 1973) (leading case holding that legislation must either provide a substitute remedy or be justified by overpowering public necessity).

49. The decision in *1519-1525 Lakeview Boulevard Condominium Ass'n* is illustrative. There, the

This tension necessarily implicates separation of powers concerns, as the individual right translates into the duty and prerogative of the judicial branch to declare what the law is.⁵⁰ The looming shadow of separation of powers seems to shrink when the challenge at issue concerns a statute directly affecting court procedures. In such instances, the Washington State Supreme Court has not hesitated to recognize a right of access to courts under article I, section 10 that prohibits the legislature from denying certain litigants their ability to litigate. For example, in *Doe v. Puget Sound Blood Center*⁵¹ the Court recognized that the broad right of a litigant to discovery under the court rules cannot be legislatively abrogated because it “is necessary to ensure access to the party seeking the discovery.”⁵² The Court eloquently observed:

[J]ustice which is to be administered openly is not an abstract theory of constitutional law, but rather is the bedrock foundation upon which rests all of the people’s rights and obligations. In the course of administering justice the courts protect those rights and enforce those obligations. Indeed, the very first enactment of our state constitution is the declaration that governments are established to protect and maintain individual rights.⁵³

The Court returned to this theme in *Putman v. Wenatchee Valley Medical Center, P.S.*,⁵⁴ invalidating a medical malpractice “certificate of merit” statute as violating both access to courts under article I, section 10 and separation of powers.⁵⁵ Two authorities sufficed to justify the Court’s conclusion that the statute infringed on the plaintiff’s right of

Court refused to entertain an access to courts challenge to a builders’ statute of repose, RCW 4.16.310. *Lakeview*, 144 Wash. 2d at 581, 29 P.3d at 1255. Noting that *Shea* was not dispositive because it did not address article I, section 10, the Court adopted what it described as the view of the Oregon Supreme Court, recognizing the “proper function of legislatures to limit the availability of causes of action by the use of statutes of limitation so long as it is done for the purpose of protecting a recognized public interest.” *Id.* (quoting *Josephs v. Burns*, 491 P.2d 203, 207 (Or. 1971), *abrogated on other grounds*, *Smothers v. Gresham Transfer, Inc.*, 23 P.3d 333 (Or. 2001)). The Court concluded: “Because we recognize that the legislature has broad police power to pass laws tending to promote the public welfare, we decline at this time to determine whether article I, section 10 of the state constitution guarantees a right to a remedy.” *Id.*

50. This underscores the recognized connection between the right to a remedy principle expressed in open courts clauses and expressed more globally as inherent in the role of courts, as in *Marbury v. Madison*, 5 U.S. 137, 163 (1803).

51. 117 Wash. 2d 772, 819 P.2d 370 (1991).

52. *Id.* at 782, 819 P.2d at 376.

53. *Id.* at 780, 819 P.2d at 375.

54. 166 Wash. 2d 974, 216 P.3d 374 (2009).

55. *Id.* at 979–85, 216 P.3d at 376–80.

access: *Puget Sound Blood Center* and *Marbury v. Madison*.⁵⁶ Subsequently, in *Lowy v. Peacehealth*,⁵⁷ the Court again relied on *Puget Sound Blood Center* to conclude that a litigant's ability to conduct discovery is protected by the right of access under article I, section 10. This constitutional principle supported a narrow construction of a hospital quality improvement statute to refer only to *external* review and not internal review of medical errors.⁵⁸

The limited reach of these decisions is clear from the cautionary passage in *Puget Sound Blood Center*.⁵⁹ The Court did not announce a broad right to a substantive remedy, nor suggest any retreat from its earlier decisions recognizing the power of the legislature to restrict, modify or eliminate causes of action entirely based on providing a substitute remedy or demonstrating a strong public necessity to do so. This is not to say that the Court has failed to appreciate the interest of litigants in seeking a remedy for injury or in asserting common law defenses.⁶⁰ However, it has not to date relied on this interest as sufficient to impose an absolute limit on the legislature's prerogative to modify the common law.⁶¹

This brings us to the question of money, or more precisely, the Court's response to claims that the expense of litigation denies access to justice. In this vein, the Court has observed: "Our cases on the right of access are somewhat perplexing."⁶² A brief flurry of activity arose

56. *Id.* at 979, 216 P.3d at 377 ("Requiring plaintiffs to submit evidence supporting their claims prior to the discovery process violates the plaintiffs' right of access to courts. It is the duty of the courts to administer justice by protecting the legal rights and enforcing the legal obligations of the people."); see *Marbury v. Madison*, 5 U.S. 137, 163 (1803).

57. 174 Wash. 2d 769, 776, 280 P.3d 1078, 1082 (2012).

58. *Id.* at 776-90, 280 P.3d at 1082-89.

59. *Doe v. Puget Sound Blood Ctr.*, 117 Wash. 2d 772, 781, 819 P.2d 370, 375 (1991) ("It is important to note that our consideration here is of the right of *access*. We are not here considering the validity of a theory of recovery. We are not considering legislative or judicial creation or abolition of a cause of action. We are not considering the abrogation or diminishment of a common law right. These are all issues for other cases." (citing *Wiggins et al.*, *supra* note 40)).

60. For example, in *Hunter v. North Mason High School*, the Court held: "The right to be indemnified for personal injuries is a substantial property right." 85 Wash. 2d 810, 814, 539 P.2d 845, 848 (1975); see also *Puget Sound Blood Ctr.*, 117 Wash. 2d at 782, 819 P.2d at 375 (citing *Hunter*).

61. See 1519-1525 Lakeview Blvd. Condo. Ass'n v. Apartment Sales Corp., 144 Wash. 2d 570, 29 P.3d 1249 (2001) (refusing to invalidate state of repose as violating article I, section 10); *c.f.*, *Godfrey v. State*, 84 Wash. 2d 959, 530 P.2d 630 (1975) (applying due process vested rights analysis and refusing to invalidate statute modifying common law to remove plaintiff's contributory negligence as a bar to recovery).

62. *Puget Sound Blood Ctr.*, 117 Wash. 2d at 781, 819 P.2d at 375.

following *O'Connor v. Matzdorff*,⁶³ where the Court waived a filing fee to secure access for indigent litigants.⁶⁴ Then in *Iverson v. Marine Bancorporation*,⁶⁵ the Court acknowledged the prohibitive costs incident to an appeal, and said: “The administration of justice demands that the doors of the judicial system be open to the indigent as well as to those who can afford to pay the costs of pursuing judicial relief.”⁶⁶ Neither of these cases expressly relied on article I, section 10. And, as noted, a subsequent plurality decision pinning the “right of access to the courts” on article I, section 4 was disowned within a year.⁶⁷ In *Housing Authority v. Saylor*⁶⁸ the court expressed no doubt that a right of access to courts is protected by the Washington State Constitution, but it did not identify article I, section 10 as the source.⁶⁹

The big push for recognizing that the right of access to courts requires committing resources to assist poor civil litigants came in *King v. King*.⁷⁰ There, the Court considered whether a litigant in a dissolution proceeding involving custody of children was entitled to counsel at public expense under various constitutional provisions, including article I, section 10.⁷¹ While the Court acknowledged its statement in *Bullock v. Roberts*⁷² that, “[f]ull access to the courts in a divorce action is a fundamental right,”⁷³ it refused to extend this right beyond the requirement of courts to remove physical barriers to court access or to waive court fees.⁷⁴ *King* highlights the difficulty courts face when considering the right of access to justice as a mandate for public spending on private civil litigation. Even when their own essential

63. 76 Wash. 2d 589, 458 P.2d 154 (1969).

64. *Id.*

65. 83 Wash. 2d 163, 517 P.2d 197 (1973).

66. *Id.* at 167–78 (“Consistent with our affirmative duty to keep the doors of justice open to all with what appears to be a meritorious claim for judicial relief, we hold that the plaintiff is entitled to the relief requested [waiver of appellate fees and costs].”).

67. *See Carter v. Univ. of Wash.*, 85 Wash. 2d 391, 536 P.2d 618 (1975), *abrogated in part*, *Hous. Auth. v. Saylor*, 87 Wash. 2d 732, 557 P.2d 321 (1976).

68. 87 Wash. 2d 732, 557 P.2d 321 (1976).

69. *Id.* at 742, 557 P.2d at 327; *see also Doe v. Puget Sound Blood Ctr.*, 117 Wash. 2d 772, 782, 819 P.2d 370, 375 (1991) (saying of *Saylor*, “[u]nfortunately, the court did not explore the rationale for its conclusion”).

70. 162 Wash. 2d 378, 388, 174 P.3d 659, 664 (2007).

71. *Id.* at 381, 174 P.3d at 661.

72. 84 Wash. 2d 101, 104, 524 P.2d 385, 387 (1974).

73. *Id.* at 104 (citing *Boddie v. Connecticut*, 401 U.S. 371 (1971)).

74. *King*, 162 Wash. 2d at 390, 174 P.3d at 665–66 (“It is more than an insignificant linguistic leap to equate that barrier to access with a right to publicly funded legal representation.”).

funding is at issue, courts express reluctance to announce a broad right of access and are careful to respect the prerogative of legislative bodies to allocate public resources.⁷⁵

This brief overview of Washington case law offers an opportunity to pause and consider the path forward. Apart from a handful of statements in cases addressing the public trial aspect of article I, section 10, descriptions of the access-to-courts principle to date generally frame it as an individual right. More precisely, cases recognize it as a legitimate *interest* of individual litigants. However, I believe there is value in broadening this focus, and reconsidering article I, section 10 in its collective, communal sense. In this sense, it expresses not simply an individual right or interest in court processes or remedies, but also a societal commitment to an open and meaningful system of justice.

III. SEEING THE GREATER GOOD IN ACCESS TO JUSTICE UNDER ARTICLE I, SECTION 10

The first Washington State Supreme Court decision to cite article I, section 10 was *Rauch v. Chapman*⁷⁶ in 1897.⁷⁷ I have previously relied on *Rauch* for the proposition that article I, section 10 is mandatory.⁷⁸ But, until musing on the themes in this Essay, I had not fully appreciated its teachings.

Rauch involved an action by a taxpayer in Klickitat County to enjoin the county treasurer from paying certain warrants, including for juror fees, witness fees in criminal matters, and sheriff's fees for serving process.⁷⁹ The taxpayer complained that paying these bills required the county to exceed its debt limit under article VIII, section 6 of the Washington State Constitution. The Court rejected this argument, holding the debt limit was not intended to restrict the county's ability to provide for "certain necessary fundamental functions of government."⁸⁰ Quoting article I, section 10 and other bill of rights provisions implicated

75. See, e.g., *In re Juvenile Dir.*, 87 Wash. 2d 232, 552 P.2d 163 (1976). This decision, notable in recognizing the inherent power of the judiciary to compel the legislature to expend funds for court operations, makes no mention of article I, section 10. Based solely on a separation of powers analysis, the Court adopted a deferential standard requiring clear, cogent and convincing proof that court action is needed.

76. 16 Wash. 568, 48 P. 253 (1897).

77. *Id.* at 575, 48 P. at 255.

78. See *State v. Beskurt*, 176 Wash. 2d 441, 457, 293 P.3d 1159, 1167 (2013) (Stephens, J., concurring); *State v. Duckett*, 141 Wash. App. 797, 804, 173 P.3d 948, 951 (2007).

79. *Rauch*, 16 Wash. at 568–69, 48 P. at 253.

80. *Id.* at 574, 48 P. at 255.

by the county warrants, the Court explained:

All these provisions of their organic law are alike declared to be mandatory. It would make these various provisions of the constitution contradictory, and render some of them nugatory, if a construction were placed upon the limitation of county indebtedness which would destroy the efficiency of the agencies established by the constitution to carry out the recognized and essential powers of government. It cannot be conceived that the people who framed and adopted the constitution had such consequences in view.⁸¹

The Court's holding conveys more than the simple reality that government costs money, though that is certainly the bottom line.⁸² *Rauch* recognizes the higher law embodied in the constitution, which is “[d]esigned for [the people’s] protection in the enjoyment of the rights and powers which they possessed before the constitution was made.”⁸³ It articulates the vision of ordered society the framers embraced—with meaningful access to the courts at its center. For me, the discussion in *Rauch* underscores the word in article I, section 10 that has been the least emphasized in our cases: “Justice in all cases shall be administered openly, and without unnecessary delay.”⁸⁴

Inherent in this concept of justice is both an individual and a collective, systemic right. Both are important, and focusing on individual rights helps underscore the plurality of ways constitutional rights are experienced in daily life. A unique value in litigating individual rights lies in the repetition of similar stories involving different players. Judith Resnik has argued that “[t]he redundancy produced by litigants raising parallel claims of rights enables debate about the underlying legal rules. The particular structural obligations of trial level courts have advantages for producing, redistributing, and curbing power in a fashion that is generative in democracies.”⁸⁵

But, returning to the themes in *Rauch*, it is also important to recognize the *collective* right of access to justice secured by article I, section 10.

81. *Id.* at 575, 48 P. at 255.

82. *See* *Duryee v. Friars*, 18 Wash. 55, 60, 50 P. 583, 585 (1897) (saying of *Rauch*: “And with that holding we are well content; for that the maintenance of its government is of paramount importance needs no argument, and it cannot be done without money, or resorting to the county’s credit in some way”).

83. *Rauch*, 16 Wash. at 572, 48 P. at 253 (quoting THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION (1868)).

84. WASH. CONST. art. I, § 10 (emphasis added).

85. Resnik, *supra* note 29, at 938.

The promise that justice shall be administered openly and without undue delay describes a particular system of justice, i.e. a court system. As the Court recognized in *Rauch*, the framers plainly understood the open administration of justice to be an obligation of government, as essential to its functions as any part of government. In this sense, article I, section 10 differs from other, liberty-oriented bill of rights provisions. This aspect of article I, section 10 does not speak to freedoms citizens may exercise but to an institution the government must maintain.⁸⁶

Article I, section 10 is different from individually-focused bill of rights provisions in another way. A court's obligations under this provision do not depend on individual litigants asserting their rights. In the public trial context, Washington case law has long recognized that article I, section 10 imposes an independent duty on courts to engage in a careful analysis before closing any proceeding, regardless of whether the parties before the court object to closure.⁸⁷ This precedent is built in part on the understanding that article I, section 10 is more than an individual trial right; it speaks to rights held by the public as a whole.⁸⁸ A natural corollary is that article I, section 10 requires the maintenance of a justice system consistent with its values.

The core value at the heart of article I, section 10 is open, impartial justice. It has long been recognized that access to courts is “conservative of all other rights.”⁸⁹ It is essential to the maintenance of civil society.⁹⁰

86. There is, of course, a collective notion inherent in the recognition of individual rights generally, though it is often overlooked. Many provisions in early colonial charters and state constitutions use express language to make this point. *See, e.g.*, PA. CONST. of 1776 art. VIII (“That every member of society hath a right to be protected in the enjoyment of life, liberty and property, and therefore is bound to contribute his proportion towards the expense of that protection, and yield his personal service when necessary, or an equivalent thereto . . .”); THE COMPLETE BILL OF RIGHTS: THE DRAFTS, DEBATES, SOURCES, AND ORIGINS 22 (Neil H. Cogan ed., 1997) (guaranteeing that all inhabitants “may from Time to Time, and at all Times, freely and fully have and enjoy his and their Judgments and Consciences in matters of Religion throughout the said Province, they behaving themselves peaceably and quietly, and not using this Liberty to Licentiousness, nor to the civil Injury or outward disturbance of others” (quoting CONCESSION AND AGREEMENT OF THE LORDS PROPRIETORS OF THE PROVINCE OF NEW CAESAREA, OR NEW-JERSEY (1664)). There is a good example in the Washington State Constitution. WASH. CONST. art. I, § 5 (“Every person may freely speak, write and publish on all subjects, being responsible for the abuse of that right.”). But, with or without such language, few would argue that the recognition of individual rights is intended to elevate individual autonomy to the demise of the greater social good.

87. *See State v. Wise*, 176 Wash. 2d 1, 15–16, 288 P.3d 1113, 1120 (2012); *State v. Bone-Club*, 128 Wash. 2d 254, 257, 906 P.2d 325, 327 (1995) (citing *State v. Marsh*, 126 Wash. 142, 146–47, 217 P. 705, 706 (1923)).

88. *State v. Easterling*, 157 Wash. 2d 167, 174, 137 P.2d 825, 828 (2006).

89. *Chambers v. Balt. & Ohio R.R. Co.*, 207 U.S. 142, 148 (1907).

90. *See The Amy Warwick*, 67 U.S. 635, 667 (1862) (noting “the true test” of the existence of civil war is “[w]hen the regular course of justice is interrupted by revolt, rebellion, or insurrection,

This recognition should inform the way courts interpret article I, section 10, so that its application in particular contexts remains true to its focus. The failure of article I, section 10 to gain judicial acceptance as an individual right to substantive remedies should not be regarded as fatal to its effectiveness. Article I, section 10 remains an important expression of a central tenet of our social order.

We must recognize that access to justice defies absolutism in practice. No government has yet found the resources to fully fund all the promises of justice made in state and federal constitutions.⁹¹ And we must not be tempted to embrace an interpretation of a fundamental principle such as access to courts without some sense of proportionality and purpose, lest this constitutional right be made to carry the seeds of its own destruction.

We have far to go to secure the promise of article I, section 10, but focusing first and foremost on its collective promise of a meaningful system of justice can help emphasize the central place the courts occupy in our democratic society.⁹²

CONCLUSION

Article I, section 10 expresses the fundamental right of access to justice in Washington. While it may not be possible to explicate its precise origins, or to fully define its parameters, we have a sufficient working knowledge of its themes and provenance to justify reliance on this provision to improve our justice system. To this end, I encourage courts and commentators to reconsider the collective and systemic value the right expresses. Without discounting its significance as an individual right, we would do well to embrace article I, section 10's collective value as a constitutional mandate to develop and maintain a more open and accessible justice system.

so that the Courts of Justice cannot be kept open”).

91. See Resnik, *supra* note 29, at 973–78 (surveying efforts to fund courts and improve access for litigants).

92. See *id.* at 994 (“[C]ourts have a distinctive claim for public support as well as for public regulation because governments need the infrastructure that courts provide, and democracies need the opportunities for the multi-party interactions that adjudication entails. Courts offer links between individuals and government, and hence have a special claim on resources. Diminution of opportunities to use open courts impoverishes the status of individuals and diminishes the effectiveness of government.”).