The Use and Interpretation of Article I, Section Eight of the Minnesota Constitution 1861-1984

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THE USE AND INTERPRETATION OF ARTICLE I,
SECTION EIGHT OF THE MINNESOTA
CONSTITUTION 1861-1984

RUTH A. MICKELSEN†

Article I, section eight of the Minnesota Constitution, the remedies clause, has seldom surfaced in supreme court opinions. Despite its limited use by litigants and the judiciary, however, the clause enjoys continued vitality. Ms. Mickelsen's comprehensive historical survey of section eight includes discussion of the constitutional convention of 1857, the 1984 Green-Glo Turf Farms, Inc. decision of the Minnesota Supreme Court, and all of the section eight cases in between. On the basis of her thorough survey, analysis, and comparison with the Illinois and Wisconsin clauses, Ms. Mickelsen offers a prognosis for the Minnesota remedies clause.

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I. INTRODUCTION

A. An Overview

Although most attorneys are familiar with the equitable maxim "ubi jus, ibi remedium,"¹ they may not be aware of a section of the Minnesota Bill of Rights which contains similar phraseology. Article I, section eight (section eight), the remedies clause of the Minnesota Constitution, states:

Every person is entitled to a certain remedy in the laws for all injuries or wrongs which he may receive in his person, property or character; he ought to obtain justice freely and without purchase; completely and without denial; promptly and without delay, conformable to the laws.²

During the last ten years, the Minnesota Supreme Court has expressed increased interest in the protections offered by this section of the constitution. In 1974, a workers' compensation law abrogating a third party's right to indemnity against an employer was held to violate due process and section eight.³ On two occasions the Minnesota Supreme Court has sua sponte⁴ characterized state statutes as creating "difficult"⁵ or "grave"⁶ section eight problems. Recently, section eight has been used to challenge immunities from tort liability.⁷ The increasing use of the remedies

1. The phrase means "equity will not suffer a wrong to be without a remedy." J. EATON, HANDBOOK OF EQUITY JURISPRUDENCE 44 (1901).
4. Section eight arguments were not raised in the briefs. See Appellant's Brief and Appendix, Haugen v. Town of Waltham, 292 N.W.2d 737 (Minn. 1980); Brief for Appellant, Brief for Respondent, Kittson County v. Wells, Denbrook & Assocs., 308 Minn. 237, 241 N.W.2d 799 (1976).
5. Haugen v. Town of Waltham, 292 N.W.2d 737, 740 (Minn. 1980).
7. See Hage v. Stade, 304 N.W.2d 283, 288 (Minn. 1981) (Scott, J., dissenting); Anderson v. Stream, 295 N.W.2d 595, 600 (Minn. 1980); Cracraft v. St. Louis Park, 279 N.W.2d 801, 809 (Minn. 1979) (Kelley, J., dissenting); Appellant's Brief at 12, Naylor v. Minnesota Daily, 342 N.W.2d 632 (Minn. 1984); Appellant's Brief and Appendix at 10,
clause by litigants and the Minnesota Supreme Court inspires this survey and analysis.

An understanding of the court's interpretative struggle with this constitutional provision requires integrating changes in legal philosophy and theory during the nineteenth and twentieth centuries. The first section of this Article describes the transition from a natural rights to a positivistic approach and the accompanying changes in judicial philosophy and activism. The second section explores the historical underpinnings of the Minnesota provision. The third section presents and analyzes Minnesota Supreme Court decisions involving section eight. The fourth section compares the Minnesota Supreme Court's use of the remedies clause with interpretations of similar provisions by two other state supreme courts. The last section offers a prognosis for section eight.

B. Changes in American Legal Thought

An analysis of judicial interpretation of a historical document such as the Minnesota Constitution requires some discussion of the philosophical views of the time. H.L.A. Hart has characterized American legal thought as traditionally "beset by two extremes, respectively, the Nightmare and the Noble Dream." The Nightmare views the distinction between legislators and judges as mere illusion; judges actually create law when resolving disputes. The view that judges create law is associated with principles of legal positivism that permit or encourage judicial creation of new social and economic rights. The Noble Dream conceptualizes

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Nieting v. Blondell, 306 Minn. 122, 235 N.W.2d 597 (1975); Respondent's Brief and Appendix at 5, Nieting; Brief and Appendix of Amicus Curiae at 5-7, 16, Nieting.

8. See infra notes 13-31 and accompanying text.
9. See infra notes 32-46 and accompanying text.
10. See infra notes 47-154 and accompanying text.
11. See infra notes 180-239 and accompanying text.
12. See infra notes 240-49 and accompanying text. This discussion will concentrate on judicial interpretation of article one, section eight, clause one, relating to a remedy for all wrongs to persons, property, or character. Cases discussing the second clause of article one, section eight, relating to the availability of free, prompt, and complete justice will not be discussed. For a discussion of the second clause, see State v. Harris, 309 Minn. 395, 244 N.W.2d 733 (1976); Gram v. Village of Shoreview, 259 Minn. 145, 106 N.W.2d 553 (1960); Payne v. Lee, 222 Minn. 269, 24 N.W.2d 259 (1946); Wilcox v. Ryder, 126 Minn. 95, 147 N.W. 953 (1914); Lommen v. Minneapolis Gaslight Co., 65 Minn. 196, 68 N.W. 53 (1896); Adam v. Corriston, 7 Minn. 365 (1862); Weller v. City of St. Paul, 5 Minn. 70 (1860).
judges as never creating but only declaring the law they impose upon litigants. This view has its roots in a natural rights philosophy.14

History reveals that the United States Constitution was based on principles of natural law.15 Remarks of the Minnesota Framers during constitutional debates indicate that they too accepted natural rights philosophy.16 According to natural rights theory, rights exist in and of themselves, derive directly from the ultimate structure of the natural world, and belong to individuals as part of their intrinsic characters.17 Governments can only codify, enforce, and recognize rights; they cannot create them. This theory dominated legal thought from the birth of the nation until the nineteenth century.18

The appeal of natural law doctrine to a "higher" law eventually began to contrast sharply with statutes and other man-made rules.19 The natural law concepts of justice predominant before 1800 were gradually displaced by instrumentalists' ideas.

The revolt against natural law and the adoption of an instrumentalist outlook20 brought change to the methodology and char-

14. Id. at 978.
16. See infra notes 34-38 and accompanying text; accord MINN. CONST. preamble (1857, amended 1974). The preamble acknowledges God as the source of "civil and religious liberty." Id.
20. The important areas of private law—contracts, torts and equity—were altered in the mid-1800's to inhibit interference in the relationship between public and private entities, including corporations and their employees. Private law, which had its origins in an agrarian society of small enterprise and petty trade, could not survive in a system where order of economic necessity was fashioned according to the demands of large commercial enterprises. Equity, which originally allowed individuals to escape the feudal rigidity of English common law and was infused into the individualism of American common law in
acter of the common law. The general rules of precedent and longstanding principles of construction, which limited judicial discretion within the common law process, made legislatures an important factor in the legal system.21 Rules settled by practice became, with time and statutory enactment, the laws of the land. As other general customs fell into desuetude, changes in the law occurred through the application of judicial discretion.22

During the twentieth century, a private law developed which focused on a movement from private to social rights. The individualistic ethic, which had emphasized the rights of property owners and entrepreneurs, was replaced by a newer concept of law as a mechanism for promoting social welfare. Legal realism acknowledged the fallibility of the participants in the judicial process and the principles of legal positivism finally came to predominate.

Legal positivism held rights to exist solely through laws enacted by governments. Only by embodiment in law, via established procedures of a legal system, could rights have substantive content.23 Nevertheless, legal positivism afforded the judiciary a flexibility and potential for activism unforeseen by eighteenth century legal scholars. Arguably, legal positivism allowed courts to create rights and remedies when confronted with a "hard case" where no settled rule or law applied.24 Through legal positivism, other jurisprudential movements developed which concentrated on the social outcome and public policy impact of legal decisions.25 The resulting judicial activism and result orientation received much criticism. For example, one commentator insisted that "[l]egal positivism and American constitutionalism are irreconcilable."26 Despite such criticism, however, judge-made law is generally accepted as

21. Bridwell, supra note 19, at 491 n.117.
22. In Darwinism, legal rules and decisions were reflected in the balance of conflicting interests, desires, and power forces at any one time, with the judge remaining neutral by discounting his own references. Darwinism captured the essence of this rigorous intellectual skepticism. See generally authorities cited supra note 19.
24. R. DWORKIN, TAKING RIGHTS SERIOUSLY 81 (1978). The development of the right of privacy is an example of this phenomenon.
25. See generally J. FRANK, LAW AND THE MODERN MIND 98 (1936) ("[T]he practice of law is a series of experiments, of adventures in the adjusting of human relations and the compromising of human conflicts.").
an undeniable reality. 27

Judicial interpretation of section eight has reflected the evolution of American legal philosophy. Statements made by the Framers of the Minnesota Constitution during the natural law era characterized section eight as a general principle. 28 Early judicial decisions emphasized that section eight principles would be equally the law of the land even if not included in the constitution. 29 The courts avoided a positivistic approach, declining to fashion new rights or remedies in difficult cases. This treatment of section eight as a natural law principle was consistent with the early nineteenth century belief that judges merely applied the law and did not create legal rights.

In contrast, during the twentieth century, principles of legal positivism welcomed judicially created rights and remedies. 30 Economic and social changes such as the introduction of workers' compensation laws, the increased availability of other types of insurance coverage, and the creation of statutory rights and remedies, dramatically altered the remedies available to litigants. These social and legislative changes evoked a more activist role by the judiciary than was probably contemplated by either the Framers or Justice Mitchell, who wrote that section eight "creates no new legal rights or new legal wrongs and establishes no rule of damages. It merely declares that for any wrong, recognized as such by law, a person shall have a remedy . . . ." 31

II. THE MINNESOTA SUPREME COURT'S APPROACH TO SECTION EIGHT

A. The History of Section Eight

Although the Framers' subjective intent in adding section eight to the constitution is largely unascertainable, the Framers probably were familiar with earlier documents calling for a remedy upon the commitment of a wrong. 32 A short historical survey

28. See infra note 46 and accompanying text.
29. See infra notes 68-73 and accompanying text.
30. See infra notes 75-99 and accompanying text.
32. The Magna Carta contained the following language: "To none will we sell, to none will we deny, or delay, right or justice." S. KIMBALL, HISTORICAL INTRODUCTION
reveals the Framers' lack of certainty as to the purpose and meaning of the remedies clause.  

Before Minnesota's admission to statehood in 1858, an equal number of Republicans and Democrats assembled to write a state constitution. Political antipathy and mutual distrust caused Republican and Democratic delegates to caucus separately and draft two state constitutions. A conference committee drew up a compromise constitution. The compromise constitution was primarily a distillation of various provisions from constitutions of several other states.

The dual nature of Minnesota's constitutional convention requires consideration of both parties' debates, since each party proposed separate constitutional language. The Republicans

TO THE LEGAL SYSTEM 46 (1966) (quoting Magna Carta of 1215, ch. 40); see Appeal of O'Rourke, 300 Minn. 158, 165, 220 N.W.2d 811, 815-16 (1974) (Magna Carta concepts are embodied in art. I, § 8).

While the idea originated with the Magna Carta, phraseology used by Sir Edward Coke is considered the source of the language for the guaranty in many states' constitutions. In re Lee, 64 Okla. 310, 311, 168 P. 53, 54-55 (1917); Note, A Remedy for all Injuries?, 25 CHI-KENT L. REV. 90, 96 (1947) (arguing that Coke's language is source for first part of constitutional guaranty). Sir Edward Coke explained the pledge offered by the King in the following language:

And therefore, every subject of this realme, for injury done to him in bonis, terris, or vel persona, by any other subject, be he ecclesiastical, or temporall, free, or bond, man, or woman, old, or young, or be he outlawed, excommunicated, or any other without exception 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.

Id. at 95-96 (quoting E. COKE, SECOND INSTITUTE OF THE LAW OF ENGLAND 55-56 (1853)).


35. For a discussion of the historical reasons for the bitterness and distrust between the two political parties, see W. ANDERSON & A. LOBB, supra note 34, at 45-47, 58-59, 70-71.

36. Sheran, supra note 33, at 35-37. Minnesota's constitution appears to have been patterned after those of New York, Ohio, Michigan, Illinois, Wisconsin, and Iowa. See Anderson, Minnesota Frames a Constitution, 36 MINN. HISTORY 1, 10 (1958).

37. See DEBATES AND PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION FOR THE TERRITORY OF MINNESOTA 105 (1858) (contains the debates of the 1857 Republican Convention) (the remedies clause in the Republican Constitution was in section nine) [hereinafter cited as DEBATES AND PROCEEDINGS].
originally proposed a more detailed form of section eight, yet questioned its necessity. The Democratic draft did not contain a remedy provision, nor was one proposed or debated. Consequently, the conference committee looked to the Republican draft for the constitution's section eight language.

According to the classic canons of constitutional construction,
no section of the constitution can be considered superfluous.\textsuperscript{43} A constitutional provision is considered an "imperative mandate of the sovereign people."\textsuperscript{44} An understanding of the historical context of and the debates preceding adoption of a particular section generally facilitates constitutional construction.\textsuperscript{45} Unfortunately, the Framers' sketchy comments and the dual nature of the convention provide little insight into the intent or underlying rationale of section eight. It appears that the Framers considered its inclusion prudent, but neglected to identify the specific evils that the section was designed to remedy.\textsuperscript{46} Perhaps this lack of specificity is the reason the Minnesota Supreme Court has never referred to the constitutional history of section eight in its decisions.

\textbf{B. Judicial Construction of Section Eight}

Although section eight has been cited in over fifty decisions since its original enactment more than one hundred years ago, it has been expressly relied upon to strike down statutes or abrogate immunities in only four cases.\textsuperscript{47} This reluctance to rely on section eight as legal support may stem from the court's perception of the section as a general principle, rather than as a rule of law.\textsuperscript{48} It was construing article six, sections seven and ten relating to the filling of judicial vacancies. \textit{See} Crowell v. Lambert, 9 Minn. 267 (1864).

During the next term of the Minnesota Supreme Court, Chief Justice Emmett was succeeded by Chief Justice Wilson. Justice Wilson was a member of the Republican Convention whose proposals were largely rejected by the conference committee. In Taylor v. Taylor, 10 Minn. 81 (1865), Chief Justice Wilson stated:

It is also urged that the debates in the convention that framed the constitution, show that the construction claimed by the plaintiff is the correct one. If such debates could ever properly be resorted to as aids in interpretation, it seems quite obvious that such a rule could not properly be followed in this case. The convention that framed this constitution divided on the first day of the session, forming two organizations . . . . We think such debates should not influence a court in expounding a constitution in any case.

\textit{Id.} at 99. Since \textit{Taylor}, the debates have rarely been referred to in Minnesota Supreme Court decisions.

\textsuperscript{43} \textit{See}, e.g., Butler Taconite v. Roemer, 282 N.W.2d 867, 870 (Minn. 1979); \textit{State ex rel.} Chase v. Babcock, 175 Minn. 103, 220 N.W. 408 (1928).

\textsuperscript{44} \textit{Freeman} v. Goff, 206 Minn. 49, 54, 287 N.W. 238, 241 (1939).

\textsuperscript{45} \textit{See}, e.g., Lyons v. Spaeth, 220 Minn. 563, 567, 20 N.W.2d 481, 484 (1945); \textit{State ex rel.} Chase v. Babcock, 175 Minn. 103, 107, 220 N.W. 408, 410 (1928); \textit{State v. Peterson}, 159 Minn. 269, 272-73, 198 N.W. 1011, 1012 (1924).

\textsuperscript{46} \textit{Cf. In re} Lee, 64 Okla. 310, 311, 168 P. 53, 55 (1917) (court commented that English jurists did not agree on which evils the similar language in the Magna Carta was designed to alleviate).

\textsuperscript{47} \textit{See infra} notes 49-74, 98-102, 135-36 and accompanying text.

\textsuperscript{48} \textit{See generally} C. \textit{Ducat}, \textit{Modes of Constitutional Interpretation} 95-100 (1978) (many provisions of the United States Constitution state a rule, yet many constitu-
not until 1949 that the court formulated a test for evaluating section eight challenges. Since then, statutes giving rise to remedies clause problems have not always been reviewed by application of this test. Instead, the common meaning of key words or phrases in section eight are sometimes used to establish a constitutional violation.

The following discussion divides section eight decisions into four principal categories: cases approaching the provision as a principle; cases applying a test to evaluate a constitutional challenge; cases focusing on construction of the provision’s key words and phrases; and cases concerning immunity from tort liability.

1. The Nineteenth Century Cases—Natural Law and Section Eight

The first case relying on section eight was *Agin v. Heyward*, an 1861 decision written three years after Minnesota’s admission to statehood. In *Agin*, the Minnesota Supreme Court considered whether a district court’s jurisdiction encompassed the enforcement of a mechanic’s lien for less than one hundred dollars. Article VI, section five of the Minnesota Constitution specifically granted original jurisdiction to district courts, in law and equity, where the amount in controversy exceeded one hundred dollars.

Relying in part on section eight, Chief Justice Emmett concluded that district courts had original jurisdiction in cases where the Minnesota Constitution did not clearly confer jurisdiction on a different court. The Chief Justice reasoned that since section eight “includes the enforcement of rights as well as the redress of wrongs,” denial of jurisdiction would render the section ineffective.

Straightforward interpretation of section eight characterized *Agin* and other early remedies clause decisions. The *Agin* court reasoned that the effectiveness of section eight would be limited if judicial power could not be exercised because the lower court had no jurisdiction. The court did not formulate a test or rule for determining whether section eight had been violated. Instead, the absence of a forum for claims of less than one hundred dollars led.

49. 6 Minn. 53 (1861).
50. *Id.* at 58.
51. *Id.* at 62.
52. *Id.* at 59.
the supreme court to extend district court jurisdiction to these small claims, thus permitting the enforcement of these rights.

One year later, the court used section eight to declare a legislative act unconstitutional in *Davis v. Pierse.*53 *Davis* involved the constitutionality of a state statute suspending the privilege of all persons supporting the Confederacy during the Civil War to prosecute and defend legal actions.54 In condemning the act, the justices focused on the phrase "every person" finding that the section was intended to benefit all citizens, even those residing in states attempting to secede from the Union.55 The Chief Justice compared the right to a remedy for all wrongs with the right to a trial by jury, the right to freedom from unreasonable search and seizures, and the right to just compensation upon the taking of private property for public use.56 None of these rights was found "more sacred to the citizen, or more carefully guarded by the constitution, than the right to have a certain and prompt remedy in the law for all injuries or wrongs to person, property, or character."57

As in *Agin,* the *Davis* court was guided in its disposition of this politically charged issue by the principles embodied in section eight.58 In holding that the statute violated sections seven, eight, and eleven of article I,59 the court did not formulate rules for determining the constitutionality of legislation under these sections. Instead, the court reasoned that the "chief end of all government is the protection of the rights of all"60 and that even without a constitutional remedies provision, all members of society may rightfully claim protection of their property.61

In 1866, the supreme court in *Baker v. Kelley,*62 used section eight to declare unconstitutional a tax law requiring persons whose

53. 7 Minn. 1 (1862).
54. Id. at 3; accord *Jackson v. Butler,* 8 Minn. 92 (1862); *McFarland v. Butler,* 8 Minn. 91 (1862); *Wilcox & Barber v. Davis,* 7 Minn. 12 (1862).
55. 7 Minn. at 5-6.
56. Id. at 6.
57. Id.
58. Id. at 5-6.
59. Id. at 4-5. Section seven prohibited criminal charges from being issued without indictment by grand jury. *MINN. CONST.* of 1857, art. 1, § 7. Section eleven prohibited laws impairing obligations of contracts and *ex post facto* laws. Id. art. 1, § 11. The *Davis* court found that the act in question contravened all three provisions of the constitution. 7 Minn. at 5. The analysis, however, involved only the language of section eight.
60. 7 Minn. at 6.
61. Id.
62. 11 Minn. 358 (1866).
property was sold in a tax sale to bring an action testing the sale's validity within one year. Failure to bring an action within one year forever barred a former property owner from his rights in the property. The limitations period commenced when the tax deed was recorded, but the cause of action did not accrue until the owner was ejected from the property, potentially an indefinite period after the recording. Often, the limitations period could commence before the property owner possessed the cause of action necessary to toll the statute of limitations. The court saw that the law's practical effect was to deny a remedy in a majority of cases.

In striking down the statute, the court distinguished between a law operating merely as a statute of limitations and a law requiring a party to bring suit to continue enjoying his rights as a property owner. According to the justices, statutes of limitation were valid exercises of legislative authority, acting to extinguish a remedy once a full, fair, and impartial trial became improbable. In contrast, the challenged tax law compelled a property owner to sue an adverse claimant to preserve the uninterrupted enjoyment of his property, or forever be barred from asserting his rights as a property owner. The court deemed such a deprivation of prop-

63. Id. at 371-74. The court also relied on the due process clause of the Minnesota Constitution. Id. at 375-77.

64. Id. at 367-68. In Baker, the plaintiff brought an action for ejectment from real property. The defense to this action was possession of a tax title and the plaintiff's failure to commence an action within one year after the tax deed had been recorded. Id. The disputed sections read:

Sec. 6. That any person owning, or claiming any right, title, or interest, in or to any land or premises so to be sold under the provisions of this act, shall, on or before the day of the sale thereof, commence an action for the purpose of testing the validity of the assessment of the taxes thereon, or in any manner questioning the regularity or validity thereof, or otherwise asserting his right, interest, or claim thereto, or be forever barred in the premises.

Sec. 7. That any person or persons, having or claiming any right, title or interest in or to any land or premises after a sale under the provisions of this act, adverse to the title or claim of the purchaser at any such tax sale, his heirs or assigns shall, within one year from the time of the recording of the tax deed for such premises, commence an action for the purpose of testing the validity of such sale, or be forever barred in the premises.

Id. at 365-67 (emphasis added).

65. Id. at 371. The court noted:

If this law required an action of ejectment to be brought within one year after the cause of action accrues, there would, perhaps be some difference of opinion as to whether that would be such a denial of the remedy as is inhibited by the constitution; it would certainly be an advance towards that point.

Id.

66. Id. at 373-74.

67. Id. at 371-72.

68. Id. at 362.
erty rights to be beyond legislative authority.\textsuperscript{69}

In its analysis, the \textit{Baker} court presumed that the rights of property owners were guaranteed by natural law.\textsuperscript{70} The legislature could not require property owners who possessed their property to bring an action to vindicate their property rights.\textsuperscript{71} Since the legislature could not require a property owner to commence an action, the court reasoned that failure to do what could not be required would not bar a property owner's otherwise valid lawsuit.\textsuperscript{72} In contrast to later decisions discussed below,\textsuperscript{73} the \textit{Baker} court ruled that the legislature could not enact laws effectively depriving citizens of rights guaranteed by natural law.\textsuperscript{74}

Three years later in \textit{Allen v. Pioneer-Press Co.},\textsuperscript{75} the court refused to declare a libel act unconstitutional because it limited various common law remedies.\textsuperscript{76} The disputed law prohibited the recovery of general damages upon proof of publication alone, and limited the recovery of special damages to specified cases.\textsuperscript{77} Chief Justice Mitchell, writing for the majority, stated that the constitutional guaranty of a certain remedy at law for all injuries to person, property, or character was but "declaratory of general fundamental principles, founded in natural right and justice, and which would be equally the law of the land if not incorporated in the constitution."\textsuperscript{78}

Treating the remedies clause as a declaration of general principles, the \textit{Allen} court viewed section eight as too uncertain and indefinite to form rules for judicial decisions in all cases.\textsuperscript{79} Chief Justice Mitchell saw such principles as "guides to legislative judgment, rather than as absolute limitations of their power."\textsuperscript{780} The

\textsuperscript{69} Id. at 372-74.
\textsuperscript{70} Id. at 374.
\textsuperscript{71} Id. at 372-73.
\textsuperscript{72} Id. at 373.
\textsuperscript{73} See infra notes 74-97 and accompanying text.
\textsuperscript{74} 11 Minn. at 374-77.
\textsuperscript{75} 40 Minn. 117, 41 N.W. 936 (1889) (Mitchell, J.).
\textsuperscript{76} Id. at 121, 41 N.W. at 937.
\textsuperscript{77} Id.
\textsuperscript{78} Id. at 122, 41 N.W. at 938; accord Peters v. City of Duluth, 119 Minn. 96, 105-06, 137 N.W. 390, 394 (1912); Beaulieu v. Great N. Ry., 103 Minn. 47, 56-57, 114 N.W. 353, 356 (1907); Francis v. Western Union Tel. Co., 58 Minn. 252, 263, 59 N.W. 1078, 1081 (1894).
\textsuperscript{79} 40 Minn. at 123, 41 N.W. at 938.
\textsuperscript{80} Id. Chief Justice Mitchell wrote:

There is unquestionably a limit in these matters, beyond which if the legislature should go, the courts could and would declare their action invalid. But inside of that limit there is, and necessarily must be, a wide range left to the judgment and
court reasoned that what constitutes "an adequate remedy" or a "certain remedy" was not determined by an inflexible constitutional rule, but was subject to variation and modification as society changed.\textsuperscript{81} Therefore, the legislature was given wide latitude to determine the form and measure of a remedy.\textsuperscript{82}

In contrast to \textit{Baker}, the statute challenged in \textit{Allen} limited, but did not preclude, a specific common law remedy. While in \textit{Baker} the disputed tax law eliminated the property owner's right to uninterrupted enjoyment of his property, in \textit{Allen} the right to obtain redress for libel remained even though the remedy had been limited by legislative act. Consequently, the \textit{Allen} plaintiffs continued to possess the "certain remedy" required by section eight.

These nineteenth century decisions approached section eight as a legal principle that would have been equally the law of the land even if it had not been included in the constitution. As a declaration of natural law, the court deemed the remedies clause too indefinite to form inflexible rules. It resolved each case by applying section eight's principles to the specific facts and analyzing them to determine whether a remedy for a wrong was completely lacking. Only where no remedy remained did the court strike down the disputed legislative provision.

\section*{2. The Twentieth Century Cases—Development of a Rule of Law}

In most cases since \textit{Allen}, judicial deference to legislative authority has been accompanied by judicial characterization of section eight as a principle. This approach has produced numerous unsuccessful section eight challenges.\textsuperscript{83} In most of these cases, section discretion of the legislature, and within which the courts cannot set up their judgment against that of the legislative branch of the government. These constitutional declarations of general principles are not, and from the nature of the case cannot be, so certain and definite as to form rules for judicial decisions in all cases, but up to a certain point must be treated as guides to legislative judgment, rather than as absolute limitation of their power.

\textit{Id.} at 122-23, 41 N.W. at 938.
\textsuperscript{81} \textit{Id.} at 123, 41 N.W. at 938.
\textsuperscript{82} \textit{Id.}

\textsuperscript{83} See Wulff v. Tax Ct. of App., 288 N.W.2d 221 (Minn. 1979) (legislation requiring transfer of tax cases from district court to tax court of appeals); Gram v. Village of Shoreview, 259 Minn. 145, 106 N.W.2d 553 (1960) (statute permitting trial courts to require plaintiff to furnish surety bond); Johnson v. Chicago, Burlington & Quincy R.R., 243 Minn. 58, 66 N.W.2d 763 (1955) (application of doctrine of forum non conveniens); State v. International Harvester Co., 241 Minn. 367, 63 N.W.2d 547, \textit{appeal denied}, 348 U.S. 853 (1954) (statute requiring employers to continue to pay employees while exercising voting rights in federal, state, and local elections); \textit{State ex rel. Kane} v. Stassen, 208 Minn. 523, 294 N.W. 647 (1940) (repeal of statutory right of mandamus); Minnesota
eight was asserted as an alternative to federal or state due process theories. When state and federal claims were made, the potentially determinative federal claims usually were examined first. Consequently, the court did not provide separate section eight analyses. If the challenged statute satisfied minimum requirements of federal equal protection or due process, it generally was held to satisfy section eight. This approach was common to other state courts and has contributed to the limited development of state constitutional law. 

In 1949, however, the Minnesota Supreme Court formulated a rule for measuring section eight challenges. In *Breimhorst v. Beckman*, the court adopted an “adequate substitute” standard of review for the remedies clause. The plaintiff in *Breimhorst* argued that a workers’ compensation statute eliminating a common law remedy for serious disfigurement deprived him of an adequate remedy. In articulating the standard, the court stated that the legislature could abrogate a common law remedy without violating section eight, if it substituted an adequate remedy for the discarded common law remedy. When the *Breimhorst* court announced this rule, it relied on language from *Allen v. Pioneer-Press Co.* characterizing section eight as a mere declaration of general principles. Notwithstanding the *Breimhorst* court’s adoption of a

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Wheat Grower’s Coop. Mktg. Ass’n v. Huggins, 162 Minn. 471, 203 N.W. 420 (1925) (Cooperative Marketing Act allowing formation of voluntary farmer associations for purpose of introducing direct marketing concepts); Peters v. City of Duluth, 119 Minn. 96, 137 N.W. 390 (1912) (provision of Minnesota Torrens Act); Rhodes v. Walsh, 55 Minn. 542, 57 N.W. 212 (1893) (constitutional provision exempting members of Minnesota Legislature from arrest during legislative session).


85. 227 Minn. 409, 35 N.W.2d 719 (1949).

86. Id. at 429, 35 N.W.2d at 732.

87. Id. at 436, 35 N.W.2d at 735. The *Breimhorst* court first balanced the advantages and disadvantages of the Workers’ Compensation Act to an injured employee. Id. at 429, 35 N.W.2d at 732. The court concluded that the elimination of an employee’s common law cause of action for permanent disfigurement, where disfigurement did not interfere with employability, did not violate the plaintiff’s entitlement to a certain remedy for all injuries and wrongs. Because the Act provided an adequate substitute for the common law or statutory action for damages, section eight was not violated. Id. at 436, 35 N.W.2d at 735.

88. The *Breimhorst* court relied on the following language from *Allen v. Pioneer-Press*:

These constitutional declarations of general principles are not, and from the nature of the case cannot be, so certain and definite as to form rules for judicial decisions in all cases, but up to a certain point must be treated as guides to legislative judgment, rather than as absolute limitations of their power.

Id. at 435, 35 N.W.2d at 735 (quoting *Allen*, 40 Minn. at 122, 41 N.W. at 938); cf. C.
section eight standard of review, its reference to Allen indicated that its basic view of section eight as a principle remained unchanged.

Twenty-three years later, in Haney v. International Harvester Co., the court announced a more liberal rule than the one in Breimhorst. In Haney, an employee covered by workers' compensation insurance sued a third-party tortfeasor. The third-party tortfeasor joined the plaintiff's employer as a third-party defendant for purposes of contribution and indemnity. The plaintiff's employer argued that he should not be joined because his common law liability had been extinguished by workers' compensation laws.

The court acknowledged that the workers' compensation laws had eliminated the third-party's common law right to contribution. It then espoused a new standard for evaluating section eight claims: "[a] common-law right of action may be abrogated without providing a reasonable substitute if a permissible legislative objective is pursued." In applying this rule, the court found the legislature had neither substituted a reasonable remedy nor pursued a permissible objective when it eliminated the common law damage remedy.

DUCAT, supra note 48, at 100 (arguing that principles often underlie rules or are contained in rules).

89. It is not surprising that almost a quarter of a century passed before the court was again confronted with a section eight issue. The incorporation of federal protections applicable to the states through the fourteenth amendment resulted in the neglect of rights independently secured by state constitutions. See Brennan, State Constitutions and the Protection of Individual Rights, 90 HARV. L. REV. 489 (1977). Instead, litigants benefited from expansion of federal due process and equal protection principles during the activist years of the Warren Court. Federal jurisprudence alone provided ample protection for individual liberties. See Note, Of Laboratories and Liberties: State Court Protection of Political and Civil Rights, 10 GA. L. REV. 533, 550 (1976).

90. 294 Minn. 375, 201 N.W.2d 140 (1972).

91. In Haney, the Minnesota Workers' Compensation Act indirectly abrogated a third party's common law right to contribution or indemnity from a negligent employer. The court refrained from directly finding such an abrogation and remanded the case to the trial court for a determination of the comparative negligence of the parties. Id. at 386-87, 201 N.W.2d at 146-47.

92. Id. at 377, 201 N.W.2d at 141.

93. Id.

94. Id. at 383, 201 N.W.2d at 145.

95. Id. at 385, 201 N.W.2d at 146. The Haney court perhaps viewed the question of abrogation of a common law remedy as strictly a due process issue. See id. But cf. Carlson v. Smogard, 298 Minn. 362, 215 N.W.2d 615 (1974). In Carlson, the court held a section of the Minnesota Workers' Compensation Act unconstitutional in the face of an article one, section eight attack, because it extinguished a third party's common law right of indemnity without providing a reasonable substitute or pursuing a legitimate legislative objective. Id. at 369, 215 N.W.2d at 620.
law right. Despite its conclusion that the section eight test had not been satisfied, the court declined to rule on the constitutional issue and remanded the case for a determination of the comparative negligence of all parties.

Two years later, in 1974, the Minnesota Supreme Court applied the same standard to circumstances similar to those in HANEY. In Carlson v. Smogard, the justices considered the constitutionality of a workers' compensation law extinguishing a third-party tortfeasor's common law right to indemnity from an injured worker's employer. They stressed that the legislature intended the Minnesota Workers' Compensation Act to control only the rights between employers and employees; third-party indemnification against employers was independent of the Act. Thus, the justices concluded that the Act abrogated the common law right of indemnification without including a reasonable substitute within the workers' compensation laws or pursuing a permissible legislative objective. The statute was held to violate the due process clauses of the fifth and fourteenth amendments to the United States Constitution and section eight of the Minnesota Constitution.

96. 294 Minn. at 385, 201 N.W.2d at 146.
97. Id. at 385, 201 N.W.2d at 146-47.
99. Id. at 366, 251 N.W.2d at 618. The Minnesota Supreme Court addressed whether subdivision ten of Minnesota Statutes section 176.061 violated the due process clause of the United States Constitution and article one, section eight of the Minnesota Constitution. Minnesota Statutes section 176.061, subdivision 10 provided:

If an action as provided in this chapter prosecuted by the employee, the employer, or both jointly against a third person, results in judgment against such third person, or settlement by such third person, the employer shall have no liability to reimburse or hold such third person harmless on such judgments or settlements in absence of a written agreement to do so executed prior to the injury.

MINN. STAT. § 176.061(10) (1971) (repealed 1976). In Carlson, the plaintiff was an employee of Quality Mercury and the defendant a customer of Quality Mercury. The plaintiff suffered a heart attack while driving the defendant's car in the course of his employment with Quality Mercury. He sued the defendant, alleging that the sole proximate cause of his injuries was the defendant's negligence in installing a homemade locking device on the hood of his car. 298 Minn. at 365, 215 N.W.2d at 617. The defendant denied all negligence, asserting that the proximate cause of the plaintiff's injuries was the negligent conduct of Quality Mercury, and sought indemnification and contribution from Quality Mercury. Id. The trial court had disallowed the defendant's claim for indemnification pursuant to the statute quoted above. Id.

100. 298 Minn. at 368, 215 N.W.2d at 619.
101. The court stated that "[t]he result would be that a common-law right of action will be abrogated without providing a reasonable substitute. No legitimate objective is fostered by preventing indemnification to a third-party tortfeasor from a negligent employer. No substitute remedy has been provided to Smogard." Id. at 368-69, 215 N.W.2d at 619.
tion.\footnote{Id. at 369, 215 N.W.2d at 620. Only once has article one, section eight been used as the sole basis for declaring a legislative act unconstitutional. \textit{See} Agin v. Heyward, 6 Minn. 53, 59 (1861) (art. I, § 8 assures every person a particular remedy in the law; therefore district court had jurisdiction over controversy unless constitution provided otherwise). \textit{Compare} Baker v. Kelley, 11 Minn. 358, 376-77 (1866) (act violated MINN. CONST. of 1857, art. 1, §§ 2, 8, the remedies and state due process clauses) \textit{with} Davis v. Pierse, 7 Minn. 1, 4-5 (1862) (act violated MINN. CONST. of 1857, art. 1, §§ 7, 8, 11).}

\textit{Carlson} was the last decision to apply the \textit{Haney} rule to declare a statute unconstitutional.

Since \textit{Carlson}, plaintiffs challenging workers' compensation laws have not succeeded on claims that the legislature eliminated a common law right without providing a reasonable substitute or pursuing a permissible objective. The following cases demonstrate the difficulty of succeeding on a section eight challenge when the legislature retains any remedy whatsoever. They also evidence the court's reluctance to interfere with legislative schemes regulating complex social or political problems.

In \textit{Tracy v. Streeter Litton Industries}, \footnote{Id. at 914.} the court upheld a statute permitting an injured employee to collect permanent partial benefits while receiving temporary disability benefits.\footnote{Id. at 915.} While applying the \textit{Haney} test, the court viewed the entire statutory scheme as a substitute remedy and refused to condemn the legislature for failing to provide a remedy-for-remedy exchange.\footnote{306 N.W.2d 564 (Minn. 1981).} Similarly, in \textit{Tri-State Insurance Co. v. Bouma}, \footnote{Id.} the court declined to declare a workers' compensation statute unconstitutional. The \textit{Tri-State} court found a permissible legislative objective was pursued by not requiring injured employees to reimburse insurance overpayments received in good faith.\footnote{Id. at 566.} It further noted that in many cases the insurance company could obtain restitution.\footnote{Id. at 915.} Finally, the court rejected section eight as an absolute limitation on the legislature's power to determine the form and measure of a remedy for a wrong.

The outcomes in \textit{Tri-State} and \textit{Tracy} are consistent with the court's earlier statement that what constitutes an "adequate" or "certain" remedy is not governed by an inflexible constitutional
rule. The liberal Haney standard of review accords the court maximum flexibility to modify the meaning of these terms to accommodate a changing society.

The Haney test was recently applied in Calder v. City of Crystal. In Calder, city residents sought to recover for property damage caused by a defective water drainage system. They argued that the applicable statute of limitations violated section eight by providing an unreasonably short period in which to join third parties for contribution or indemnity. The court rejected the plaintiffs' claim, noting that statutes of limitation were generally deemed constitutional because they fulfilled the permissible legislative objective of extinguishing stale claims. Thus, the court distinguished a substantive statute of limitations from a procedural one, like that contained in Baker, which made a remedy impossible to achieve.

Calder exemplifies the court's practice of balancing the importance of the permissible legislative objective against the importance of retaining a remedy. In balancing these countervailing interests, the court held that the importance of extinguishing stale claims outweighed the hardship to plaintiffs of a shortened limitations period.

110. 318 N.W.2d 838 (Minn. 1982).
111. Id. at 839.
112. Id.
113. Id. at 844; see Baker v. Kelly, 11 Minn. 358, 371-72 (1866). But see Kittson County v. Wells, Denbrook & Assocs., 308 Minn. 237, 240, 241 N.W.2d 799, 801 (1976) (statute of limitations should be construed narrowly when necessary to avoid constitutional questions despite legislative objective).
114. 318 N.W.2d at 844.
115. Id.; cf. Kittson County v. Wells, Denbrook & Assocs., 308 Minn. 237, 241 N.W.2d 799 (1976). In Kittson County, the plaintiff challenged a statute of limitations relating to building contractors. Id. at 237, 241 N.W.2d at 799. The statute barred actions for breach of a building contract or breach of warranty brought over two years after discovery of the breach or over ten years from the completion of the construction. The court upheld the statute by construing it narrowly to avoid its application. Id. at 240-41, 241 N.W.2d at 801. The court indicated, however, that the short duration of the two-year "discovery period" and the "absolute nature of the ten year nullification provision which applied despite a total lack of notice" of a defective condition, might create "grave" section eight problems. Although statutes of limitations are usually deemed reasonable exercises of legislative authority, apparently the court was reluctant to sanction one that could expire before the injured party became aware of a building defect. Id. at 240, 241 N.W.2d at 802. Instead, the court held that the statute did not apply to actions sounding in breach of contract and in warranty where the plaintiff is in privity with the defendants. Id. Such an action was held to be governed by the six-year general statute of limitations. Id. at 243, 241 N.W.2d at 802.
The majority of decisions applying the Haney test have upheld the challenged statutes. Given the heavy burden of proof in constitutional cases and the deference accorded legislative action, such a result is not surprising. Although these decisions articulate an adjudicative rule, the rule requires the court to balance the concerns of both parties with the principles of section eight. Formulating a rule that requires judicial determination of the "reasonableness" of a substitute remedy and the "permissibility" of a legislative objective inevitably transforms an adjudicative rule into a balancing process. This balancing process is characteristic of judicial application of legal principles and enables the court to use section eight to respond creatively to particular problems. 116 Although the majority of decisions applying the Haney test have not yielded favorable outcomes for plaintiffs, this should not discourage future plaintiffs from pursuing a section eight theory. A standard of review which requires the balancing of interests is an inherently flexible standard. This flexibility should encourage litigants to pursue a section eight theory in factually unique situations.

3. Key Words and Phrases—A Textual Approach

A useful technique for developing a constitutional provision is to explore the linguistic variation between federal and state constitutional counterparts. 117 Although section eight has no federal counterpart, a linguistic or textual approach is equally useful.

In its judicial interpretation of section eight, the court has periodically focused on its key words and phrases. For example, in Davis v. Pierse, 118 the court construed the phrase "every person." The court interpreted this phrase to mean all persons residing within the state, but noted it was "not to be taken in its broadest sense, as that would include aliens, enemies, as well as friends." 119 Later, in Allen v. Pioneer-Press Co., 120 Justice Mitchell focused on the phrase "certain remedy" when determining the constitutionality of a libel law limiting recovery of special damages and prohibiting recovery of general damages in particular circumstances. Justice

116. See generally C. Ducat, supra note 48, at 105 (argues that balancing of interests, rather than strict application of rules allows courts to formulate particular solutions to unique problems).
117. See Project Report, supra note 84, at 315.
118. 7 Minn. 1 (1862).
119. Id. at 5.
120. 40 Minn. 117, 41 N.W. 936 (1889).
Mitchell determined that these limitations did not offend section eight's principles which were not "so certain and definite as to form rules for judicial decisions in all cases."\textsuperscript{121}

More recently, in \textit{Haugen v. Town of Waltham},\textsuperscript{122} the court suspended enforcement of a section of Minnesota's No-Fault Insurance Act pending further legislative enactments establishing guidelines for its effective administration.\textsuperscript{123} The court found that the lack of legislative guidelines made a statutorily mandated deduction of no-fault economic loss benefits inequitable for successful litigants.\textsuperscript{124} The section eight challenge focused on the absence of the plaintiff's no-fault carrier as a party to the action, which could have forced the plaintiff to relitigate his claim under the arbitration provisions of the insurance policy if the no-fault carrier contested the damage award.\textsuperscript{125} According to the court, the potential for relitigation "face[d] a difficult constitutional barrier in Minnesota,"\textsuperscript{126} because section eight required "a certain remedy in the laws" that "completely" allowed a person to obtain justice.\textsuperscript{127}

In \textit{Haugen}, the court did not formulate a new test for section eight challenges, nor did it apply the \textit{Haney} test.\textsuperscript{128} Instead, it focused on the practical consequences of the challenged legislation which it measured against a common sense interpretation of the section's language.\textsuperscript{129} The court viewed the plaintiff's remedy in \textit{Haugen} as "incomplete" and "uncertain."\textsuperscript{130} It observed that the language of section eight was singular, not plural, and that the "constitution seem[ed] to contemplate a single remedy and not a series of remedies."\textsuperscript{131}

As discussed in section III of this Article,\textsuperscript{132} the Illinois and Wisconsin courts have concentrated on the key words and phrases in their remedies provisions. These courts have shown that more active use of a remedies provision does not require formulation of a rigid standard of review. A narrow focus on key terminology per-
mits conflict resolution without creating precedent that must be steadfastly followed or painstakingly distinguished in later cases.

4. The Immunity Decisions

In recent years, the court has consistently cited section eight in cases addressing immunity from tort liability. This trend contrasts with earlier decisions which refrained from using section eight to confer new rights or abrogate common law immunities. For example, in 1914, the court upheld a common law rule precluding married women from maintaining civil actions against their husbands for tortious conduct committed during coverture. Similarly, in 1935, the court refused to create a cause of action to compensate wives for injuries inflicted on their husbands by third parties. In both cases, the court concluded that the absence of a common law right did not offend section eight.

In the 1930's, however, the court began to use section eight to eliminate common law immunities that prohibited suits against the sovereign. For example, in *State ex rel. Benson v. Stanley*, the court relied on article one, sections seven, eight, and thirteen of the Minnesota Constitution to hold that a landowner, whose property was damaged by state highway construction and who was omitted from the condemnation proceeding, could have his land included for purposes of a damage assessment, notwithstanding that common law sovereign immunity would probably bar such relief. In *Thiede v. Town of Scandia Valley*, section eight was cited to support a holding that a municipal official who maliciously evicted a pauper from his home was personally liable for all actual and punitive damages resulting from his acts.

State sovereign immunity for torts was abolished in *Nieting v. Blondell*. In abrogating sovereign immunity, the *Nieting* court

135. 188 Minn. 390, 247 N.W. 509 (1933).
136. *Id.* at 393, 247 N.W. at 510; see also *State ex rel.* Peterson v. Anderson, 220 Minn. 139, 19 N.W.2d 70, 74-75 (1945) (quoting *State ex rel.* Benson v. Stanley, 185 Minn. 390, 394, 247 N.W. 509, 510 (1933)).
137. 217 Minn. 218, 14 N.W.2d 400 (1944).
138. *Id.* at 230-31, 14 N.W.2d at 407-08.
139. 306 Minn. 122, 235 N.W.2d 597 (1975).
relied on section eight's \textsuperscript{140} premise that "one of the paramount interests of the members of an organized and civilized society is that they be afforded protection against harm to their person, properties, and characters." \textsuperscript{141} The court concluded that an individual must have a "reasonable and adequate remedy against the wrongdoer." \textsuperscript{142} In the later decision of \textit{Cracraft v. City of St. Louis Park}, \textsuperscript{143} the court stated in dicta that absolute sovereign immunity from liability violated section eight. \textsuperscript{144}

\textsuperscript{140} See \textit{id.} at 131, 235 N.W.2d at 602. The opinion does not refer specifically to section eight.

\textsuperscript{141} \textit{Id.}

\textsuperscript{142} \textit{Id.} at 131, 235 N.W.2d at 602-03.

\textsuperscript{143} 279 N.W.2d 801 (Minn. 1979).

\textsuperscript{144} See \textit{id.} at 809 (Kelley, J., dissenting). The \textit{Cracraft} court stated:

Prior to abolishment of sovereign immunity, an injured party was left with no right of recovery when the state or municipality was the sole negligent actor, a result which clearly contradicted our constitutional mandate that every person is entitled to a certain remedy in the laws for all injuries or wrongs which he may receive to his person or property.

\textit{Id.} at 808 (citation omitted). In \textit{Hage v. Stade}, 304 N.W.2d 283 (Minn. 1981), the court affirmed dismissal of a negligence action against the state. Justices Scott, Sheran, Wahl, and Yetka strenuously dissented, stating: "In effectuating Minnesota's own Constitution, art. 1, § 8 . . . there seems no reason for not accepting the abolishment of governmental immunity." \textit{Id.} at 288.

Recently, in \textit{Naylor v. Minnesota Daily}, 342 N.W.2d 632 (Minn. 1984), the supreme court concluded that the 180-day notice requirement in the Minnesota Tort Claims Act, MINN. STAT. § 3.736 (1982), as amended by Act of Apr. 20, 1976, ch. 331, 1976 Minn. Laws 1282, was non-jurisdictional in nature. 342 N.W.2d at 634. The appellant argued that the notice provision violated section eight. Appellant's Brief at 12. The court, however, did not mention this constitutional argument in its opinion. 342 N.W.2d 632.

Most recently, in \textit{Green-Glo Turf Farms, Inc. v. State}, No. C7-82-520, slip op. (Minn. Apr. 27, 1984), the court upheld the constitutionality of the outdoor recreation exception of the Minnesota State Tort Claims Act, MINN. STAT. § 3.736 (1982), as amended by Act of Apr. 20, 1976, ch. 331, 1976 Minn. Laws 1282, was non-jurisdictional in nature. \textit{Green-Glo}, slip op. at 3. The statute was challenged as a violation of federal equal protection and section eight. \textit{Id.} at D-1. The majority concluded that the legislative shield providing tort immunity for operation of outdoor recreation areas was rationally related to the legitimate state interest of "the preservation of Minnesota's outdoor recreational resources’ in light of ‘the growing demand for outdoor recreational facilities and the spread of development and urbanization in the state.’" \textit{Id.} at 5. The majority also concluded that appellants were not left without a remedy as they could proceed in inverse condemnation to require the state to condemn a flowage easement. \textit{Id.} at 6.

Justices Scott, Amdahl, Todd, and Yetka dissented. \textit{Id.} at D-1. The dissent viewed the application of the exception to nonusers of the system as a violation of equal protection principles. \textit{Id.} at D-1, D-2 to -5. The dissent also concluded that application of sovereign immunity "unjustifiably denies appellants a remedy for their injuries as mandated by the Minnesota Constitution." \textit{Id.} at D-5. The dissent stated:

The only possible reason for immunizing the state from liability to non-users would be to lessen the impact of tort liability upon the public coffers. Such reasoning resurrects the disavowed sovereign immunity doctrine . . . . Indeed,
Parental immunity also has been the subject of section eight attacks. Parental immunity was nearly eliminated in the 1968 decision of *Silesky v. Kelman*. The *Silesky* court preserved two circumstances allowing parental immunity as a defense. Twelve years later, in *Anderson v. Stream*, the last remnants of parental immunity were abolished. The *Anderson* court abandoned these exceptions because they were difficult to apply and liability insurance had become more prevalent. In disposing of the exceptions, the court cited *Nieting v. Blondell* and section eight for the proposition that a remedy must be available to anyone injured by the conduct of another.

Although these decisions demonstrate the court's increasing dissatisfaction with common law immunities, they do not establish a standard of review for determining the constitutionality of an immunity under section eight. While the principle contained in section eight is as old as that of sovereign immunity, it was not until *Nieting* that the court unanimously acknowledged an irreconcilable conflict between these two common law principles. In *Kossack*, we expressed doubt whether there could ever exist a proper basis for distinguishing between victims injured by a private tortfeasor and those injured by a government tortfeasor.

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145. 281 Minn. 431, 161 N.W.2d 631 (1968).
146. *Id.* at 442, 161 N.W.2d at 638. The two areas in which immunity was preserved were: acts involving ordinary parental discretion with respect to food, shelter, medical and dental care and acts involving exercise of reasonable parental authority over the child. *Id.*
147. 295 N.W.2d 595 (Minn. 1980).
148. *Id.* at 600.
149. 306 Minn. 122, 235 N.W.2d 597 (1975).
150. 295 N.W.2d at 600.
151. 306 Minn. at 131-32, 235 N.W.2d at 602-03. Remnants of sovereign immunity such as discretionary immunity, which the court encouraged the legislature to codify, have been held not to violate section eight. *Id.; see Minn. Stat. § 3.736 (1982 & Supp. 1983).* Instead, the court has focused on application of the doctrine of discretionary immunity. The discretionary acts exception to the general rule of liability is designed to protect public officials from personal liability when in the exercise of their discretion they act or fail to act, thereby causing injury. *See Cairl v. State, 323 N.W.2d 20 (Minn. 1982); Larson v. Independent School Dist. No. 314, 289 N.W.2d 112 (Minn. 1979) (construing the Municipal Tort Claims Act, Minn. Stat. § 466.02 (1982)); Papenhausen v. Schoen, 268 N.W.2d 565 (Minn. 1978). See generally Note, Sovereign Immunity--Discretionary Function Exemption to the Tort Claims Act, 5 Hamline L. Rev. 103 (1982).* The court also has focused on the public duty doctrine. This doctrine holds that public officials who perform legally required inspections owe a duty only to the general public, absent circumstances creating a private relationship with individual members of the public. *See Hage v. Stade, 304 N.W.2d 283 (Minn. 1981); Cracraft v. City of St. Louis Park, 279 N.W.2d 801 (Minn. 1979).*

The court has not explicitly resolved the section eight implications of statutes codify-
When these two conflicting principles have met, the court has considered the relative weight and importance of each. The immunity cases which abrogate old common law immunities indicate that the court increasingly views the right to a remedy as outweighing the burden of imposing liability on immune parties, in part because of the increased availability of liability insurance. Consequently, future litigants should continue to argue that limited forms of immunity violate section eight. Plaintiffs should emphasize that these limited forms of immunity may pose an absolute bar to any recovery.

Persons challenging statutorily-based immunities may benefit from section eight's broad, equitable language and the absence of a clear standard of review. Where equal protection principles require plaintiffs to satisfy the burdensome rational basis test, the language of section eight requires that the plaintiff demonstrate only an injury and the absence of a remedy. Until a standard of review for section eight is consistently applied, plaintiffs should request that the court construe section eight as its broad remedial language demands and strike down the remnants of immunities that bar a constitutionally mandated remedy.

C. A Proposed Classification of Minnesota Supreme Court Decisions

As previously mentioned, the Minnesota Supreme Court has not applied the Haney standard of review to all section eight cases. The lack of a clear standard of review for state constitutional provisions is not unique to Minnesota. Nevertheless, the absence of a standard of review applicable to all cases frustrates predicting
the outcome of future decisions or categorizing past decisions uniformly. Minnesota Supreme Court cases, however, may be classified as those which approach section eight as a general constitutional principle and those which attempt to fashion a rule of law from the provision's general language. This classification is useful in distilling an implicit standard of review in section eight cases.

Understanding this classification of section eight decisions requires that principles be distinguished from rules.\(^{156}\) Both principles and rules describe particular legal obligations, but differ in the character of the direction that they give.\(^{157}\) A principle may be defined as a "standard that is to be observed, not because it will advance or secure an economic, political, or social situation deemed desirable, but because it is a requirement of justice or fairness or some other dimension of morality."\(^{158}\) The general effect of a legal principle is that officials and decisionmakers must consider it during the decisionmaking process. They need not follow the principle if conflicting principles outweigh it or a rule contradicts it.\(^{159}\) When more than one principle applies, the relative weight of each is considered by the decisionmaker in reaching a conclusion.\(^{160}\)

The balancing of interests inherent in adjudication by principle does not create rigid precedent.\(^{161}\) A principle approach coincides with a view of the law as continuously adjusting to societal needs.\(^{162}\) It is particularly well-suited to interpretation of language over 800 years old, since each century of jurists must apply the same language to dramatically changed legal and social issues.\(^{163}\)

Rules, on the other hand, apply in an "all-or-nothing" fashion.\(^{164}\) When rules conflict, one of them cannot be valid because

\(^{156}\) This distinction is taken from the work of Ronald M. Dworkin. Dworkin, The Model of Rules, 35 U. CHI. L. REV. 14 (1967).

\(^{157}\) C. DUCAT, supra note 48, at 95 (quoting Dworkin, Is Law a System of Rules?, in ESSAYS IN LEGAL PHILOSOPHY 37 (R. Summers ed. 1968)).

\(^{158}\) Dworkin, supra note 156, at 23. Dworkin used the common law standard "no man may profit from his own wrong" as an example of a principle. Id.

\(^{159}\) Id. at 26.

\(^{160}\) Id. at 27.

\(^{161}\) See generally C. DUCAT, supra note 48, at 104-05 (arguing that adjudication by rule produces a rigid and unworkable legal system).

\(^{162}\) See generally Rostow, American Legal Realism and the Sense of the Profession, 34 U. COLO. L. REV. 123, 141-42 (1962).

\(^{163}\) See supra note 32 and accompanying text.

\(^{164}\) Dworkin, supra note 156, at 25. Dworkin wrote: "The difference between legal principles and legal rules is a logical distinction. Both sets of standards point to particular
rules are mandatory.\textsuperscript{165} It is not always clear from the form of a standard whether it is a rule or a principle.\textsuperscript{166} Courts may cite principles to justify the adoption of rules\textsuperscript{167} and in "hard cases," where no settled rule applies, courts will use legal principles to guide them to an acceptable result.\textsuperscript{168}

In applying this definitional distinction to section eight, Minnesota Supreme Court decisions may be divided into two primary categories.\textsuperscript{169} The first category treats the remedies clause as a principle. Decisions treating the remedies clause as a principle frequently use "principle" terminology \textsuperscript{170} and refrain from creating new rights or remedies.\textsuperscript{171} The differing factual and legal contexts in which the court has refrained from finding a section eight violation \textsuperscript{172} exemplify its frequent use of the principle approach.

The second category of decisions uses the principle embodied in section eight to formulate rules. Cases in this category formulate a
test derived from section eight language for constitutional elimination or alteration of common law remedies. For example, in Breimhorst, the court announced a test for judging whether the elimination of a common law remedy was constitutional. Although the court articulated a clear test, it relied on language from Allen stressing that section eight was a constitutional declaration of principles. Nevertheless, the test acted as a rule. Legislative action was then measured against the rule's requirements. As the court enunciated in Haney, if a common law remedy is eliminated without providing a reasonable substitute or pursuing a permissible legislative objective, the act eliminating the remedy is unconstitutional. The court has not yet departed from the Haney test.

Nevertheless, the court often does not apply the Haney test. Instead, it treats section eight as a principle. This treatment gives the court more freedom to decide whether a legislative act violates the remedies clause; it may measure the relative weight of conflicting principles and reach differing outcomes depending on the factual circumstances and subject matter of the litigation. Inconsistencies in precedent may result from the court according greater weight to section eight principles in certain decisions.

Notwithstanding critical changes in jurisprudential philosophy, the court's treatment of the remedies clause as a principle has remained relatively constant over the last one hundred years. Nineteenth century jurists generally considered their primary duty to be the preservation of natural rights. Consequently, section eight was used to support the continued existence of a right or remedy secured by natural law. In contrast, twentieth century jurists have relied on the remedies clause to eliminate common law immunities inherited from natural law jurisprudence. Thus, while the nineteenth century court relied on section eight to preserve inherent organic rights, the twentieth century court has used it to create new rights by eliminating common law immunities.

173. See, e.g., Carlson v. Smogard, 298 Minn. 362, 215 N.W.2d 615 (1974); Haney v. International Harvester Co., 294 Minn. 375, 201 N.W.2d 140 (1972) (court adopted rule that a "common-law right of action may be abrogated without providing a reasonable substitute if a permissible legislative objective is pursued"); accord Breimhorst v. Beckman, 227 Minn. 409, 35 N.W.2d 719 (1949) (former "rule" with respect to common law remedies; common law remedies may be eliminated if legislature provides adequate substitute).

174. 227 Minn. 409, 435-36, 35 N.W.2d 719, 735 (1949).

175. Id. at 435, 35 N.W.2d at 735.

176. See supra notes 13-31 and accompanying text.

177. See supra notes 49-82 and accompanying text.

178. See supra notes 83-116 and accompanying text.
Creation of these new rights demonstrates a positivist approach to adjudication.

D. Summary

This survey has indicated that a litigant can successfully challenge a statute by demonstrating loss of a common law remedy without substitution of a reasonable alternative remedy or pursuit of a permissible legislative objective. An overly restrictive statutory remedy may create constitutional problems, as may a statutorily mandated remedy which is excessively burdensome to the plaintiff. Any statute or administrative rule that contravenes the common meaning of the provision’s key words and phrases also may be constitutionally infirm.

Ancient immunities, born of natural law, may be vulnerable to constitutional attack. Thus far, the Minnesota Supreme Court has taken a rather conservative approach to the language of section eight. Other jurisdictions have used similar constitutional language to formulate entirely new remedies or causes of action. The liberal construction of remedies provisions by sister states could influence the Minnesota Supreme Court’s future use of section eight.

III. A Comparison with Illinois and Wisconsin

Minnesota is not the only state to mandate constitutionally a remedy for a wrong. Of the state constitutions after which the Minnesota Constitution was patterned, three have similar provisions. A comparison of judicial applications of these provisions illustrates their potential as a tool for litigants. The comparison also demonstrates judicial confusion over the historical and modern meaning of remedies clauses and the judiciary’s role in creating rights, remedies, and causes of action in an age of judicial

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179. See supra note 151.
180. Using phraseology similar to article one, section eight of the Minnesota Constitution, 36 state constitutions provide that every person shall have a remedy for all injuries and wrongs. See Note, supra note 32, at 94 n.29.
181. See Anderson, supra note 36, at 10. The six model states appear to have been New York, Ohio, Michigan, Illinois, Wisconsin, and Iowa. Id.
182. Ohio will not be considered in this survey because the Ohio Constitution’s section eight equivalent is used as the state due process clause. See Ohio Const. art. I, § 16 (1851, amended 1912).
activism.\footnote{184}{See Holmes, \textit{supra} note 27, at 457. In what is probably the most famous law review article ever written, Justice Holmes wrote: "The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law." \textit{Id.} at 461. This acknowledgement of the authority and power of the judicial branch was in sharp contrast to more established ideas that law was simply "discovered" or "applied" by judges.}

A. Expression of Philosophy or Constitutional Mandate?

Early Minnesota decisions referred to section eight as a statement of general fundamental principles "founded in natural right and justice, and which would be equally the law of the land if not incorporated in the constitution."\footnote{185}{Allen \textit{v.} Pioneer-Press Co., 40 Minn. 117, 122, 41 N.W. 936, 938 (1889).} This perspective has been echoed by Illinois courts when construing their constitutional provision. Illinois appellate courts have stated that the Illinois constitutional provision\footnote{186}{The Illinois provision states: "Every person shall find a certain remedy in the laws for all injuries and wrongs which he receives to his person, privacy, property or reputation. He shall obtain justice by law, freely, completely, and promptly." \textit{ILL. CONST.} art. I, § 12 (1870, amended 1970).} is an expression of philosophy and not a requirement that a "certain remedy" be provided in any specific form.\footnote{187}{Sullivan \textit{v.} Midlothian Park Dist., 51 Ill. 2d 274, 277, 281 N.E.2d 659, 662 (1972); see People \textit{v.} Dowery, 62 Ill. 2d 200, 209, 340 N.E.2d 529, 533 (1974); Heckendorf \textit{v.} First Nat'l Bank, 19 Ill. 2d 190, 194, 166 N.E.2d 571, 573, \textit{cert. denied}, 364 U.S. 882 (1960); Angelini \textit{v.} Snow, 58 Ill. App. 3d 116, 118, 374 N.E.2d 215, 218 (1978); Steffa \textit{v.} Stanley, 39 Ill. App. 3d 915, 918, 350 N.E.2d 886, 888 (1976). \textit{But see} Skelly Oil Co. \textit{v.} Universal Oil Prod. Co., 338 Ill. App. 79, 81, 86 N.E.2d 875, 878 (1949) (§ 19 is a "clear mandate to the courts, that wherever the legislature has failed to provide a remedy, the courts must").} This interpretation did not change despite an amendment to the language of the Illinois provision from the permissible "ought to" to the mandatory "shall."\footnote{188}{The predecessor to the current article I, section 12 of the Illinois Constitution read as follows: "Every person ought to find a certain remedy in the laws for all injuries and wrongs which he may receive in his person, property or reputation; he ought to obtain, by law, right and justice freely, and without being obliged to purchase it, completely and without denial, promptly, and without delay." \textit{ILL. CONST.} of 1870, art. II, § 19. \textit{See generally} G. \textit{Bradon} \& R. \textit{Cohn}, \textit{The Illinois Constitution: An Annotated and Comparative Analysis} (1969).} In contrast, the Wisconsin
Supreme Court has referred to its provision as one "of great importance in our jurisprudence" which guaranties a remedy for common law and legislatively recognized rights.

Although the Illinois provision has been characterized as a mere philosophical expression, it has been cited as a basis for recognizing new remedies, rights, and causes of action. For example, in *Daily v. Parker*, the Seventh Circuit Court of Appeals created a cause of action in favor of a minor against a woman who enticed the minor's father away from home. The court relied on the Illinois remedies clause and the doctrine of judicial empiricism.


Wisconsin's constitutional provision reads:

> Every person is entitled to a certain remedy in the laws for all injuries, or wrongs which he may receive in his person, property, or character; he ought to obtain justice freely, and without being obliged to purchase it, completely and without denial, promptly and without delay, conformably to the laws.


When evaluating legislative alterations of remedies, the Wisconsin Supreme Court has declared its test to be: "If the legislative act materially impairs the remedy, the Act is unconstitutional; but if the legislative act leaves the parties with a 'substantial remedy' it does not violate the constitution." Von Baumberg v. Bade, 9 Wis. 559, 577-78 (1859); see State ex rel. Blockwitz v. Diehl, 198 Wis. 326, 223 N.W. 852 (1929). In upholding a change in statutory tax collection procedures, the *Diehl* court stated: "A remedy may not be taken away altogether, but it may be changed or modified, providing it leaves an adequate remedy, though less convenient, prompt, or speedy." *Id.* at 330-31, 223 N.W. at 854; *cf.* Knickerbocker v. Beaudette Garage Co., 190 Wis. 474, 482, 209 N.W. 763, 765 (1926) (trial judge's prejudicial remarks to jury in attempt to force counsel to settle case violated art. I, § 9 by denying litigant a "complete remedy").
It characterized the failure to provide a remedy as a return to the age-old philosophy "whatever is, is right," noting that "probably no institution has given life and breath to this thought as freely as the judiciary." The court reasoned that in a complex society, courts can "hardly be advisedly called radical if they indulge in lawmaking by decisions, or in a word, engage in judicial empiricism."

In *St. Louis v. Drolet*, an Illinois appellate court demonstrated its willingness to use the remedies clause to create new remedies. The *Drolet* court affirmed a lower court order expunging police records of a minor who was released without being charged. It ruled that, under the constitutional directive of the Illinois remedies clause, the lower court had "acted within its inherent power to grant a remedy to the invasion of privacy of the juvenile involved therein."

The Wisconsin Supreme Court has been more hesitant to use the state's remedies clause to ameliorate wrongs and create causes of action because it perceives the creation of rights as a legislative prerogative. On two occasions, however, the Wisconsin court has fashioned new review procedures when an adequate remedy

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195. The *Daily* court accepted Pound's definition of judicial empiricism as "the method of applying the judicial experience of the past to the judicial questions of the present." 152 F.2d at 177.

196. Id.

197. Id. The court quoted extensively from Pound's book *The Spirit of the Common Law*. "Anglo-American law is fortunate indeed in entering upon a new period of growth with a well-established doctrine of law-making by judicial decision .... Undoubtedly .... judicial empiricism was proceeding over-cautiously at the end of the last century." Id. See generally Comment, *Tort Liability of a Parent to Minor Unemancipated Child for Wilful and Wanton Acts*, 41 MARQ. L. REV. 188 (1957) (suggesting that Wis. CONST. art. I, § 9 mandates a cause of action by a minor against parents for tortious acts); Comment, *The Infant's Right of Action for Prenatal Injuries*, 1951 Wis. L. REV. 518 (express legislation not needed for courts to create right of action by infant for injuries inflicted while *en ventre sa mere*, because article I, § 9 of the Wisconsin Constitution provides sufficient basis for action).


199. Id. at 30, 348 N.E.2d at 292.

200. Id.

201. See Mulder v. Acme-Cleveland Corp., 95 Wis. 2d 173, 189, 290 N.W.2d 276, 284 (1980) ("No legal rights are conferred by this portion of the Constitution."); Scholberg v. Itnyre, 264 Wis. 211, 215, 58 N.W.2d 698, 700 (1953) ("We still believe that the creation of new rights is a question for .... the legislature, a function which the courts should not usurp."); Wick v. Wick, 192 Wis. 260, 212 N.W. 787 (1927). In *Wick*, the court refused to create a new cause of action in favor of a minor against a parent for personal injuries. Id. at 263, 212 N.W. at 788. Justice Crownhart dissented, arguing that article one, section nine of the Wisconsin Constitution made the common law maxim "ubi jus, ibi remedium" the supreme law of Wisconsin. Id. at 264, 212 N.W. at 788 (Crownhart, J., dissenting).
did not exist. Recently, the Wisconsin Supreme Court relied on the remedies clause to permit a DES plaintiff to proceed against several drug manufacturers under strict liability and negligence theories, even though the plaintiff could not determine the actual manufacturer.

The decisions of the Illinois and Wisconsin courts demonstrate the creative use of a remedies clause. As the Seventh Circuit noted in Daily, judicial empiricism coupled with the language of a remedies clause permits courts to respond to new dilemmas in a complex and changing society. Proponents of state court activism have encouraged state courts to rely on independent constitutional language, experiment with novel judicial resolutions to problems, and "regionalize" concepts of civil liberties.

B. Judicial Reluctance to Fashion Rights and Remedies

Although state courts have been willing to use their remedies clauses, they have also recognized certain limitations. The Wisconsin and Illinois courts have refused to create new causes of action when an express statutory prohibition limits expansion of a right or remedy. For example, in Heckendor v. First National Bank, the plaintiff attacked the Illinois Interspousal Immunity

202. See D.H. v. State, 76 Wis. 2d 286, 294, 251 N.W.2d 196, 201 (1977); Hortonville Educ. Ass'n v. Hortonville Joint School Dist., 66 Wis. 2d 469, 497, 225 N.W.2d 658, 673 (1974), rev'd on other grounds, 426 U.S. 482 (1976). "When an adequate remedy or forum does not exist to resolve disputes or provide due process, the courts, under the Wisconsin Constitution, can fashion an adequate remedy." 76 Wis. 2d at 294, 251 N.W.2d at 201 (citing Hortonville, 66 Wis. 2d at 497, 225 N.W.2d at 673). In both cases, the court fashioned a new procedure when an adequate remedy did not exist, but provided that the remedy would be available only until the legislature established an adequate remedy and forum. D.H., 76 Wis. 2d at 294, 251 N.W.2d at 201; Hortonville, 66 Wis. 2d at 498, 225 N.W.2d at 673.

203. Collins v. Eli Lilly Co., 342 N.W.2d 37 (Wis. 1984). DES (diethylstilbestrol) was commonly prescribed during the 1950's to prevent miscarriages. High rates of cancer have now appeared in daughters of women who took DES during pregnancy. Id. at 44-45.

204. See generally B. CARDOZO, supra note 27, at 102-06 (arguing judicial process requires interpretation of changing social conscience).

205. 152 F.2d 174, 177 (7th Cir. 1945).

206. See New State Ice Co. v. Liebmann, 285 U.S. 262, 310-11 (1932) (Brandeis, J., dissenting). Justice Brandeis stated: "It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." Id. at 311. See generally Note, supra note 89, at 553 (state courts should assume activist role to increase autonomy in state law, avoid retrenchment of civil rights in Burger era, and develop regional notions of individual liberties).

207. See infra notes 208-22 and accompanying text.

208. 19 Ill. 2d 190, 166 N.E.2d 571, cert. denied, 364 U.S. 882 (1960).
Act. The Act prohibited marriage partners from suing each other for injuries inflicted during coverture and was challenged as a violation of the Illinois remedies clause. The Illinois Supreme Court characterized the basic jurisprudential policy of the clause as one which "serves both to preserve the rights recognized by the common law and to permit the fashioning of new remedies to meet changing conditions." Notwithstanding its broad policy statement, the court added a significant qualifier: "[T]his policy expression does not authorize us to create a new cause of action unknown to the common law in the face of an express statutory prohibition.

Judicial willingness to use a constitutional remedies provision to create a new cause of action depends in part upon whether the injury or wrong was recognized at common law. If the injury or wrong was actionable at common law, application of the remedies provision to fashion a judicial remedy is appropriate. Similarly, a purely statutory right, nonexistent at common law, may be legislatively abolished or modified without constitutional problems.

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209. Id.
210. Id. at 194, 166 N.E.2d at 572-73.
211. Id. at 194, 166 N.E.2d at 573.
213. Nolin v. Nolin, 68 Ill. App. 2d 54, 215 N.E.2d 21 (1966). In Nolin, the court declined to create a cause of action for libel or slander against one who presents a defamatory will for probate. Id. at 54, 215 N.E.2d at 24. The court stated that "Article II, § 19 of ... our Constitution has been construed to mean only that remedies known to the common law, though subject to reasonable legislative change for the public welfare, are preserved and may not be destroyed." Id. at 56, 215 N.E.2d at 24.
214. See Firemen's Ins. Co. v. Washburn County, 2 Wis. 2d 214, 85 N.W.2d 840 (1957) ("injuries and wrongs" as used within Wis. Const. art. I, § 9, must be construed in light of the common law as it stood at the time of the adoption of the constitution in 1848).
215. Steffa v. Stanley, 39 Ill. App. 3d 915, 350 N.E.2d 886 (1976). In upholding the Illinois Interspousal Immunity Act, the court traced the history of a wife's legal status, noting her common law status as chattel; an 1874 legislative determination that permitted a wife to sue her husband; and an 1953 legislative determination that wife and husband be prohibited from suing each other for torts committed during coverture. Id. at 917, 350 N.E.2d at 888. The court summarized: "As it was within the power of the legislature to determine public policy and grant such right ... in 1874, it was also within its authority in 1953 to change this policy concept and to partially withdraw such right." Id. at 917, 350 N.E.2d at 888 (quoting Heckendorn v. First Nat'l Bank, 19 Ill. 2d at 195, 166 N.E.2d at 574); see Cogger v. Trudell, 35 Wis. 2d 350, 151 N.W.2d 146 (1967) (since cause of action for wrongful death was purely statutory, no such right existed at common law and Wis. Const. art. I, § 9 had no applicability to a wrongful death claim); Firemen's Ins. Co. v. Washburn County, 2 Wis. 2d 214, 85 N.W.2d 840 (1957) (remedies for wrongs not
Judicial creation of new causes of action, however, should not depend entirely on whether the common law recognized a specific right. Although some jurists characterize constitutional interpretation as limited by the understanding of its framers, such an approach can create serious problems for jurists when applying the constitution to modern conditions. Eventually, a constitutional document must be acknowledged to be a "very human document" that is valuable only when unconstrained by ancient actionable at common law but made so by statute can be abolished prospectively without violating Wis. Const. art. I, § 9). But see People v. Connell, 2 Ill. 2d 332, 118 N.E. 2d 262 (1954) (divorce law requiring person desiring divorce to file written statement of intent to file complaint not less than 60 days or more than one year before filing complaint violated Ill. Const. art. II, § 19). In Connell, the court rejected the argument that "injuries and wrongs" referred only to natural rights existing independently of statute, concluding that article two, section nineteen applied to rights born by legislative grant. 2 Ill. 2d at 340, 118 N.E. 2d at 266; see also Dougherty v. American McKenna Process Co., 255 Ill. 369, 99 N.E. 619 (1912) (Ill. Const. art. II, § 19 applied to action based on statutory right to recover damages caused by wrongful death).

216. See, e.g., Payne v. City of Racine, 217 Wis. 550, 259 N.W. 437 (1935) (words and phrases in constitution must be understood in sense most obvious to common understanding at time of adoption); State ex rel. Bare v. Schinz, 194 Wis. 397, 400, 216 N.W. 509, 511-12 (1927) ("The meaning of the constitutional provision having been once firmly established as of the time of its adoption . . . continues forever, unless it is changed or modified by the Constitution.").

217. Borgnis v. Falk Co., 147 Wis. 327, 330, 133 N.W. 209, 215 (1911). In Borgnis, Chief Justice Winslow, while upholding the constitutionality of Wisconsin's voluntary workers' compensation laws, outlined the dilemma facing twentieth century jurists:

A constitution is a very human document, and must embody with greater or less fidelity the spirit of the time of its adoption. It will be framed to meet the problems and difficulties which face the men who make it, and it will generally crystallize with more or less fidelity the political, social, and economic propositions which are considered irrefutable, if not actually inspired, by the philosophers and legislators of the time; but the difficulty is that, while the Constitution is fixed or very hard to change, the conditions and problems surrounding the people, as well as their ideals, are constantly changing. The political or philosophical aphorism of one generation is doubted by the next, and entirely discarded by the third. The race moves forward constantly, and no Canute can stay its progress.

Constitutional commands and prohibitions, either distinctly laid down in express words or necessarily implied from general words, must be obeyed, and implicitly obeyed, so long as they remain unamended or unrepealed. Any other course on the part of either legislator or judge constitutes violation of his oath of office; but when there is no such express command or prohibition, but only general language, or a general policy drawn from the four corners of the instrument, what shall be said about this? By what standards is this general language or general policy to be interpreted and applied to present day people and conditions? When an eighteen century constitution forms the charter of liberty of a twentieth century government, must its general provisions be construed and interpreted by an eighteenth century mind in the light of eighteenth century conditions and ideals? Clearly not. This were to command the race to halt in its progress, to stretch the state upon a veritable bed of Procrustes.

Id. at 348-49, 133 N.W. at 215-16.
common law precedent that serves little purpose in today’s society.

Judicial willingness to create new remedies has not been affected by additions to the language of a constitutional remedies provision. In 1970, Illinois added the word “privacy” to its remedies clause.\(^{218}\) Although the constitutional commentary to the amendment provided that the addition gave, “for the first time, the assurance that a person who receives an injury or a wrong for ‘invasion of privacy’ shall have a remedy,”\(^{219}\) the Illinois courts construed the amendment as only a reaffirmation of the common law right to privacy.\(^{220}\) Thus, the insertion of the word “privacy” did not create a new cause of action\(^{221}\) or mandate extension of the right of privacy to currently unrecognized circumstances.\(^{222}\)

C. Key Words and Phrases—A Textual Approach

Earlier discussion demonstrated that the Minnesota Supreme Court has approached the Minnesota remedies provision as a mere philosophical statement,\(^{223}\) as a rule or test,\(^{224}\) and as an expression of the common meaning of its terms.\(^{225}\) The Illinois and Wisconsin courts have also construed the key words and phrases of their respective provisions.\(^{226}\) Key terms generally are construed independently of any standard for measuring a constitutional challenge. By interpreting the key terms of their remedies provisions, the Illinois and Wisconsin courts have fashioned pragmatic solu-

\(^{218}\) See supra note 186 for current language of Illinois provision and supra note 188 for pre-1970 language.


\(^{221}\) Kelly v. Franco, 72 Ill. App. 3d 642, 391 N.E.2d 54 (1979).

\(^{222}\) See People v. McCarty, 86 Ill. 2d 200, 340 N.E.2d 529 (1975) (criminal defendant had no “right” to suppression of evidence at probation revocation hearing and art. I, § 12 did not mandate application of criminal exclusionary rule to probation revocation proceeding).

\(^{223}\) See supra notes 49-82 and accompanying text.

\(^{224}\) See supra notes 82-116 and accompanying text.

\(^{225}\) See supra notes 117-32 and accompanying text.

\(^{226}\) The constitutional provisions of Wisconsin and Illinois offer redress or remedy to “every person” for “injuries” or “wrongs” which he receives to his “person” or “property.” The Illinois provision also includes wrongs to “privacy” and “reputation.” In addition, Illinois’ constitution reads “injuries and wrongs,” while Wisconsin’s constitution reads “injuries or wrongs.” Both Illinois and Wisconsin provide for a “certain remedy.” See Ill. Const. art. I, § 12 (1870, amended 1970); Wis. Const. art. I, § 9.
tions to a variety of problems. For example, the phrase “every person” has been held to include illegal aliens.227

The constitutional guaranty of a “certain remedy” has been interpreted as guaranteeing a litigant his day in court, but not the specific remedy he desires.228 Nor has the term “certain remedy” required recognition of a new cause of action or remedy, if one was available but the complainant failed to meet the requisite burden of proof.229 Statutory limitations on damages have been unsuccessfully attacked as violative of the term “certain remedy.”230 In particular, statutory restrictions on the type of damages recoverable in common law actions have been upheld where the underlying cause of action remained available.231

228. Metzger v. Wisconsin Dept. of Tax., 35 Wis. 2d 119, 150 N.W.2d 431 (1967) (requirement that plaintiff challenging constitutionality of gift tax assessment exhaust administrative procedures before filing action does not violate Wis. CONST. art. I, § 9 even though procedures are inconvenient and expensive); accord Smith v. Department of Pub. Aid, 67 Ill. 2d 529, 367 N.E.2d 1286 (1977) (failure of Illinois Public Aid Code to adopt Illinois Administrative Review Act for food stamp termination does not violate ILL. CONST. art. I, § 12 because common law certiorari was available to plaintiff to permit judicial review); cf. Wiener v. J.C. Penney Co., 65 Wis. 2d 139, 222 N.W.2d 149 (1974) (statute prohibiting certain usury victims from maintaining class action does not violate Wis. CONST. art. I, § 9, although amount of excess interest due any one individual may not justify individual litigation).
So long as some remedy for the alleged wrong exists, section 12 does not mandate recognition of any new remedy . . . . The mere fact that the relief provided by these remedies [action for malicious prosecution or abuse of process] is limited, or that the plaintiff is unable to meet the burden of proof required does not dictate the creation of new remedies.
Id. at 950-51, 381 N.E.2d at 1374 (citation omitted); see also Pantone v. Demos, 59 III. App. 3d 328, 375 N.E.2d 480 (1978). In Pantone, plaintiff physicians sought recognition of a new cause of action for “willfully and wantonly bringing suit against them without having reasonable cause to believe that they were guilty of medical malpractice . . . .” Id. at 331, 375 N.E.2d at 482. The court responded: “Section 12 . . . . is not a mandate that a ‘certain remedy’ be provided in any specific form . . . . So long as some remedy for the alleged wrong exists section 12 does not mandate recognition of any new remedy.” Id. at 320, 375 N.E.2d at 483.
230. See Goldstein v. Hertz Corp., 16 Ill. App. 3d 89, 305 N.E.2d 617 (1973) (statutory damage limitation on recovery in wrongful death action does not violate art. I, § 12); Zostautas v. St. Anthony De Padua Hosp., 23 Ill. 2d 326, 178 N.E.2d 303 (1961) (limited remedies provided in wrongful death act did not violate art. II, § 19); Smith v. Hill, 12 Ill. 2d 508, 147 N.E.2d 321 (1958) (act limiting damages for alienation of affections to actual damages, and restricting consideration of certain elements such as the defendant’s wealth, prospect for wealth, plaintiff’s mental anguish, and injury to plaintiff’s feelings in computation of damages did not violate art. II, § 19).
231. See Siegall v. Solomon, 19 Ill. 2d 145, 166 N.E.2d 5 (1960) (statute not prohibiting action for alienation of affections but denying certain damages did not violate art. II, § 19); Smith v. Hill, 12 Ill. 2d 508, 147 N.E.2d 321 (1958) (act limiting damages to actual
The meaning accorded the terms "injuries" and "wrongs" further illuminates the judicial reasoning process. Modern courts generally reason that the existence of an actionable legal right is a prerequisite to an actionable legal wrong. When construing a constitutional remedies provision, courts have restricted themselves to "actionable wrongs" or wrongs born of the violation of a "legal right." This restrictive definition limits the scope of remedies clauses to preclude recognition of a purely moral right as the basis for a wrong actionable under a remedies provision.

D. The Relationship Between Constitutional Provisions and Public Policy

A constitutional remedies provision usually does not pose problems for legislation barring the exercise of certain rights or remedies for well-recognized public policy reasons. Statutes of damages in breach of promise and seduction actions did not violate art. II, § 19, since cause of action remains); cf. Heck v. Schupp, 394 Ill. 296, 68 N.E.2d 464 (1946). In Heck, the Illinois Supreme Court found that the "Heart Balm Act" violated article two, section 19. Id. at 300, 68 N.E.2d at 466. Although the act did not abolish the actions for alienation of affections, breach of contract to marry, or criminal conversion, it made it unlawful to file, cause to be filed, threaten to file, or threaten to cause to be filed such actions. Id. at 299, 68 N.E.2d at 465. The legislation was held to have "virtually abolished" the common law causes of action, therefore violating the remedies provision. Id. at 300, 68 N.E.2d at 466. See generally Comment, Constitutionality of "Anti-Heart-Balm" Statute, 13 U. CHI. L. REV. 375 (1945).

232. See Welch v. Davis, 342 Ill. App. 69, 95 N.E.2d 108 (1950), rev'd on other grounds, 410 Ill. 130, 101 N.E.2d 547 (1951) (since it is not an "actionable civil wrong" for one spouse to injure another, art. II, § 19 was not violated); Cords v. State, 62 Wis. 2d 42, 214 N.W.2d 405 (1974) (since citizen has no "legal right" to hold his sovereign liable for personal injuries, art. I, § 9 was not violated); Ross v. Ebert, 275 Wis. 523, 82 N.W.2d 315 (1957) (Wisconsin Fair Employment Code did not create right to union membership over racially-based objections of other members, therefore minorities seeking admission to bricklayers' union did not have art. I, § 9 right to remedy).

233. See Lutheran Trifoldighed Congregation v. St. Paul's English Evangelical Lutheran Congregation, 159 Wis. 56, 150 N.W. 190 (1914). The court stated:

The function of judicial remedies is to redress and prevent wrongs of sufficient dignity according to the written or unwritten law to be worthy of such interference. There are many outside of that field left to be redressed by the condemnation of the wrong-doer's conscience or social condemnation or penalized in some other way within his environment.

Id. at 58, 150 N.W. at 191.

Courts have never taken jurisdiction over purely moral wrongs. The equitable maxim ubi jus, ibi remedium historically required that the right in question be within the scope of judicial action. Equity never attempted to deal with obligations and corresponding rights which were identified as purely moral. See, e.g., Gavin v. Curtin, 171 Ill. 640, 49 N.E. 523 (1898) (courts of equity will provide a remedy not for mere abstract moral rights but for rights recognized by existing law); see also 2 J. POMEROY, EQUITY JURISPRUDENCE § 424, at 185-86 (1941).
limitations have survived constitutional attack. In other states, the doctrine of sovereign immunity and guest statutes have survived right-to-remedy attacks, although dictum in a Minnesota decision stated that historical sovereign immunity contradicted the Minnesota remedies provision. A constitutional remedies provision cannot be used to remedy poor lawyering, nor will it help a litigant whose counsel failed to state a cause of action or to


235. In McCoy v. Kenosha County, 195 Wis. 273, 218 N.W. 348 (1928), the plaintiff, contesting the constitutionality of a statutorily imposed damage limitation when suing a municipality for personal injuries, argued that Wisconsin's Constitution article I, section 9 was designed "to sweep away all the old doctrines and previously recognized limitation upon the so-called natural rights of the individual ...." Id. at 275, 218 N.W. at 350. The court rejected the argument, noting that its adoption "would indeed effect quite a revolution in our present concepts of the rights and obligations of individuals to each other, and of the state and its agencies towards the individual." Id. Since the provision was construed as protecting only those injuries or wrongs recognized by the common law when the provision was adopted in 1848, a legislatively created right of action could be curtailed, extended, or limited without offending the constitution. Id. at 276, 218 N.W. at 351. But cf. State ex rel. Wickham v. Nygaard, 159 Wis. 396, 400, 150 N.W. 513, 515 (1915) (art. I, § 9 "is above and beyond any inconsistent common law rule that existed when the constitution was framed, as well as any statute enacted reasonably applicable to the current situation"). See generally Annot., 57 A.L.R. 419 (1928) (author concludes that broad constitutional provisions such as Wis. Const. art. I, § 9 do not alter common law rules of sovereign immunity).

Although plaintiffs have continued to argue the invalidity of the doctrine of sovereign immunity and tort immunity acts under a constitutional remedies provision, they have been unsuccessful. See, e.g., Richardson v. Grundel, 85 Ill. App. 3d 46, 406 N.E.2d 575 (1980) (judicial officers immune from suit for injuries resulting from acts performed in exercise of judicial function); Adams v. City of Peoria, 77 Ill. App. 3d 683, 396 N.E.2d 572 (1979) (tort immunity act exempting public entities and employees from liability for acts or omissions while engaged in firefighting did not violate art. I, § 12); Sullivan v. Milothian Park Dist., 51 Ill. 2d 274, 281 N.E.2d 659 (1972); Maloney v. Elmhurst Park Dist., 47 Ill. 2d 367, 265 N.E.2d 654 (1970).

236. Cracraft v. City of St. Louis Park, 279 N.W.2d 801, 808 (Minn. 1979).


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plead properly.\textsuperscript{239}

\section*{IV. Conclusion}

This survey has illustrated that the Minnesota Supreme Court’s approach to the remedies clause has been more restrictive than that of other states. Because the court has only once used section eight alone to declare a legislative act invalid,\textsuperscript{240} its power as a tool of constitutional attack appears limited. Nevertheless, when attempting to fashion new remedies in the future, litigants may profit from the precedent of other jurisdictions.

The Minnesota Supreme Court recently recognized a new cause of action for intentional infliction of emotional distress.\textsuperscript{241} Policy reasons and persuasive precedent from other jurisdictions were cited to support recognition of the tort. No reference was made to section eight, although it was well-suited as a basis for recognizing the cause of action. Judicially created remedies may be needed where rights have been statutorily enacted without accompanying remedies, and section eight should be relied on when attempting to reconcile such situations. Finally, the immunity cases indicate section eight may be a successful theory when litigants are confronted with various historically-based immunities.

Although the courts do not always accord a literal meaning to the guaranty of “no wrong without a remedy,” its status as a constitutional mandate lends greater force to an argument than mere recitation of the equitable maxim.\textsuperscript{242} In addition, the historical

\begin{footnotesize}
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\item 688, 691 (1977) (dismissal of defective complaint did not offend art. I, § 12); Bauscher v. City of Freeport, 103 Ill. App. 2d 372, 376, 243 N.E.2d 650, 652 (1968) (failure to state cause of action cannot be cured by alleging that plaintiff should have a remedy for all injuries and wrongs under art. II, § 19).
\item 239. See Zalduendo v. Zalduendo, 45 Ill. App. 3d 849, 855, 360 N.E.2d 386, 391 (1977) (art. I, § 12 afforded subject matter jurisdiction to court for purpose of awarding child support based on divorce decree entered in Cuba); cf. Douglas v. Hutchinson, 183 Ill. 323, 327, 55 N.E. 628, 628 (1899) (art. II, § 19 did not afford circuit court jurisdiction over proceeding to contest judicial election because proceeding is not suit in law or equity pursuant to ILL. CONST. art. 6 conferring jurisdiction on circuit courts in “all causes in law and equity”).
\item 240. Agin v. Heyward, 6 Minn. 53 (1861).
\item 242. Formation of a rule as a constitutional provision raises its status to an “imperative mandate” of the sovereign people and not merely “good advice which legislators and
\end{itemize}
\end{footnotesize}`
and psychological significance of the provision's language should not be underestimated. The Illinois Constitutional Study Commission considered deleting the provision, but recommended its retention, even though the Illinois courts had not developed a clear statement of its meaning. The Minnesota Constitutional Study Commission did not consider deleting section eight. The Minnesota constitutional Framers, well aware that the federal Constitution did not contain similar language, obviously considered this principle essential to the maintenance of liberty and a civilized government. Although it is doubtful that the Framers contemplated section eight's use as a basis for judicial legislation, they clearly appreciated the worthlessness of a legal right without an adequate legal remedy. This concern continues to be reflected in twentieth century judicial decisions.

The United States Supreme Court has largely forsaken the judicial activism of the Warren Court. Today, its decisions are often conservative, favoring states rights and narrowing federal protections. The nationwide impact of its decisions may discourage the Court from establishing minimum rights, because such establishment halts regional experimentation. Consequently, state jurists should not hesitate to use the broad remedial language of a state constitution to create or expand rights and remedies, especially when a federal constitutional counterpart is lacking. The courts may accept or reject as they please.” Freeman v. Goff, 206 Minn. 49, 54, 287 N.W. 238, 241 (1939) (citing Sjoberg v. Security Sav. & Loan Ass'n, 73 Minn. 203, 212, 75 N.W. 1116, 1118 (1898)).

243. One analysis of the Illinois constitutional provision, prepared in 1969 for the Illinois Constitutional Study Commission to assist with its drafting of an amended constitution, noted that “[T]he Illinois courts have never been quite sure what to do with this section.” G. BRADEN & R. COHN, supra note 188, at 90. Nevertheless, the authors recommended its retention, stating:

The section in style and tone appears to be a pious, homiletic pronouncement of incontestable verities . . . . It would indeed be astonishing to find that persons in states lacking this constitutional provision have suffered deprivation of rights as a consequence. Notwithstanding, the section does have historic, political and psychological significance. Since its abolition or change may be misconstrued, it may be good constitutional policy to preserve it.

Id. at 97; see also Note, An Effort to Revise the Minnesota Bill of Rights, 58 MINN. L. REV. 157 (1974) (this report of the recommendations of the Minnesota Constitutional Study Commission indicated that art. I, § 8 was not considered for expansion or deletion).

244. See Note, supra note 243, at 189.

245. Project Report, supra note 84, at 272.

246. Id. at 290.

247. Id.

248. Many commentators have urged renewed reliance on state constitutional provisions. See, e.g., Fleming & Nordby, The Minnesota Bill of Rights: “Wrapped in the Old Miasmal
language of section eight was not inserted in the Minnesota Constitution as a "matter of idle ceremony or a 'string of glittering generalities.' "249 Courts as well as litigants should actively assert section eight in future cases.

249. Theide v. Town of Scandia Valley, 217 Minn. 218, 230, 14 N.W.2d 400, 408 (1944) (quoting Rhodes v. Walsh, 55 Minn. 542, 549, 57 N.W. 212, 213 (1893)).