

Fall 1977

## Article 1, Section 21: Access to Courts in Florida

Judith Anne Bass

Follow this and additional works at: <http://ir.law.fsu.edu/lr>



Part of the [Constitutional Law Commons](#), and the [State and Local Government Law Commons](#)

---

### Recommended Citation

Judith A. Bass, *Article 1, Section 21: Access to Courts in Florida*, 5 Fla. St. U. L. Rev. 871 (2014) .  
<http://ir.law.fsu.edu/lr/vol5/iss4/8>

This Note is brought to you for free and open access by Scholarship Repository. It has been accepted for inclusion in Florida State University Law Review by an authorized editor of Scholarship Repository. For more information, please contact [bkaplan@law.fsu.edu](mailto:bkaplan@law.fsu.edu).

## ARTICLE I, SECTION 21: ACCESS TO COURTS IN FLORIDA

The judiciary is an indispensable part of the operation of our . . . system. With the growing complexities of government it is often the one and only place where effective relief can be obtained. If the judiciary were to become a super-legislative group sitting in judgment on the affairs of people, the situation would be intolerable. But when wrongs to individuals are done by violation of specific guarantees, it is abdication for courts to close their doors.<sup>1</sup>

**"THE COURTS SHALL BE OPEN TO EVERY PERSON FOR REDRESS OF ANY INJURY, AND JUSTICE SHALL BE ADMINISTERED WITHOUT SALE, DENIAL OR DELAY."**

—FLA. CONST., art. I, § 21

### I. INTRODUCTION

The constitutional provision above guarantees to Floridians rights so basic, so assumed and taken for granted, as not to require expression within our state constitution. Surely as *Americans* we have the right of access to the courts—and just as surely the right of redress for any injury. And justice—we may conceive of situations in which the "sale, denial or delay" of justice may occur; but to sanction that sale, denial or delay? Certainly never in a nation predicated upon "liberty and justice for all."<sup>2</sup>

The right of access to the courts was such an integral part of the common law that the framers of our Federal Constitution perceived no need to guarantee this right expressly. Though not specifically provided for, the right of court access is nevertheless pervasive within the United States Constitution. Over the years courts have found this right in the first amendment's "petition for redress of grievances" provision;<sup>3</sup> in the fifth and fourteenth amendments' "due process of law" clauses;<sup>4</sup> in the sixth amendment's "right to a speedy and public trial" guarantee;<sup>5</sup> in the fourteenth amendment's "privileges and im-

---

1. *Flast v. Cohen*, 392 U.S. 83, 111 (1968) (Douglas, J., concurring).

2. Pledge of Allegiance to the American Flag.

3. *See, e.g., United Transp. Union v. State Bar*, 401 U.S. 576 (1971). *See generally* Gammon, *A Reappraisal of the Indigent's Right of Access to Bankruptcy Proceedings*, 9 AKRON L. REV. 531, 532-37 (1976); Note, *A First Amendment Right of Access to the Courts for Indigents*, 82 YALE L.J. 1055 (1973).

4. *See, e.g., Boddie v. Connecticut*, 401 U.S. 371 (1971).

5. *See, e.g., Smith v. United States*, 360 U.S. 1 (1959).

munities" provision;<sup>6</sup> and in the fourteenth amendment's "equal protection" clause.<sup>7</sup>

No unanimity exists as to the source and exact nature of the federal right of access to courts—and, therefore, as to the appropriate standard of review to be applied when a denial of this right occurs.<sup>8</sup> Indeed, controversy exists among current Supreme Court members regarding not only the constitutional source of this right, but also its very existence. Justice Rehnquist finds the "'fundamental constitutional right of access to the courts' . . . created virtually out of whole cloth . . . ."<sup>9</sup> Chief Justice Burger is "unenlightened as to the source of the 'right of access to the courts' . . . ."<sup>10</sup> Justices Stewart,<sup>11</sup> Brennan,<sup>12</sup> and Marshall<sup>13</sup> anchor the right in the due process clause, and Justice Brennan also finds it within the purview of the equal protection clause.<sup>14</sup>

In direct contrast to such confusion and controversy stands article I, section 21 of the Florida Constitution. This provision today guarantees to Floridians the same rights to court access and redress for injury as guaranteed by the framers of the Florida Constitution of 1838. For 123 years Florida constitutions have expressly granted constitutional status and protection for these rights.<sup>15</sup> Article I, section 21 is self-executing. Its language is mandatory and all-encompassing: "The courts *shall* be open to *every* person for redress of *any* injury, and justice *shall* be administered without sale, denial or delay."<sup>16</sup>

Yet Florida courts do not utilize this provision as fully as the words of section 21 demand. Prior to 1973, section 21 and its precursor, Declaration of Rights section 4, were rarely utilized as the sole basis for decisions. Instead, the access-to-courts provision was generally applied by the courts in conjunction with state and federal equal protection and due process provisions. In 1973, however, the Florida Supreme Court addressed the issue of legislative modification or abolishment of common law remedies. With the test articulated in *Kluger v.*

---

6. See, e.g., *Chambers v. Baltimore & O.R.R.*, 207 U.S. 142 (1907).

7. See, e.g., *Griffin v. Illinois*, 351 U.S. 12 (1956).

8. For consideration of potential avenues to be utilized by the courts in developing a conceptual framework of constitutional adjudication to deal with the issue of access to courts, see Comment, *The Right of Access to Civil Courts by Indigents: A Prognosis*, 24 AM. U.L. REV. 129, 146-57 (1974).

9. *Bounds v. Smith*, 97 S. Ct. 1491, 1504 (1977).

10. *Id.* at 1501.

11. *United States v. Kras*, 409 U.S. 434, 454 (1973) (Stewart, J., dissenting).

12. *Id.* at 458 (Douglas & Brennan, JJ., dissenting).

13. *Id.* at 462 (Marshall, J., dissenting).

14. *Id.* at 458 (Douglas & Brennan, JJ., dissenting).

15. But see discussion at text accompanying notes 270-75 *infra*.

16. (emphasis added).

*White*,<sup>17</sup> the court heightened the importance and viability of section 21.

Such viability, however, remains limited to those situations in which the right of access to the courts and the right of remedy are threatened by legislative action. In cases which attempt to expand the concept of court access—through the standing doctrine, for example, or access to courts for indigents—Florida courts have generally declined the invitation to expand the potential of section 21. As a result, the rights of access to the courts and redress for any injury stand underdeveloped and underutilized by Florida courts.

It seems inconceivable that an affluent society would tolerate the denial of access to the judicial system solely because an individual is poor. But that is the law today, despite the express command of article I, section 21. It seems inconceivable that the courts of the state would deny citizens standing to sue on matters of great public concern where there has been genuine, though undifferentiated, injury. But that is the law today, despite the express command of article I, section 21.

The command that the courts “be open to every person” means more than that the business hours are from nine to five. Yet when confronted with practical problems—a poor person who cannot pay court fees or a citizen trying to hold her government to account—the courts have ignored the plain language of the section. Overmuch heed has been paid to federal precedent developed for a system of limited powers instead of developing a responsive judicial system for a sovereign state with plenary powers.

This note will review the origin and development of Florida's access-to-courts provision. It will review the judicial doctrines that have evolved thereunder. The writer will suggest that a more expansive reading of the section by the courts is imperative in order to make access to courts a meaningful reality instead of an empty promise. In the alternative, if Florida courts are unwilling to fulfill section 21's language in full measure, express constitutional change should be undertaken.

## II. HISTORICAL PERSPECTIVE

The language of article I, section 21 of the Florida Constitution has its origins in the Magna Carta, which was written over 750 years

---

17. 281 So. 2d 1 (Fla. 1973).

ago.<sup>18</sup> Chapter Forty of the Magna Carta's sixty-three chapters read: "To no one will we sell, to no one will we deny, or delay right or justice."<sup>19</sup>

Chapter Forty, along with other provisions of the Magna Carta, was transported during the seventeenth century to the English colonies in the New World where they formed the basis for the rights of American citizens.<sup>20</sup> The principle of "open courts" and "justice without sale, denial, or delay" appeared in some of the earliest colonial documents and charters,<sup>21</sup> and later reappeared in the "Declaration of Rights" sections of the original constitutions of Delaware,<sup>22</sup> Maryland,<sup>23</sup> North Carolina,<sup>24</sup> Massachusetts,<sup>25</sup> and New Hampshire.<sup>26</sup>

Yet the principle was not incorporated in the Bill of Rights of the Federal Constitution.<sup>27</sup> Interestingly, none of the plans presented at the Federal Convention of 1787 even offered a bill of rights.<sup>28</sup> Many members of the Convention evidently believed that provisions to safeguard individual liberties, such as those contained within the Magna Carta, were created to protect subjects from rulers claiming absolute powers. Since the Constitution then under consideration was to be founded upon the will of the people themselves, such express protections were thought unnecessary.<sup>29</sup> Near the end of the Convention a movement to frame a formal bill of rights to accompany the Constitution arose but was unsuccessful.<sup>30</sup> The Constitution was submitted to Congress on September 17, 1787, without a bill of rights.<sup>31</sup>

18. Written in 1215, the Magna Carta was granted by King John of England under threat of civil war. Its purpose was to obtain recognition of certain basic rights which had been violated by the King. Because the Great Charter acknowledged essential limitations on the power of the King, it has been termed "the exemplar of the Bill of Rights." *SOURCES OF OUR LIBERTIES* 9 (R. Perry ed. 1959) [hereinafter *SOURCES*], quoting Radin, *The Myth of Magna Carta*, 60 *HARV. L. REV.* 1060, 1072 (1947).

19. *SOURCES*, *supra* note 18, at 17.

20. The policy of the English throne was that the protection of the laws of England should follow those subjects who settled in remote lands. *SOURCES*, *supra* note 18, at 9.

21. See, e.g., The Concessions and Agreements of West New Jersey, Ch. 23, Mar. 13, 1677, in *SOURCES* note 18, at 188.

22. *DEL. CONST.* of 1776, Decl. of Rights § 12, in *SOURCES*, *supra* note 18, at 339.

23. *MD. CONST.* of 1776, Decl. of Rights § 17, in *SOURCES*, *supra* note 18, at 348.

24. *N.C. CONST.* of 1776, Decl. of Rights § 13, in *SOURCES*, *supra* note 18, at 356.

25. *MASS. CONST.* of 1780, Decl. of Rights § 11, in *SOURCES*, *supra* note 18, at 376.

26. *N.H. CONST.* of 1784, arts. I & XIV, in *SOURCES*, *supra* note 18, at 384.

27. Certain commentators would argue, however, that the right of access is equivalent to the first amendment provision guaranteeing the right to petition the government for redress of grievances and therefore is contained within the Bill of Rights. See Gammon, *supra* note 3, at 531.

28. *SOURCES*, *supra* note 18, at 403.

29. *Id.* at 404.

30. *Id.* at 404-05.

31. *Id.* at 418.

The first ten amendments to the Constitution were the product of an intense four-year struggle over ratification. Most of these amendments originated as proposals by James Madison of Virginia and were based largely on the "Declarations of Rights" provisions of state constitutions—and particularly that of Virginia.<sup>32</sup> The amendments, however, were not intended to be exhaustive. As provided by the ninth amendment of the Federal Constitution, "the enumeration in the Constitution of certain rights, shall not be construed to deny or disparage others retained by the people."

Lacking an express constitutional provision guaranteeing the right of access to the courts, the United States Supreme Court has been compelled to anchor this right within existing constitutional provisions. As early as 1885 the Court declared that "[t]he Fourteenth Amendment . . . undoubtedly intended . . . that all persons . . . should have like access to the courts of the country for the protection of their persons and property, the prevention and redress of wrongs, and the enforcement of contracts . . . ."<sup>33</sup> Such decisions have been far from unanimous. Even justices on the majority side differ as to the existence or precise constitutional source of the right of access to the courts.<sup>34</sup>

In direct contrast to the framers of the Federal Constitution, Floridians since 1838 have specifically retained for themselves rights to open courts and justice administered without "sale, denial, or delay."<sup>35</sup> With minor modifications in language and sentence structure from its predecessors, the Florida Constitution of 1885 provided that:

All courts in this State shall be open, so that every person for any injury done him in his lands, goods, person or reputation shall have remedy, by due course of law, and right and justice shall be administered without sale, denial or delay.<sup>36</sup>

For eighty-three years, Florida courts utilized that language to give vitality to the maxim that "for every wrong there is a remedy."<sup>37</sup> With the 1968 revision of the Florida Constitution, section 4 of the Declara-

---

32. *Id.* at 421-22. Comprised of 16 sections, the Constitution of Virginia did not contain a provision guaranteeing open courts, or redress of injury without sale, denial or delay. *Id.* at 311-12.

33. *Barbier v. Connolly*, 113 U.S. 27, 31 (1885). *See also* *Truax v. Corrigan*, 257 U.S. 312, 330-34 (1921); *Chambers v. Baltimore & Ohio Ry.*, 207 U.S. 142, 148 (1907).

34. *See* section I *supra*.

35. Art. I, § 9 provided "[t]hat all Courts shall be open, and every person for an injury done him, in his lands, goods, person, or reputation, shall have remedy by due course of law; and right, and justice, administered without sale, denial, or delay." *See also* CONST. of 1865, art. I, § 9 and FLA. CONST. of 1861, art. I, § 9.

36. FLA. CONST. of 1885, Decl. of Rights § 4.

37. *Holland ex rel. Williams v. Mayes*, 19 So. 2d 709, 711 (Fla. 1944).

tion of Rights (hereinafter section 4) became article I, section 21 (hereinafter section 21). The new provision condensed and linguistically refined its predecessor: "any injury done him in his lands, goods, person or reputation" became "any injury"; "remedy, by due course of law" now reads "redress"; and "[a]ll courts in this State" is simply "[t]he courts". The product of the 1968 revision reads: "The courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay."<sup>38</sup>

By contrast, most of the thirty-five states which provide for access to courts in their constitutions still utilize the more archaic provisions.<sup>39</sup> Only a few states, of which Arizona,<sup>40</sup> Georgia,<sup>41</sup> and Louisiana<sup>42</sup> are typical, have refined and updated their access-to-court sections.<sup>43</sup>

Two other sections of the Florida constitution support the concept of access to courts. The Preamble was revised in 1968 to expressly "guarantee equal civil and political rights to all." The second, a 1972 amendment to Article V guarantees in addition that "[t]he supreme court shall adopt rules for the practice and procedure in all courts including . . . a requirement that no cause shall be dismissed because an improper remedy has been sought."<sup>44</sup>

The language of section 21 is clearly adequate to confer upon Floridians the rights of complete court access and remedy for all wrongs. It is equally clear that Florida courts have failed to provide section 21 rights to the fullest extent possible. The following discussion deals first with judicial treatment in general of the access-to-courts provision under the 1885 and 1968 constitutions; second, with judicially

38. FLA. CONST. art. I, § 21.

39. See, e.g., ALA. CONST. art. I, § 13; ARK. CONST. art. II, § 13; CONN. CONST. art. I, § 10; DEL. CONST. art. I, § 9; IND. CONST. art. I, § 12; KY. CONST. Bill of Rights § 14; ME. CONST. art. I, § 19; MINN. CONST. art. I, § 8; MISS. CONST. art. III, § 24; MO. CONST. art. I, § 14; MONT. CONST. art. 3, § 6; N.H. CONST. pt. 1, art. 14; N.C. CONST. art. I, § 18; N.D. CONST. art. I, § 22; PA. CONST. art. 1, § 11; R.I. CONST. art. I, § 5; S.D. CONST. art. VI, § 20; TENN. CONST. art. I, § 17; TEX. CONST. art. I, § 13; UTAH CONST. art. I, § 11; VT. CONST. ch. I, art. 4; W. VA. CONST. art. III, § 17; WISC. CONST. art. I, § 9.

40. ARIZ. CONST. art. II, § 11 reads: "Justice in all cases shall be administered openly, and without unnecessary delay."

41. Art. I, § 1, ¶ IX of the GA. CONST. reads: "No person shall be deprived of the right to prosecute or defend his own cause in any of the courts of this State, in person, by attorney, or both."

42. Art. I, § 22 of the LA. CONST. reads: "All courts shall be open, and every person shall have an adequate remedy by due process of law and justice, administered without denial, partiality, or unreasonable delay, for injury to him in his person, property, reputation, or other rights."

43. See also COLO. CONST. art. II, § 6; IDAHO CONST. art. I, § 18; ILL. CONST. art. I, § 12; KAN. CONST. Bill of Rights § 18; and MONT. CONST. art. III, § 6.

44. FLA. CONST. art. V, § 2(a).

permitted infringement of section 21 rights; and third, with the most serious denials of court access.

### III. JUDICIAL REVIEW UNDER 1885 DECLARATION OF RIGHTS, SECTION 4

Florida courts have, for the most part, relied upon the constitutional access-to-courts provision in conjunction with other state and federal constitutional provisions.<sup>45</sup> In *Atlantic Coast Line Railroad Co. v. Wilson & Toomer Fertilizer Co.*,<sup>46</sup> for example, the 1925 Florida Supreme Court reviewed a lower court decision which awarded damages, with penalty interest and attorney fees, for the loss of three carloads of fertilizer on the defendant's train. Considering the award of the penalty interest, the court stated:

In view of the amount of the claim, the unusual circumstances of the case, and the uncertainty of the defendant's liability, it was the defendant's right to fully investigate and test the legality and justness of the claim; and to impose heavy penalties for doing so, even under statutory authority, would deny to the defendant the rudiments of fair play which would violate the provisions and principles of the Fourteenth Amendment to the federal Constitution, and of sections 1, 4, and 12 of the Declaration of Rights of the Florida Constitution.<sup>47</sup>

A year later the court considered the issue of eminent domain in a condemnation proceeding by Brevard County. Relying on sections 4 and 12 of the Declaration of Rights, along with article XVI, section 29 of the state constitution, the court in *Spafford v. Brevard County*<sup>48</sup> stated that "individual rights [are secured] against unconstitutional invasion by the state, as well as from violation by other governmental agencies and individuals."<sup>49</sup>

Florida courts have tended to utilize the access-to-courts provision alone<sup>50</sup> or in conjunction with other constitutional provisions<sup>51</sup> to

---

45. Other state constitutional provisions most frequently cited with § 4 were Declaration of Rights §§ 1 and 12. Section 1 provided: "All men are equal before the law, and have certain inalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing and protecting property, and pursuing happiness and obtaining safety." Section 12 provides: "No person shall . . . be deprived of life, liberty, or property without due process of law . . . ."

46. 104 So. 593 (Fla. 1925).

47. *Id.* at 594.

48. 110 So. 451 (Fla. 1926).

49. *Id.* at 454.

50. See, e.g., *Cooper v. Tampa Elec. Co.*, 17 So. 2d 785 (Fla. 1944); *Fla. E. Coast Ry. v. State*, 83 So. 708 (Fla. 1920).

51. See, e.g., *State ex rel. Lawson v. Woodruff*, 184 So. 81 (Fla. 1938); *State ex rel.*



provide due process and equal protection rights similar to federal fourteenth amendment guarantees.<sup>52</sup> In *Gay v. Bessemer Properties*,<sup>53</sup> for example, the supreme court held that taxes imposed upon a non-domiciliary taxpayer with no business situs in Florida violated the Declaration of Rights and the fourteenth amendment of the United States Constitution.<sup>54</sup> And in an earlier taxation case, the supreme court in *State ex rel. Attorney General v. Avon Park*<sup>55</sup> relied on sections 1, 4, and 12 of the Declaration of Rights and the federal fourteenth amendment to provide equitable relief from taxation of lands illegally included in Avon Park's tax base.<sup>56</sup>

Courts have applied section 4 by itself, however, to provide both procedural and substantive rights for injured persons. In the 1933 case of *State ex rel. Vetter v. McCall*,<sup>57</sup> the supreme court considered the validity of an amendment to section 33.09, Florida Statutes, which prescribed the issuance, service, and return of process for civil courts of record. The amendment was found in violation of Declaration of Rights, section 4, because it denied resort to courts in particular suits.<sup>58</sup>

In 1942, the supreme court expanded its use of certiorari review, basing its decision on section 4. In *Kilgore v. Bird*,<sup>59</sup> the court treated a petition for a writ of prohibition on an interlocutory order as a petition for a writ of certiorari. Prior to that time a writ of certiorari issuing from the supreme court would lie only in the case of a final judgment for which no provision had been made for review by appeal—not, as in *Kilgore*, for rulings on objections to interrogatories arising in trial court proceedings. Justifying its action, the court noted:

Certiorari is a discretionary common-law writ which, in the absence of an adequate remedy by appeal or writ of error or other remedy afforded by law, a court of law *may* issue in the exercise of

---

Gore v. Chillingworth, 171 So. 649 (Fla. 1936); Skipper v. Schumacher, 169 So. 58 (Fla. 1936), *appeal dismissed & cert. denied*, 299 U.S. 507 (1936); *State ex rel. Adams v. Lee*, 166 So. 262, *cert. denied*, 299 U.S. 542 (1936); Getzen v. Sumter Co., 103 So. 104 (Fla. 1925).

52. "The clauses of the Florida Constitution which provide that every person for any injury done him, shall have remedy [Decl. of Rights § 4], that all persons are equal before the law and have certain inalienable rights [Decl. of Rights § 1], and that no person shall be deprived of life, liberty or property without due process of law [Decl. of Rights § 12] are the substantial equivalent of the due process clause of the Federal Constitution." *Quarterly Synopsis of Florida Cases*, 3 U. MIAMI L. REV. 40, 41 (1948).

53. 32 So. 2d 587 (Fla. 1947).

54. *Id.* at 591.

55. 149 So. 409 (Fla. 1933).

56. *Id.*

57. 145 So. 841 (Fla. 1933).

58. *Id.*

59. 6 So. 2d 541 (Fla. 1942).

a sound judicial discretion to review a judicial or quasi judicial order or judgment that is unauthorized or violates the essential requirements of controlling law, and that results or reasonably may result in an injury which section 4 of the Declaration of Rights of the Florida constitution commands shall be remedied by due course of law in order that right and justice shall be administered.<sup>60</sup>

In *Wilson v. Lee Memorial Hospital*,<sup>61</sup> the plaintiff sought damages for personal injuries resulting from the defendants' negligence in leaving a surgical sponge in plaintiff's abdomen. Wilson had sued the doctors who had performed the operation and the hospital. A nurse, employed by the hospital, had assisted in the operation. She averred in an affidavit that she had performed as agent and servant of the surgeon, thereby removing the hospital from liability under the doctrine of respondeat superior.<sup>62</sup> Wilson in a counter affidavit denied the allegation. The lower court, perceiving no genuine issue as to the material facts, granted the defendant-hospital's motion for summary judgment as to the hospital and Wilson appealed. Reversing the lower court, Justice Terrell wrote:

Complaints seeking to recover damages for tort should be tested by section 4 of the Declaration of Rights, Florida Constitution, F.S.A., which speaks in the imperative and requires that any one injured in his lands, goods, person or reputation, shall have remedy by due course of law, without sale, denial or delay. It is well to require the complaint to state a cause of action, but that done, it should never be overthrown by technical impediments that do not go to the merits of the cause. Whether the technical impediment be a rule or statute is not material. It is certain that the makers of the constitution did not intend that one injured in "lands, goods, person or reputation" be deprived of a right of action.<sup>63</sup>

While courts have construed section 4 positively to provide procedural rights for litigants,<sup>64</sup> the provision has been read in addition

---

60. *Id.* at 544 (citations omitted).

61. 65 So. 2d 40 (Fla. 1953).

62. *Id.*

63. *Id.* at 41. An earlier hospital case relying on § 4 reached a similar result under slightly different circumstances. In *Nicholson v. Good Samaritan Hosp.*, 199 So. 344 (Fla. 1940), the hospital provided free care and treatment for indigents, but charged those better financially circumstanced. A paying patient brought suit for damages for burns allegedly caused by the negligence of a nurse. The court held the hospital liable despite its charitable nature, stating that the doctrine of "respondeat superior" was so much a part of "due course of law" within Decl. of Rights § 4 as to require court recognition in the absence of legislation to the contrary.

64. For other cases considering procedural issues under Decl. of Rights § 4, see *Sin-*

to imply or presume a court with jurisdiction and a proceeding utilizing recognized forms of procedure.<sup>65</sup> The 1964 case of *Shotkin v. Cohen*<sup>66</sup> is illustrative. Shotkin, a layperson, represented himself in various law suits with "rambling, incoherent, non-responsive" briefs and, in the appellate court's opinion, either deliberately ignored the applicable rules of procedure or was unable to understand them. Ordering that Shotkin be prohibited from further representing his corporations or himself in court, the Third District Court of Appeal asserted:

We recognize the constitutional mandate that the courts be open to all persons under § 4, Declaration of Rights, Constitution of the State of Florida, F.S.A. . . . However, when one person by his activities [not in just an isolated case but in a series of cases] upsets and interferes with the normal procedures of a court that will have approximately 1,000 matters filed before it this year, it becomes necessary to exercise restraint upon such person.<sup>67</sup>

Courts have regularly applied this provision in substantive areas. Beginning in 1922 with *Kaufman v. City of Tallahassee*,<sup>68</sup> the supreme court has construed statutes defining municipal liability for torts to be the same as liability for private individuals. For example, a city may be liable for the negligent acts of its agents who at the time of the

clair Refining Co. v. Hunter, 191 So. 38 (Fla. 1939) (statutory requirement providing that writs of error be sued out within 60 days does not deny access to courts for a remedy); *State ex rel. Globe & Rutgers Fire Ins. Co. v. Cornelius*, 129 So. 752 (Fla. 1930) (improper refusal to settle and sign a bill of exceptions, substantially correct and duly presented, may constitute denial of the right of appeal guaranteed by law or the right to have justice administered without delay, guaranteed by Decl. of Rights § 4); *Owen v. State*, 50 So. 639 (Fla. 1909) (writs of error in criminal cases may be voluntarily secured to facilitate the administration of justice, but not when the apparent purpose is to delay a review in violation of Decl. of Rights § 4 that right and justice shall be administered without delay); *Kirkland v. State*, 185 So. 2d 5 (Fla. 2d Dist. Ct. App. 1966) (refusal to allow defense to pose questions going to animus, impeachment, and credibility of all three alleged eyewitnesses to second-degree murder on cross-examination was such compounded error as to deny safeguards of Decl. of Rights § 4).

65. *Railway Express Agency v. Hoagland*, 62 So. 2d 756 (Fla. 1952); *State ex rel. Watson v. Lee*, 8 So. 2d 19 (Fla. 1942).

66. 163 So. 2d 330 (Fla. 3d Dist. Ct. App. 1964).

67. *Id.* at 332. *But see* *Reddish v. Forlines*, 207 So. 2d 703, 708 (Fla. 1st Dist. Ct. App. 1968), which points out that

judicial restraint should be practiced in the exercise of the court's inherent power to dismiss actions for want of prosecution, to the end that persons may not be wrongfully deprived of their constitutional right to a remedy by due course of law for any injury done them in their land, goods, person, or reputation. Although speed in the disposition of litigation is desirable, it should be accomplished . . . without undue sacrifice of the rights of the litigants.

*Accord*, *Demos v. Walker*, 126 So. 305 (Fla. 1930).

68. 94 So. 697 (Fla. 1922).

act were not engaged solely in the exercise of a governmental function.<sup>69</sup>

In *Williams v. City of Jacksonville*,<sup>70</sup> the supreme court considered the validity of a statute prohibiting tort actions against a city unless the damage was attributable to "gross negligence." To avoid conflict between the statute and section 4, the court "regarded the word 'gross' as either eliminated from the statute or as meaning nothing more than the word 'negligence' itself would import."<sup>71</sup>

The 1944 case of *Cason v. Baskin*<sup>72</sup> contains the most exhaustive analysis of section 4, as well as the best utilization of the constitutional access-to-courts provision to develop substantive rights. Plaintiff Zelma Cason sought to recover damages from authoress Marjorie Kinnan Baskin<sup>73</sup> for her portrayal of Zelma in *Cross Creek*. The action was based on the alleged invasion of Ms. Cason's privacy and was a case of first impression in the Florida Supreme Court.

The court thoroughly traced the history of the developing right to privacy in America and analyzed the potentiality for such a right in Florida law under sections 1<sup>74</sup> and 4 of the Declaration of Rights. Applying section 4 to *Cason*, Justice Brown, writing for the court, considered the individual meanings of various words and phrases in section 4. The word "person," he wrote,

should not be confined in its meaning to the person's physical body alone. The individual has a mind and spirit as well as a body. He

---

69. See, e.g., *Ballard v. City of Tampa*, 168 So. 654 (Fla. 1936), in which Tampa was held liable for the death of a city prisoner.

70. 160 So. 15, 20 (Fla. 1935).

71. Compare *id.* with *Ragans v. City of Jacksonville*, 106 So. 2d 860 (Fla. 1st Dist. Ct. App. 1958). A provision of the Jacksonville city charter that no tort action could be brought against the city unless gross negligence on the part of the city could be shown was held void by the court because of the conflict with § 4. See also *Rabin v. Lake Worth Drainage Dist.*, 82 So. 2d 353 (Fla. 1955) (drainage district not liable for negligent spraying of canal with chemical herbicide which destroyed landowner's plants and contaminated his water, since district was acting in its governmental capacity as a public corporation); *Woods v. City of Palatka*, 63 So. 2d 636 (Fla. 1953) (statute relieving Palatka from liability for personal injuries due to the defective conditions of its sidewalks held unconstitutional).

On the related issue of liability by state employers, see 060 Op. Att'y Gen. 95 (1960) (legislation purporting to relieve the Director and employees of the Crippled Children's Commission from tort liability in connection with their employment or duties would be of questionable validity because of Decl. of Rights § 4); and 060 Op. Att'y Gen. 81 (1960) (legislation purporting to relieve the officers and employees of the Division of Mental Health from tort liability in connection with their employment or duties would be of questionable validity because of conflict with Decl. of Rights § 4).

72. 20 So. 2d 243 (Fla. 1944).

73. Ms. Baskin published under the pen name Majorie Kinnan Rawlings and is perhaps best known for her novel *The Yearling*.

74. See note 45 *supra* for text of Decl. of Rights § 1.

has thoughts, emotions and feelings, as well as physical sensations. So, the word "person" as used in said section, must be construed to mean the whole man, his personality as well as his physical body.<sup>75</sup>

In discussing the meaning of "for any injury . . . [he] shall have remedy, by due course of law," the court stated that such words "do not mean that strictly legislative power is delegated to the courts."<sup>76</sup> Rather, the words of section 4 imply that for every injury done to an individual, a remedy existed in either statutory or common law.<sup>77</sup>

Focusing on the nature of the injury to be remedied by section 4, the court noted:

The word "injury," however, does imply the doing of some act which Constitutes an invasion of a legal right. The law cannot possibly remedy all the evils which affect mankind. But . . . for any act of another which constitutes an injurious invasion of any right of the individual which is recognized by or founded upon any applicable principle of law, statutory or common, the courts shall be open to him and he "shall have remedy, by due course of law."<sup>78</sup>

The opinion concluded that invasions of an individual's privacy are injuries to the person within the intention and protection of section 4.<sup>79</sup>

---

75. 20 So. 2d at 250. *Cf. Confederation Life Ass'n v. Ugalde*, 151 So. 2d 315 (Fla. 3d Dist. Ct. App.), *aff'd in part, rev'd in part* 164 So. 2d 1, *cert. denied*, 379 U.S. 915 (1964) (the word "person" in Decl. of Rights § 4 is not limited to Florida citizens, but includes a Cuban citizen seeking redress for a wrong remediable in law).

76. 20 So. 2d at 250 (Fla. 1944). *Accord*, *Cooper v. Tampa Electric Co.*, 17 So. 2d 785 (Fla. 1944) (Decl. of Rights § 4 does not authorize the courts to invade a legislative prerogative granted under the Constitution). Other cases have held that Decl. of Rights § 4 does not create new causes of action, although it does not prohibit the creation of new causes of action by due course of law. *Kirkpatrick v. Parker*, 187 So. 620 (Fla. 1939) (an adult woman does not have a cause of action for seduction in the absence of particular allegations which are actionable at common law); *Wilson v. O'Neal*, 118 So. 2d 101 (Fla. 1st Dist. Ct. App.), *appeal dismissed*, 123 So. 2d 677 (Fla. 1960), *cert. denied*, 365 U.S. 850 (1961) (no cause of action for improper swearing of an arrest warrant).

77. 20 So. 2d at 250-51. The court viewed the word "law" as used within § 4 to include

not only organic and statutory law but also . . . that great body of legal principles we call the common law, as construed and applied by the courts of England and America throughout the years to new factual conditions as they have arisen, and which in such practical applications to concrete cases "have broadened out from precedent to precedent" to protect the essential rights of the individual.

*Id.* at 251.

78. 20 So. 2d at 250-51. The Florida Supreme Court in the earlier case of *Folsom v. Bank of Greenwood*, 120 So. 317 (Fla. 1929) had interpreted the word "injury" as being a substantial invasion of rights and not merely *de minimis*.

79. 20 So. 2d at 253.

In sum, Declaration of Rights, section 4 served from 1885 through 1968 as an additional right of equal protection and due process. Courts applied section 4 to protect rights of a substantive nature through an equal protection construction, interpreting almost literally that "every person for any injury [shall have] remedy."<sup>80</sup> Procedural rights were guaranteed by the language that "[a]ll courts—shall be open [to provide] remedy, by due course of law;" and that "right and justice shall be administered without sale, denial, or delay."<sup>81</sup>

#### IV. JUDICIAL REVIEW UNDER 1968 CONSTITUTION, ARTICLE I, SECTION 21

Judicial review of access-to-court issues under section 21 has been similar to review under section 4. The continuing trend is to rely on both state and federal constitutional provisions and, in some instances, only upon federal law.

In the 1971 case of *Gates v. Foley*,<sup>82</sup> the Florida Supreme Court considered the issue of whether a wife could recover for loss of consortium as a result of injuries to her husband. At common law the wife could not maintain such an action, and Florida courts until *Gates* had consistently followed the common law rule. The court observed that "recent changes in the legal and societal status of women in our society forces us to recognize a change in the doctrine with which this opinion is concerned."<sup>83</sup> Citing article I, sections 2, 9,<sup>84</sup> and 21 of the Florida Constitution, and the federal fourteenth amendment, the court held that "the wife of a husband injured as a proximate result of the negligence of another shall have a right of action against that same person for her loss of consortium."<sup>85</sup>

In the same year the supreme court considered the validity of a portion of Florida's Wrongful Death Act. In *Garner v. Ward*,<sup>86</sup> the decedent's first wife sought to intervene in a wrongful death action filed by the decedent's second wife.<sup>87</sup> The court construed the statute as providing that "all persons who suffer loss as a result of the wrong-

---

80. FLA. CONST. of 1885, Decl. of Rights § 4 (emphasis added).

81. *Id.* (emphasis added).

82. 247 So. 2d 40 (Fla. 1971).

83. *Id.* at 44.

84. Art. I, § 2 provides: "All natural persons are equal before the law and have inalienable rights . . . ."

Art. I, § 9 provides: "No person . . . shall be deprived of life, liberty, or property without due process of law . . . ."

85. 247 So. 2d at 45.

86. 251 So. 2d 252 (Fla. 1971).

87. The relevant statute provided: "Every such action shall be brought by and in the name of the widow or husband . . . ." *Id.* at 253.

ful death and who are entitled to recover are proper parties,"<sup>88</sup> thereby permitting the decedent's first wife to intervene in the action. The court reasoned:

This policy will better honor the constitutional command that the courts be open to all persons for redress of wrongs, and also will avoid the risk of a constitutional challenge grounded on allegations of discrimination among survivors of the same class (such as litigation between decedent's children by two mothers).<sup>89</sup>

In *Yordon v. Savage*,<sup>90</sup> both parents sought damages from a pediatrician for the negligent treatment of their minor child. Relying on *Wilkie v. Roberts*<sup>91</sup> as precedent that only one parent may have such a cause of action, the trial court granted defendant's motion to strike, as an improper party, the child's mother.<sup>92</sup> The *Wilkie* court had held that the parent or guardian of an unemancipated minor child, injured by the tortious act of another, had a cause of action in his own name for direct expenditures and indirect losses suffered as a result of the tortious act. The *Yordon* court, citing article I, sections 2, 9 and 21 of the Florida Constitution, and the fourteenth amendment of the Federal Constitution, reversed the lower court and held that a cause of action for injury to a minor child "is available to *either* the father *or* the mother, *or* to the two parents together."<sup>93</sup>

The case of *Gammon v. Cobb*<sup>94</sup> is significant in two respects: the Florida Supreme Court again relied on both the Federal and Florida Constitutions to reach its decision, yet failed to address the issue of access to courts specifically raised by the plaintiff. In question was the constitutionality of former section 742.011, Florida Statutes, which required that the mother of an illegitimate child be unmarried at the time of the child's conception in order to sue for paternity and child support.<sup>95</sup> Ms. Gammon, married at the time of her child's birth, argued that this statute violated article I, sections 2 and 21 of the Florida Constitution, and amendments 14 and 19 of the Federal Constitution. After reviewing federal and state cases on illegitimacy, the

---

88. 251 So. 2d at 257.

89. *Id.*

90. 279 So. 2d 844 (Fla. 1973).

91. 109 So. 2d 225 (Fla. 1926).

92. 279 So. 2d at 844.

93. *Id.* at 846.

94. 335 So. 2d 261, 268 (Fla. 1976).

95. FLA. STAT. § 742.011 (1973) read: "Any unmarried woman who shall be pregnant or delivered of a bastard child, may bring proceedings in the circuit court, in chancery, to determine the paternity of such child." Act of June 9, 1951, ch. 26949, § 1, 1951 Fla. Laws 1185.

court—ignoring the argument of a section 21 violation—held the “portion of § 742.011, Florida Statutes, which limits actions thereunder to unmarried women to be unconstitutional in contravention of Article I, § 2 of the Constitution of the State of Florida and the Fourteenth Amendment to the Constitution of the United States . . . .”<sup>96</sup>

Generally speaking, the Florida Supreme Court appears more willing to provide procedural rights than rights of a substantive nature via section 21. In *Slay v. Department of Revenue*,<sup>97</sup> for example, the court cited section 21 to assert that “[Florida] courts have inherent equity powers to provide relief if the law does not clearly provide a remedy.”<sup>98</sup> In *Slay*, Holmes County sought to enjoin the Florida Department of Revenue from interfering with the collection of 1974 real property taxes.<sup>99</sup> Even though the county had failed to exhaust its administrative remedies, the court permitted judicial review in the face of “financial emergency.”<sup>100</sup>

But in the recent case of *State ex rel. English v. McCrary*,<sup>101</sup> newspaper reporter Carey English was denied his right of access to courts on procedural grounds. Circuit Judge McCrary refused English permission to attend the dissolution of marriage hearing of the local state attorney. English responded by filing a petition for writ of prohibition with the First District Court of Appeal; he alleged *inter alia* that “not to allow the press access was in derogation of the fundamental right of the public and the press to access to all judicial proceedings.”<sup>102</sup>

The district court dismissed English’s petition, concluding that he had failed to state a *prima facie* case for issuance of a writ. On appeal, the supreme court affirmed the district court’s ruling.<sup>103</sup> Justice Karl concluded that “prohibition was not an available remedy under the circumstances presented.”<sup>104</sup>

Justice England, in vigorous dissent, observed that the majority “has denied a judicial forum to this reporter and offers no specific means of access to others in the same situation.”<sup>105</sup> Taking the majority to

---

96. 335 So. 2d at 268 (Fla. 1976).

97. 317 So. 2d 744 (Fla. 1975).

98. *Id.* at 746.

99. Holmes County’s 1974 tax assessment roll had been disapproved by the Department of Revenue, and the county had failed to remedy the existing inequities by the next year’s tax collection time.

100. 317 So. 2d at 746.

101. 328 So. 2d 257 (Fla. 1st Dist. Ct. App. 1976).

102. *Id.* at 258.

103. *English v. McCrary*, 348 So. 2d 293 (Fla. 1977). Justice Karl, writing for the majority, was joined by Justices Adkins and Hatchett and Chief Justice Overton. Justices England and Sundberg dissented.

104. *Id.* at 298.

105. *Id.* at 300.



task for its "strict, if not slavish, adherence to the historical bases for writs of prohibition,"<sup>106</sup> he indicated "no reluctance to expand the narrow, historical notion of prohibition to meet a need not otherwise met by traditional processes of appellate review."<sup>107</sup> Justice England cited article I, section 21 and article V, section 2(a) as the bases for his position.<sup>108</sup>

The majority's position is difficult to reconcile with two earlier prohibition cases. In 1974 the court in *State ex rel. Harris v. McCauley*<sup>109</sup> permitted a petition for writ of prohibition to be treated as a petition for writ of habeas corpus. And in the 1976 case of *State ex rel. Miami Herald Publishing Co. v. McIntosh*,<sup>110</sup> a unanimous court held that although prohibition was technically not available to the news media when challenging a "gag order" in a criminal case, it would treat the prohibition petition as a petition for writ of certiorari. As Justice England pointed out in his dissent in *English*: "Nothing of significance . . . distinguishes a criminal case from a civil case as regards the procedural technique for initiating a challenge by persons not a party to the litigation."<sup>111</sup>

#### V. JUDICIALLY RECOGNIZED EXCEPTIONS TO RIGHTS OF ACCESS AND REMEDY

Declaration of Rights section 4 was frequently relied upon by Florida courts considering the constitutionality of statutes which abolished preexisting common-law remedies.<sup>112</sup> Prior to 1973, however, the Florida Supreme Court had never specified guidelines for deter-

106. *Id.* at 299.

107. *Id.*

108. *Id.*

109. 297 So. 2d 825 (Fla. 1974).

110. 340 So. 2d 904 (Fla. 1976).

111. 348 So. 2d at 300.

112. *See, e.g.,* *Carter v. Sims Crane Service, Inc.*, 198 So. 2d 25 (Fla. 1967) (workmen's compensation statute which deprives subcontractor's employee of common-law remedy against another subcontractor under the same general contractor does not violate Decl. of Rights § 4); *Ross v. Gore*, 48 So. 2d 412 (Fla. 1950) (statutes which prohibit punitive damages in libel or slander suits do not violate Decl. of Rights § 4); *Rotwein v. Gersten*, 36 So. 2d 419 (Fla. 1948) (statute abolishing the right of action for damages for alienation of affections, criminal conversation, seduction or breach of contract to marry did not violate Decl. of Rights § 4, since abolition of such causes of action was in the best interests of the people of Florida); *Haddock ex rel. Wiggins v. Florida Motor Lines Corp.*, 9 So. 2d 98 (Fla. 1942) (statute which provided that the father of a minor child could maintain an action for his child's wrongful death was construed to permit a divorced mother to maintain such action for the wrongful death of a minor son in her court-ordered custody so that statute would not conflict with Decl. of Rights § 4); *McMillan v. Nelson*, 5 So. 2d 867 (Fla. 1942) (classification established by the Florida Automobile Guest Statute does not violate Decl. of Rights § 4).

mining the applicability of section 21, and its predecessor, article I, section 4, to statutory challenges.<sup>113</sup> One of the earliest judicial reflections on the role of the legislature in relation to section 4 was made by Justice Terrell in 1944, when he wrote:

When we commenced the study of law, we were early confronted with the maxim: For every wrong there is a remedy. Section Four of our Declaration of Rights, in providing that the courts shall be open at all times to speedily avenge wrongs to person or property, was designed to give life and vitality to this maxim. We are not unmindful that contributory negligence, assumption of risk, and perhaps other common-law doctrines have subtracted from remedies that were designed to impair wrongs; at the same time many of these have been abandoned and the tendency of the law at the present is to modify or abandon them in the interest of the person injured. In some fields, noteworthy that of workmen's compensation, the legislature has declared it to be the policy that the public should help bear the burden of wrongs or injuries to the individual which occur in the line of duty.<sup>114</sup>

#### A. *The Kluger Rule*

In 1973 the Florida Supreme Court thoroughly reviewed past situations in which the legislature had abolished common-law remedies. The analysis was prompted by the first challenge to Florida's no-fault insurance law. *Kluger v. White*<sup>115</sup> presented two classic competing interests: continuously changing societal requirements which demand new remedies via legislation versus the constitutional right to a remedy which will not tolerate unjustified abolition of common law causes of action.<sup>116</sup>

Attempting to balance these competing interests, the *Kluger* court analyzed previous courts' handling of such conflicts and formulated therefrom a rule for legislative and judicial application. The court

---

113. As the court noted in *Kluger v. White*: "This court has never before specifically spoken to the issue of whether or not the constitutional guarantee of a redress for any injury (Fla. Const., art. I, § 21, F.S.A.) bars the statutory abolition of an existing remedy without providing an alternative protection to the injured party." 281 So. 2d 1, 3 (Fla. 1973).

114. *Williams v. Mayes*, 19 So. 2d 709, 711 (Fla. 1944).

115. 281 So. 2d 1 (Fla. 1973).

116. In the language of the court:

Upon careful consideration of the requirements of society, and the ever-evolving character of the law, we cannot adopt a complete prohibition against such legislative change. Nor can we adopt a view which would allow the Legislature to destroy a traditional and long-standing cause of action upon mere legislative whim, or when an alternative approach is available.

*Id.* at 4.

held that where a right of access to the courts for redress of a particular injury has been provided by statutory law predating the adoption of Florida's Declaration of Rights, or where such right has become a part of the common law, the legislature may not abolish such right (1) without providing a reasonable alternative to protect the rights of the people to redress of injuries or (2) unless an overpowering public necessity exists and no alternative method is available to meet the public necessity.<sup>117</sup> The application and operation of the *Kluger* rule is best understood through specific examples.

1. *When an Adequate Alternative Remedy Is Provided.*—As explained in *Kluger*, an exception to the right-to-redress rule is the situation in which the state legislature or Congress enacts an alternative remedy. Perhaps the oldest example in the United States of this exception is workmen's compensation law, which abolishes the right to sue one's employer for a job-related injury. As early as 1917, the United States Supreme Court considered the constitutionality of workmen's compensation laws.<sup>118</sup> In upholding the New York law, the Court opined that common-law rules relating to employer-employee rights and liabilities in accident cases could be not only altered by state legislation but even set aside entirely, as long as some reasonably just and adequate substitute was provided in their stead.<sup>119</sup>

Florida's workmen's compensation law was first enacted in 1935<sup>120</sup> and has since been significantly modified to keep pace with changing industrial and societal demands. The ostensible purpose of Florida's law is to relieve society generally, and injured employees specifically, from the economic burden of unemployment resulting from work-related injuries by placing that burden on industry.<sup>121</sup> In lieu of tort liability, Florida's workmen's compensation law requires all employers to obtain insurance for their employees to provide compensation for injuries which occur on the job.<sup>122</sup> As the *Kluger* court observed, this alternative satisfies the right-to-redress requirement by providing "adequate, sufficient, and even preferable safeguards for an employee

---

117. *Id.*

118. *New York Cent. R.R. v. White*, 243 U.S. 188 (1917).

119. *Id.* at 198-201.

120. Act of May 25, 1935, ch. 17481, § 1, 1935 Fla. Laws 1456 (current version at FLA. STAT. ch. 440 (1975)).

121. *J.J. Murphy & Sons, Inc. v. Gibbs*, 137 So. 2d 553 (Fla. 1962). *Accord*, *Jones v. Leon County Health Dep't*, 335 So. 2d 269 (Fla. 1976); *Lee Eng'r & Constr. Co. v. Fellows*, 209 So. 2d 454 (Fla. 1968); *Florida Game & Fresh Water Fish Comm'n v. Driggers*, 65 So. 2d 723 (Fla. 1953); *Protect Awning Shutter Co. v. Cline*, 16 So. 2d 342 (Fla. 1944).

122. FLA. STAT. § 440.10 (1975).

who is injured on the job.”<sup>123</sup> The statute has been upheld as constitutional.<sup>124</sup>

The major problem areas in the present workmen's compensation law have been the subject of recent litigation, however. The first difficulty is the forum required by statute for dispute settlement; injured workers are initially restricted to litigation within the workmen's compensation system. All claims must first be submitted to the Florida Industrial Relations Commission (IRC)<sup>125</sup> to be decided upon by judges of industrial claims.<sup>126</sup>

Prior to 1974, it was assumed that dissatisfied parties had access to the Florida Supreme Court by petition for writ of certiorari as a matter of right for review of IRC decisions.<sup>127</sup> In *Scholastic Systems, Inc. v. LeLoup*,<sup>128</sup> however, the supreme court denied certiorari to an employer seeking review of an IRC workmen's compensation order; the court held that the record on review indicated no departure from the essential requirements of law.<sup>129</sup> While the supreme court had traditionally reviewed workmen's compensation cases as if an appeal were being taken, the court reasoned that the Florida Constitution did not expressly require such full “appellate-type” review in these cases. According to the court, only two constitutional provisions could possibly compel an appellate-type review: article I, section 21, access to courts, and section 9, due process. The latter requirement was said to be satisfied by a hearing before the judge of industrial claims.<sup>130</sup> The constitutional access-to-courts requirement was met by the supreme court's certiorari review, albeit limited to consideration of “essential requirements” of law.<sup>131</sup>

Criticizing the court for its “innovative decision,” Justice Ervin

---

123. *Kluger v. White*, 281 So. 2d 1, 4 (Fla. 1973).

124. *Gross v. Rudy's Stone Co.*, 179 So. 2d 603 (Fla. 2d Dist. Ct. App. 1965). See *Carter v. Sims Crane Serv., Inc.*, 198 So. 2d 25 (Fla. 1967), in which the court held that FLA. STAT. §§ 440.10-11, which deprive a subcontractor's employee of a common law remedy against another subcontractor, do not violate the due process or equal protection clauses of the Decl. of Rights § 4.

125. FLA. STAT. § 440.25 (1975).

126. FLA. STAT. § 440.45 (1975).

127. See FLA. CONST. art. V, § 3(b)(3), which provides that the court “may issue writs of certiorari to commissions established by general law having statewide jurisdiction,” and FLA. STAT. § 440.27(1) (1975), providing that the IRC's compensation orders “shall be subject to review only by petition for writ of certiorari to the supreme court.”

128. 307 So. 2d 166 (Fla. 1974).

129. *Id.* at 172. For commentary applauding the court's decision in *LeLoup*, see 29 U. MIAMI L. REV. 799 (1975). See also Levinson & Ireland, *Florida Constitutional Law*, 30 U. MIAMI L. REV. 277, 283-84 (1976); Levinson, *The Florida Administrative Procedure Act: 1974 Revision and 1975 Amendments*, 29 U. MIAMI L. REV. 617, 628-29 (1975).

130. 307 So. 2d at 169.

131. *Id.* at 169-70.

argued in dissent that the majority's holding failed to afford "appellate due process" mandated by sections 9 and 21 of article I.<sup>132</sup> His concern was that the IRC by definition was a state agency unit and not a court;<sup>133</sup> therefore, the commission did "not afford a direct *judicial* review to litigants in workmen's compensation cases."<sup>134</sup> In sum, "a review of a *final* judgment or order, whether from a trial court or from the Industrial Relations Commission, should be a direct review."<sup>135</sup>

The court in *Sunspan Engineering and Construction Co. v. Spring-Lock Scaffold Co.*<sup>136</sup> considered the second access-to-courts conflict in workmen's compensation law. Plaintiff Hayden, an employee of Sunspan, sued Spring-Lock as an alleged third party tortfeasor for personal injuries sustained when a platform board fell from a scaffolding tower provided by Spring-Lock on Sunspan's job site. Spring-Lock then filed a third-party complaint against Sunspan as Hayden's employer, alleging negligent construction or operation of the scaffolding tower. Sunspan moved to dismiss the third-party complaint, claiming section 440.11(1), Florida Statutes,<sup>137</sup> barred all third-party complaints against an employer. The circuit court denied the motion and declared the provision unconstitutional.

The supreme court agreed.<sup>138</sup> Section 440.11(1) was held to be in violation of article I, section 21, insofar as it sought to preclude an alleged tortfeasor from right of access to the courts to maintain a common-law tort action against an injured worker's employer.<sup>139</sup>

132. *Id.* at 173, 174.

133. For definitional purposes, Justice Ervin cited FLA. STAT. § 120.21(1) (1973): "Agency means the governing body of any state board, commission or department, or state officer who constitutes the agency authorized by law to adjudicate any party's legal rights . . . except the legislature, *courts*, governor and the department of revenue." 307 So. 2d at 174 (emphasis in original).

134. *Id.*

135. *Id.* at 176 (emphasis in original). For a brief but concise analysis of workmen's compensation access-to-courts issues, see Slepian, *Workmen's Compensation News*, 49 FLA. B.J. 397 (1975).

136. 310 So. 2d 4 (Fla. 1975).

137. Relevant portions of FLA. STAT. § 440.11(1) (1975) provide that "the liability of an employer prescribed in S. 440.10 shall be exclusive and in place of all other liability of such employer to any third party tort-feasor and to the employee . . . and anyone otherwise entitled to recover damages from such employer . . . on account of such injury or death . . ."

138. 310 So. 2d at 8. Justices Boyd and Overton dissented, but filed no opinion. *Accord*, Mortgage Corp. of America v. Vorndran, 334 So. 2d 89 (Fla. 3d Dist. Ct. App. 1976); Spring-Lock Scaffold Rental Equipment Co. v. Lott, 311 So. 2d 759 (Fla. 3d Dist. Ct. App. 1975).

139. The court carefully considered *Sunspan* in light of *Kluger*:

No overpowering or compelling necessity as required by *Kluger* is shown for the abolishment of the third party's reciprocal right to sue an employer in a proper case. . . . But in abolishing the third party's right to sue while still allowing him to be sued does not further or expedite the objectives of the Act. He

Further, the court found that the provision violated third-party plaintiffs' rights to equal protection of the laws guaranteed by Florida Constitution article I, section 2 and the federal fourteenth amendment.<sup>140</sup>

It is, however, important to note that section 440.11(1) was held unconstitutional as applied in *Sunspan*. The court emphatically pointed out that its holding did "not directly touch upon whether Florida Statute § 440.11(1) precludes a third party tort-feasor from bringing an action for indemnification upon a contractual theory of liability nor . . . upon the general question whether the rule 'no contribution among joint tort-feasors' is any longer valid in Florida."<sup>141</sup> Assuredly other courts will be called upon in the future to address this precise issue.<sup>142</sup>

A second example of the *Kluger* reasonable alternative exception is Florida's Medical Malpractice Reform Act.<sup>143</sup> Comprehensive and far-reaching, the Act was passed by the Florida Legislature in 1975 in response to the mounting crisis in medical care.<sup>144</sup> Section 768.133,

---

receives no alternative benefits but is shorn of his common law right to sue the employer. Ch. 71-190 as applied in this case is an arbitrary and capricious innovation without any rational basis furthering any overpowering public necessity and is therefore contrary to Article I, § 21, Florida Constitution.

310 So. 2d at 7-8.

140. The court viewed the equal protection violation in these terms:

The employer and employee are authorized by law to sue the third party tort-feasor for alleged tort but unequally and unreciprocally the tort-feasor is precluded from suing in turn in a third party action the employer who may be primarily liable instead of the tort-feasor for the employee's industrial accident.

*Id.* at 7.

141. *Id.* at 8.

142. For an additional challenge to the constitutionality of the Workmen's Compensation Act, see *Mullarkey v. Florida Feed Mills, Inc.*, 268 So. 2d 363 (Fla. 1972) (upholding constitutionality of Workmen's Compensation Act insofar as it relates to compensation for death of an employee who leaves no surviving dependents).

143. The Medical Malpractice Reform Act of 1975, Ch. 75-9, 1975 Fla. Laws. 13. See generally Note, *The Florida Medical Malpractice Reform Act of 1975*, 4 FLA. ST. U.L. REV. 50 (1976); *Views on Medical Malpractice*, 49 FLA. BAR. J. 499 (1975).

144. The Preamble to ch. 75-9 gives some indication of the perceived seriousness of the medical crisis:

WHEREAS, the cost of purchasing medical professional liability insurance for doctors and other health care providers has skyrocketed in the past few months; and

WHEREAS, it is not uncommon to find physicians in high-risk categories paying premiums in excess of \$20,000 annually; and

WHEREAS, the consumer ultimately must bear the financial burdens created by the high cost of insurance; and

WHEREAS, without some legislative relief, doctors will be forced to curtail their practices, retire, or practice defensive medicine at increased cost to the citizens of Florida; and

WHEREAS, the problem has reached crisis proportion in Florida, NOW THEREFORE . . .

Florida Statutes, which mandated that allegations of medical malpractice be filed as medical liability mediation claims with the newly created liability mediation panel, was challenged in *Carter v. Sparkman* as denying timely access to courts in violation of article I, section 21 of the Florida Constitution.<sup>145</sup> Upholding the Act, the court justified modification of the procedural access to courts in instances of alleged medical malpractice by finding the prescribed process a reasonable restriction under the state's police power for the general health and welfare of Florida citizens.<sup>146</sup>

Although courts are generally opposed to any burden being placed on the rights of aggrieved persons to enter the courts because of the constitutional guaranty of access, there may be reasonable restrictions prescribed by law. Typical examples are the fixing of a time within which suit must be brought, payment of reasonable cost deposits, pursuit of certain administrative relief such as zoning matters or workmen's compensation claims, or the requirement that newspapers be given the right of retraction before an action for libel may be filed.<sup>147</sup>

In a concurring opinion, Justice England more readily acknowledged the conflict between the Act and article I, section 21. He admitted a concern that persons seeking to bring malpractice lawsuits must be put to the expense of two full trials on their claim<sup>148</sup> and that the procedure clearly "favors the medical defendant over a certain category of claimants who have limited resources."<sup>149</sup> Despite his sympathy, Justice England nonetheless concluded:

While I find the inequity in this procedure harsh to a large and undefined class of litigants, I cannot in good conscience invalidate the statute on that basis. A disparity of resources has always been an imbalance in litigation which the courts are relatively powerless to adjust. Accordingly, although I might have preferred a more delicate balance for this type of litigation, I cannot conclude that the Legislature was unreasonable in setting a procedure for this class of lawsuit which has widened existing disparities.<sup>150</sup>

---

145. 335 So. 2d 802 (Fla. 1976), *cert. denied*, 45 U.S.L.W. 3463 (1977).

The Act was also challenged as a denial of due process and equal protection under the Florida and Federal Constitutions, as well as a denial of basic rights under article I, section 2 of the Florida Constitution. *Id.*

146. *Id.* at 805-06.

147. *Id.*

148. *Id.* at 807.

149. *Id.* at 808.

150. *Id.*

One commentator has identified a second area of difficulty within the Act which potentially may be in violation of section 21.<sup>151</sup> Section 95.11(4)(b), Florida Statutes, the statute of limitations for medical malpractice cases, provides:

An action for medical malpractice shall be commenced within 2 years from the time the incident giving rise to the action occurred or within 2 years from the time the incident is discovered, or should have been discovered with the exercise of due diligence; however, in no event shall the action be commenced later than 4 years from the date of the incident or occurrence out of which the cause of action accrued. . . . In those actions covered by this paragraph in which it can be shown that fraud, concealment, or intentional misrepresentation of fact prevented the discovery of the injury within the 4-year period, the period of limitations is extended forward 2 years from the time that the injury is discovered or should have been discovered with the exercise of due diligence, but in no event to exceed 7 years from the date the incident giving rise to the injury occurred.<sup>152</sup>

Under this provision all medical malpractice claims are prohibited after seven years from the date of the incident on which the claim is based—even where fraudulent misrepresentations by the physician prevented early discovery of the resulting injury. In the words of the commentator: “When an injured party is statutorily denied his remedy before he can reasonably ascertain that an injury has in fact occurred, the obvious inquiry should be whether the party has been denied his constitutional right to redress.”<sup>153</sup>

2.—*When an Overpowering Public Necessity Exists.*—The second permissible type of legislative action abolishing a preexisting remedy is that prompted by an “overpowering public necessity.” Such legislation occurred in 1945 when the Florida Legislature abolished the right of action to sue for damages in tort for alienation of affections, criminal conversation, seduction, or breach of promise to marry.<sup>154</sup> Three years later the Florida Supreme Court in *Rotwein v. Gersten*<sup>155</sup>

---

151. See Note, *supra* note 143, at 50.

152. FLA. STAT. § 95.11(4)(b) (1975).

153. See Note, *supra* note 143 at 65. For an additional example of a legislative change which, in the eyes of the court, has provided an alternative remedy to the previously existing cause of action in wrongful death cases, see *White v. Clayton*, 323 So. 2d 573 (Fla. 1976); *Martin v. United Sec. Serv., Inc.*, 314 So. 2d 765 (Fla. 1975); *McKibben v. Mallory*, 293 So. 2d 48 (Fla. 1974). See also *Beckham & Esquiroz, Torts*, 28 U. MIAMI L. REV. 662, 690-91 (1974); 4 FLA. ST. U.L. REV. 394 (1976).

154. FLA. STAT. ch. 771 (1975).

155. 36 So. 2d 419 (Fla. 1948).



upheld the statute as constitutional against an attack predicated on sections 1, 4, and 12 of Florida's Declaration of Rights and the fourteenth amendment of the Federal Constitution. The court noted that the statute's preamble<sup>156</sup> stated that actions for alienation of affections, criminal conversation, seduction, and breach of promise to marry had been "subject to grave abuses, causing extreme annoyance, embarrassment, humiliation and pecuniary damages to many persons wholly innocent and free from wrongdoing . . . ."<sup>157</sup> Furthermore, asserted the court, these actions "grow out of the marriage relation and since the legislature has plenary power to regulate the marriage status, it follows that it may regulate, modify, abolish any right growing out of that relation without violating constitutional guaranties."<sup>158</sup> Thus the legislature properly "showed the public necessity required for the total abolition of a right to sue"<sup>159</sup> in these particular actions.

A more recent—and more controversial—example of the "overpowering public necessity" doctrine is seen in the Automobile Reparations Reform Act. [Hereinafter No-Fault Law.] Prior to 1971, tort law in Florida was based solely on fault. In 1971 the Florida Legislature supplanted tort liability for fault with no-fault legislation covering motor vehicle accident cases.<sup>160</sup> The No-Fault Law provides for tort immunity of negligent parties where damages suffered in motor vehicle accidents fall below certain stated thresholds. Insurers must compensate their own insured clients for both personal and property injuries without regard to fault.<sup>161</sup>

---

156. The language of the preamble to the 1945 Act suggests the classic approach for justifying an abolition of any existing cause of action:

WHEREAS, The remedies provided for by law for the enforcement of action based upon alleged alienation of affections, criminal conversation, seduction and breach of contract to marry have been subjected to grave abuses, causing extreme annoyance, embarrassment, humiliation and pecuniary damage to many persons wholly innocent and free of any wrongdoing, who were merely the victims of circumstances, and such remedies having been exercised by unscrupulous persons for their unjust enrichment and such remedies having furnished vehicles for the commission or attempted commission of crime and in many cases have resulted in the perpetration of frauds, exploitation and blackmail, it is hereby declared as the public policy of the State of Florida that the best interest of the people of the State will be served by the abolition of such remedies. Consequently, in the public interest the necessity for the enactment of this article is hereby declared as a matter of legislative determination . . . .

FLA. STAT. ANN. § 771.01 (1975). (Editorial Note).

157. 36 So. 2d at 420.

158. *Id.* at 421.

159. *Kluger v. White*, 281 So. 2d 1, 4 (Fla. 1973). *See Kolkey v. Grossinger*, 195 F.2d 525 (5th Cir. 1952); *Liappas v. Augoustis*, 47 So. 2d 582 (Fla. 1950); *Gill v. Shiveley*, 320 So. 2d 415 (Fla. 4th Dist. Ct. App. 1975).

160. Florida Automobile Reparations Reform Act, ch. 71-252, 1971 Fla. Laws 1355.

161. Kovelick, *Torts*, 30 U. MIAMI L. REV. 357, 381 (1976). *See generally* Beckham &

Two provisions of the No-Fault Law were immediately challenged under article I, section 21. The first challenge involved section 627.738, Florida Statutes,<sup>162</sup> which in part abolished the traditional right of action in tort for property damage arising from automobile accidents. Under the new law, the victim would seek reimbursement from her own insurance company unless she had chosen not to purchase property damage insurance and had suffered more than \$550 property damage. In *Kluger v. White*,<sup>163</sup> the Florida Supreme Court declared that section 627.738, Florida Statutes, denied access to the courts in violation of article I, section 21, and was therefore unconstitutional. The legislature clearly had failed to provide either a reasonable alternative to protect the rights of car owners such as *Kluger*, who chose not to purchase property coverage and suffered damages below the \$550 threshold, or a legitimate "overpowering public necessity" justification for abolishing such rights.

The second challenge attacked section 627.737, Florida Statutes,<sup>164</sup> which denied recovery for pain and suffering stemming from motor vehicle accidents. Similar to the property damage section, this provision limits recovery for pain and suffering in situations where the threshold requirements are met and the plaintiff sues in tort apart from the No-Fault Law. In 1975, the supreme court in *Lasky v. State Farm Insurance Co.*<sup>165</sup> upheld with one exception<sup>166</sup> the personal injury provisions of the No-Fault Law. According to the court, a reasonable alternative to the action in tort is provided by the requirement in section 627.737 that a motor vehicle owner must maintain security or lose the tort immunity:

In exchange for his former right to damages for pain and suffering in the limited category of cases where such items are preempted by the act, he receives not only a prompt recovery of his major,

---

Esquiroz, *Torts*, *supra* note 153, at 687; Levinson, *Florida Constitutional Law*, 28 U. MIAMI L. REV. 551, 604 (1974); 2 FLA. ST. U.L. REV. 178 (1974); 28 U. MIAMI L. REV. 469 (1974).

162. FLA. STAT. § 627.738 (1971).

163. 281 So. 2d 1 (Fla. 1973).

164. FLA. STAT. § 627.737 (1971).

165. 296 So. 2d 9 (Fla. 1974).

166. The *Lasky* court found the alternative threshold test of section 627.737(2), Florida Statutes, unconstitutional on equal protection grounds. 296 So. 2d at 21. Section 627.737(2) allowed suit, absent medical expenses in excess of \$1,000, permanent injury or death if "the injury or disease consists in whole or in part of . . . a fracture to a weight bearing bone, [or] a compound, comminuted, displaced or compressed fracture . . ." This provision, said the court, though "undoubtedly well intended," nevertheless constituted "a denial of equal protection of the laws by discriminating among members of the class of persons injured in automobile accidents who have survived such accident with less than \$1,000 in medical expenses and no permanent injury." 296 So. 2d at 20.

salient out-of-pocket losses—even where he is at fault—but also an immunity from being held liable for the pain and suffering of the other parties to the accident if they should fall within this limited class where such items are not recoverable.<sup>167</sup>

The court quickly disposed of a second challenge to section 627.738, “inasmuch as we have recently held this section invalid on grounds that it unconstitutionally denied the right of access to the courts under Art. I, § 21, Fla. Const. *Kluger v. White*, 281 So. 2d 1 (Fla. 1973).”<sup>168</sup>

Justice Ervin concurred insofar as the majority held sections 627.737 and 627.738 unconstitutional but dissented insofar as they were held constitutional. Stating that both provisions were “facially invalid,” Justice Ervin described the sections as “an unwarranted deprivation of the rights of motor vehicle accident tort victims without their consent to recover their actual, traditional and long-recognized bodily injury damages in actions at law from tortfeasors.”<sup>169</sup> Regarding article I, section 21, the Justice criticized:

The Legislature can do a better job than it has done. It unblushingly has decided to flatly ignore Section 21, Art. I, Dec. of Rights, Fla. Const. . . . The Legislature has no authority to take away the rights of the public without their consent to recover for tort injuries.

. . . .

If despite Section 21 of Art. I of the State Constitution the Legislature from time to time under precedents established by this Court can eliminate the redress of particular injuries, or access to the courts for such purpose, there will be no end or limit to the extent legislative power may be exercised to legislate away particular causes of actions and remedies, and particularly so if some segment of the private sector wishes to be immune from suit and can lobby through its immunizing legislation.

There are certain fundamental rights to redress for injury or wrongs which the Constitution precludes elimination by the Legislature. Those tort remedies which are the subject of this litigation are fundamental.<sup>170</sup>

A recent case questioning the constitutionality of Florida's No-Fault Law is *Faulkner v. Allstate Insurance Company*.<sup>171</sup> Ms. Faulkner, whose husband had been injured in an automobile accident, sought damages for loss of consortium. The issue was whether a wife loses

---

167. 296 So. 2d at 14.

168. 296 So. 2d at 13.

169. *Id.* at 23-24.

170. *Id.* at 26-27.

171. 333 So. 2d 488 (Fla. 2d Dist. Ct. App. 1976).

her right of action for loss of consortium when her husband does not meet at least one of the threshold requirements of the No-Fault Law. The trial court held that she did lose this right, and the Second District Court of Appeal agreed. The court justified its holding by pointing out that its decision did not deprive Ms. Faulkner of a right of access to the courts, since other compensable damages, such as medical expenses, were recoverable and thus provided "reasonable 'substituted' court access."<sup>172</sup>

### B. Denial of Court Access Under Common Law

The court in *Kluger* enunciated permissible methods and requisite reasons for legislative infringement on section 21's access-to-court rights. What the court has not explained and evidently prefers to ignore is the irreconcilability between section 21 and common-law doctrines which deny court access.

Statutory codification of the common law occurred in 1829—before Florida had its first state constitution. Section 2.01, Florida Statutes, provides:

The common and statute laws of England which are of a general and not a local nature . . . are declared to be of force in this state; provided, the said statutes and common law be not inconsistent with the constitution and laws of the United States and the acts of the legislature of this state.<sup>173</sup>

Notably missing from this section is the provision that the common law not be inconsistent with the constitution of Florida. A strict reading of this statute, therefore, would permit common law which is inconsistent with the Florida Constitution and, more specifically, with section 21.

Florida's doctrine on interspousal immunity represents one of the oldest, as well as one of the harshest, examples of this conflict. Interspousal immunity is a concept that "a tort committed by one spouse against the person or character of the other, does not give rise to a cause of action in favor of the injured spouse."<sup>174</sup> As one of the few states still applying this doctrine, Florida through its courts justifies the doctrine as essential to support the fictional unity of husband and wife.<sup>175</sup> Such adherence has been severely criticized as being "ana-

---

172. *Id.* at 491.

173. FLA. STAT. § 2.01 (1975).

174. Comment, *Tort Liability Between Husband and Wife: The Interspousal Immunity Doctrine*, 21 U. MIAMI L. REV. 423 (1966).

175. The Florida Supreme Court in *Bencomo v. Bencomo*, 200 So. 2d 171, 172 (Fla.

chronistic”;<sup>176</sup> “unrealistic and questionable”;<sup>177</sup> and “incompatible with both the spirit and letter of the new Florida constitution.”<sup>178</sup> Dean Prosser heartily supported the abolition of the interspousal immunity doctrine:

The chief reason relied upon by all these courts, however, is that personal tort actions between husband and wife would disrupt and destroy the peace and harmony of the home, which is against the policy of the law. This is on the bald theory that after a husband has beaten his wife, there is a state of peace and harmony left to be disturbed; and that if she is sufficiently injured or angry to sue him for it, she will be soothed and deterred from reprisals by denying her the legal remedy—and this even though she has left him or divorced him for that very ground, and although the same courts refuse to find any disruption of domestic tranquility if she sues him for a tort to her property, or brings a criminal prosecution against him.<sup>179</sup>

In 1956, the Federal District Court for the Western District of South Carolina held in a diversity action that Florida's interspousal immunity doctrine violated the Florida Constitution's Declaration of Rights, section 4, and the federal fourteenth amendment.<sup>180</sup> The court pointed out that the “Constitution and laws of the United States recognize that a married woman is a person and an individual and that she is entitled to the same protection of the law as other individuals regardless of ancient provisions of the common law.”<sup>181</sup> In *Bencomo v. Bencomo*,<sup>182</sup> however, the Florida Supreme Court dismissed this federal holding with one sentence: “We have no way of knowing why that court elected to depart from the rule previously announced in this state, but nevertheless we still adhere to our former decisions and reject the construction adopted by the South Carolina Federal Court.”<sup>183</sup>

---

1967) reflected: “This court has long been committed to the proposition that one spouse can not sue the other because, under the common law, they are one person.” *Accord*, *Orefice v. Albert*, 237 So. 2d 142 (Fla. 1970); *Corren v. Corren*, 47 So. 2d 774 (Fla. 1950); *Taylor v. Dorsey*, 19 So. 2d 876 (Fla. 1944).

176. Comment, *supra* note 174, at 423.

177. Comment, *Marital Disability in Personal Tort Actions*, 14 U. MIAMI L. REV. 99, 109 (1959).

178. Note, *Interpersonal Immunity in Tort: Its Relevance, Constitutionality, and Role in Conflict of Laws*, 21 U. FLA. L. REV. 484, 502 (1969).

179. W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* § 122, at 863 (4th ed. 1971).

180. *Alexander v. Alexander*, 140 F. Supp. 925, 929 (W.D.S.C. 1956).

181. *Id.* at 928.

182. 200 So. 2d 171 (Fla. 1967).

183. *Id.* at 174.

Justice Ervin, dissenting in *Bencomo*, argued cogently for the abolition of interspousal immunity in Florida.<sup>184</sup> He noted the specific language change in article I, section 21, from its predecessor, to provide remedy for "any" injury done—not simply for injury in lands, goods, person or reputation.<sup>185</sup> Quoting extensively from Prosser, Justice Ervin concluded that while there is some justification for retaining the immunity so long as the marriage relation exists, "the rationale of modern constitutional interpretations of individual rights would appear to override reasons for retaining the barrier after the marriage relation ceases."<sup>186</sup>

Judge Mills in *Mieure v. Moore*<sup>187</sup> was equally frustrated. Plaintiff B. J. Moore, his wife, and minor children sought damages for injuries caused when his vehicle ran into a tractor-trailer which Moore claimed was illegally parked. Defendants counterclaimed against Moore, asserting that he was a joint tortfeasor. Because Moore's wife and minor children could not assert their claim against Moore, the court was forced to hold that Moore was not a joint tortfeasor with the defendants. Since common liability between Moore and the defendants was lacking, the defendants had no right of contribution from Moore. While the doctrine of family immunity precluded the court from holding otherwise, Judge Mills nevertheless took the opportunity to recommend policy to the Florida Supreme Court:

In view of the recent developments in the tort field, the abrogation of contributory negligence, the adoption of comparative negligence, the enactment of the Uniform Contribution Among Tortfeasors Act, and others, the time may be ripe for the abrogation of the family immunity doctrine. It appears that this would be consistent with the recent development that a loss should be apportioned among those whose fault contributed to the event, as well as providing for contribution among joint tortfeasors. However, we do not have this authority. Only the Supreme Court may overrule this precedent.<sup>188</sup>

---

184. *Id.* at 174-76.

185. *Id.* at 174.

186. *Id.* at 176.

187. 330 So. 2d 546 (Fla. 1st Dist. Ct. App. 1976).

188. *Id.* at 547. See *Heaton v. Heaton*, 304 So. 2d 516, 517 (Fla. 4th Dist. Ct. App. 1974), in which the court states that "[w]hile appellant's argument [for abolishing the interpersonal immunity doctrine] is not without some degree of persuasiveness, we conceive our proper appellate function to apply to each case the law as we understand it to be. We do not enjoy the advocate's prerogative of stating what the law ought to be." See also *Gaston v. Pittman*, 224 So. 2d 326 (Fla. 1969) (injured woman's cause of action against ex-husband for tort committed before their marriage remained as separate property of the woman after marriage, but the right of action was abated during the existence of

Commentators are highly critical of Florida's rigid adherence to the interspousal immunity doctrine. They point out that marital harmony—or the lack thereof—remains unaffected by allowing one spouse to sue the other.<sup>189</sup> With liberal divorce laws and criminal liability for tortious assaults on one's spouse, it can hardly be said that marital tranquility will be disrupted by permitting interspousal tort actions. Commentators additionally argue that the Florida Constitution of 1968 unmistakably emphasizes and protects total spousal freedom of action as to property matters. Specific attention is directed to article I, section 21. But article X, section 5; article I, section 2; and article I, section 9 also support this argument.<sup>190</sup>

Even more important, however, is the inherent conflict between the interspousal immunity doctrine and section 21. A spouse tortiously assaulted by her mate has no remedy for her injury—in contrast to section 21's mandate that there shall be "redress for any injury."

A second example of conflict between article I, section 21 and common law which continues to deny court access is the impact rule. A rule of tort law, the impact rule prohibits recovery for mental pain and suffering that is unaccompanied by physical injuries in the absence of wantonness, willfulness, or malice.<sup>191</sup> This doctrine was first enunciated in England in 1888.<sup>192</sup> Although repudiated by British courts thirteen years later, it nevertheless crossed the waters to become firmly entrenched in early American jurisprudence.<sup>193</sup>

The Florida Supreme Court first considered the impact rule in 1893. In *International Ocean Telegraph Co. v. Saunders*,<sup>194</sup> Saunders sued the telegraph company for failing to deliver promptly a telegram summoning him to the deathbed of his wife. The court denied recovery for his resultant mental anguish, stating:

---

the marriage); *De Guido v. De Guido*, 308 So. 2d 609 (Fla. 3d Dist. Ct. App. 1975) (inroad on the interspousal immunity doctrine through holding that the defense of interspousal immunity is waived unless affirmatively pleaded, absent a strong showing of the unavailability of knowledge of the substance of the defense).

189. Comment, *supra* note 174, at 424.

190. Art. X, § 5 provides: "There shall be no distinction between married women and married men in the holding, control, disposition, or encumbering of their property, both real and personal; except that dower or curtesy may be established and regulated by law." See note 84 *supra* for text of art. I, §§ 2, 9.

191. *Clark v. Choctawhatchee Elec. Co-Operative*, 107 So. 2d 609 (Fla. 1958); *Crane v. Loftin*, 70 So. 2d 574 (Fla. 1954); *Kirksey v. Jernigan*, 45 So. 2d 188 (Fla. 1950); *Dunahoo v. Bess*, 200 So. 541 (Fla. 1941); *International Ocean Tel. Co. v. Saunders*, 14 So. 148 (Fla. 1893).

192. *Victorian Ry. Comm'rs v. Coultas*, 8 E.R.C. 405 (P.C. 1888).

193. See, e.g., *International Ocean Tel. Co. v. Saunders*, 14 So. 148 (Fla. 1893); *Mitchell v. Rochester Ry. Co.*, 45 N.E. 354 (N.Y. 1896).

194. 14 So. 148 (Fla. 1893).

His only injury . . . was mental suffering and disappointment in not being able to attend upon his wife in her last moments, and to be present at her funeral. The resultant injury is one that soars so exclusively within the realms of spirit land that it is beyond the reach of the courts to deal with, or to compensate by any of the known standards of value.<sup>195</sup>

The ensuing years since *Saunders* have witnessed a gradual erosion of the impact rule in Florida.<sup>196</sup> More important, however, forty states in that time have had the wisdom to abandon the doctrine altogether; Florida is one of ten which have not.<sup>197</sup> In place of the impact rule, states have adopted the more flexible "zone-of-danger" doctrine. This rule provides that a plaintiff may recover if it can be shown that she suffered physical manifestations resulting from mental distress as a result of the defendant's negligence and that she was close enough to the negligent act as to be within its zone of danger.<sup>198</sup> The location of the zone of danger is a question of fact for jury determination.

In 1974 the Florida Supreme Court again considered and upheld the impact rule in *Gilliam v. Stewart*.<sup>199</sup> Plaintiffs Jane and J. Parks Stewart brought suit against Freddie Gilliam and Robert Bradley for the negligent operation of their motor vehicles, whereby defendants collided with each other and crashed into the Stewart house. At the time of the crash Ms. Stewart was still in bed but not sleeping. Although she was not hit, within fifteen minutes of the accident she developed severe chest pains and was quickly placed in the intensive care unit of the local hospital.<sup>200</sup> The complaint alleged that "as a direct and proximate result of the negligence of the Defendants . . . , Jane R. Stewart suffered serious and grievous personal injuries . . . ." <sup>201</sup> The Circuit Court rendered summary judgment for the defendants.

On appeal, the Fourth District Court of Appeal reversed.<sup>202</sup> The court in a well-reasoned opinion specifically rejected the impact rule and held that the plaintiffs could recover upon proper proof. In the court's rationale:

---

195. *Id.* at 152.

196. *See, e.g.,* *LaPorte v. Associated Independents, Inc.*, 163 So. 2d 267 (Fla. 1964) (recovery permitted where malice or intent to inflict mental distress could be demonstrated); *Way v. Tampa Coca Cola Bottling Co.*, 260 So. 2d 288 (Fla. 2d Dist. Ct. App. 1972) (recovery permitted under theory of implied warranty and negligence).

197. Comment, 25 U. FLA. L. REV. 368, 369 (1973).

198. *Gilliam v. Stewart*, 291 So. 2d 593, 602 (Fla. 1974) (Adkins, J., dissenting).

199. *Id.* at 593.

200. Ms. Stewart died one year later. 271 So. 2d 466, 468 n.1 (Fla. 4th Dist. Ct. App. 1973).

201. *Id.* at 467.

202. *Id.* at 466.



The question is not really one of "impact" but rather the causal connection between the negligent act and the ultimate injury—a circumstance which in the last analysis does not seem to pose problems any more difficult to solve in a *non-impact* case than in an impact case . . . . The fact that there may be difficulty in proving or disproving a claim should not prevent a plaintiff from being given the opportunity of trying to convince the trier of fact of the truth of the claim.<sup>203</sup>

The court carefully reviewed the proffered arguments for adhering to the impact rule. In rejecting the claim that abandonment of the rule would result in "a floodtide of litigation," the court turned to section 21:

There is no more bedrock principle of law than that which declares that for every legal wrong there is a remedy and that every litigant is entitled to have his cause submitted to the arbitrament of the law . . . . It is far more consistent with justice to be concerned with the availability of a judicial forum for the adjudication of individual rights than to deny access of our courts because of speculation of an increased burden.<sup>204</sup>

The supreme court unfortunately disagreed.<sup>205</sup> Quashing the decision below and reaffirming its adherence to the impact rule, the court did not find "any valid justification to recede from the long standing decisions of this Court in this area."<sup>206</sup> Yet the court felt it necessary to point out that if sufficient justification were present, it might recede from the impact rule:

The impact rule is a judicial creation just as are many other substantive rules of tort law and, since it was judicially created, . . . if this Court should reach the conclusion that such rule was inequitable, impractical or no longer necessary, it may be, judicially, altered or abolished.<sup>207</sup>

Dissenting, Justice Adkins would have maintained the action despite the absence of any physical impact.<sup>208</sup> He painstakingly reviewed the origin and history of the impact rule, as well as the reasons for ad-

---

203. *Id.* at 473.

204. *Id.* at 475.

205. 291 So. 2d 593 (Fla. 1974). A 4-3 decision: Justices Drew, Carlton, Boyd, and Dekle concurred; Justices Adkins, Ervin, and McCain dissented.

206. *Id.* at 595.

207. *Id.*

208. *Id.* at 596.

herence to it. In rejecting the rule, Justice Adkins proposed five limitations on judicial entry in impact cases:

1. There should be no recovery except by those within the zone of danger, or area of physical risk from the defendant's negligent act;
2. The plaintiff must show a substantial physical injury;
3. The resultant physical injury should follow as a natural result of fright;
4. In the absence of a defendant's specific knowledge of a plaintiff's unusual sensitivity a plaintiff may not recover for hypersensitive mental disturbance where a normal person would not have been so affected; and
5. The injuries should not only be proximately caused by the negligence of the defendant, but should also follow closely in time to the negligent conduct.<sup>209</sup>

The wisdom of Justice Adkins' position is well summed up in his closing paragraph:

The ears of justice should not be peculiarly acute to cases involving impact, but rather, an injured citizen should be given the opportunity to be heard despite the lack of impact. Justice requires the doors of the Court to be opened sufficiently wide to accomplish such ends.<sup>210</sup>

The interspousal immunity doctrine and the impact rule are representative of the infringement upon section 21 rights permitted by the judiciary. As noted in *Gilliam*, however, the Florida Supreme Court undeniably holds the power to abandon unsatisfactory and conflicting court-made law.<sup>211</sup> The words of Justice Holmes are perhaps even more applicable today:

It is revolting to have no better reason for a rule of law than that . . . it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.<sup>212</sup>

## VI. THE RIGHT OF ACCESS TO COURTS FOR INDIGENTS AND PRISONERS

The idea of "access to courts" takes on a new dimension to one considering the plight of indigents and prisoners. Prior discussion has

---

209. *Id.* at 602-03.

210. *Id.*

211. See text accompanying note 207 *supra*.

212. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897).

focused on the personal right to redress individual injuries through the judicial process—the right to set foot figuratively inside the courthouse door. In discussing access to courts for indigents, however, the issue becomes monetary: if the individual knocking at the courthouse door is indigent, the door may never open.

Access to courts for all persons may perhaps best be comprehended as consisting of two stages. In the first stage—the procedural knocking on the door—the potential litigant must pay necessary docket fees, clerk costs, and service of process or publication costs. Upon such payment, the second stage is triggered as the court opens its door to consider the issue of redress. If payment is impossible, however, the door generally remains closed. Because monetary requirements operate as a condition precedent to court access, many poor people in America are precluded from asserting their legal rights both in criminal and civil proceedings.

On the federal level, the United States Supreme Court has previously recognized and acknowledged a constitutional right of access to the courts.<sup>213</sup> Founded in the due process clause of the fourteenth amendment, this right may or may not be defined by the Court as “fundamental” in any given case.<sup>214</sup> The right of access to the courts, apparently, will be considered fundamental only upon a showing that: (1) another clearly defined fundamental right or interest is involved; and (2) no other available means for enforcing the fundamental right exists.<sup>215</sup> Once these two prerequisites are established, the Court then

---

213. In 1974 the Court in *Wolff v. McDonald*, 418 U.S. 539, 579 (1974), clearly addressed the issue of a constitutional right of access to the courts by observing that “the right of access to the courts . . . is founded in the Due Process clause and assures that no person will be denied the opportunity to present to the judiciary allegations concerning violations of fundamental constitutional rights.” And within the past year, a majority of the Court spoke of “the fundamental constitutional right of access to the courts.” *Bounds v. Smith*, 97 S.Ct. 1491, 1498 (1977).

In dissent, however, Chief Justice Burger noted that “[t]he Court [in *Bounds*] leaves us unenlightened as to the source of the ‘right of access to the courts.’” *Id.* at 1501. And Justice Rehnquist, strongly dissenting, argued that the “‘fundamental constitutional right of access to the courts’ . . . is found nowhere in the Constitution” but instead, “is created virtually out of whole cloth with little or no reference to the Constitution from which it is supposed to be derived.” *Id.* at 1504.

214. For discussion of the right of access to the courts as a fundamental right, see Abram, *Access to the Judicial Process*, 6 GA. L. REV. 247 (1972); Goodpaster, *Free Access to the Courts*, 56 IOWA L. REV. 223, 249-56 (1970); Michelman, *The Supreme Court and Litigation Access Fees: The Right to Protect One's Rights*, 1973 DUKE L.J. 1153; Note, *Free Access To The Civil Courts As A Fundamental Constitutional Right: The Waiver of Filing Fees For Indigents*, 8 NEW ENG. L. REV. 275 (1973); Comment, *supra* note 8, at 147-48.

215. Although never clearly defined as such by the Court, this rule is apparent from dicta in *United States v. Kras*, 409 U.S. 434 (1973), and *Ortwein v. Schwab*, 410

applies a strict scrutiny standard of review, shifting the burden of proof to the state to demonstrate a compelling state interest to justify infringement on the defined "fundamental" right of access to the courts.<sup>216</sup>

Courts first became aware of the disparate treatment in litigational opportunities received by indigents in criminal proceedings.<sup>217</sup> In 1932, the Court in *Powell v. Alabama* held that a defendant in a state court has a constitutional right to an attorney in a capital case.<sup>218</sup> Thirty-one years later, the Court extended its right-to-counsel ruling to include defendants in non-capital felony cases.<sup>219</sup> In 1972 the constitutional right to counsel was further extended to misdemeanor cases in which the possibility of imprisonment exists.<sup>220</sup> Commentators speculate that judicial sensitivity to unequal treatment of the poor in criminal proceedings likely stemmed from the severity of the consequences of criminal conviction. The potential loss of life or liberty clearly involves the most fundamental of rights protected by the due process clause.<sup>221</sup>

In criminal proceedings, the constitutional right of access to courts requires not only the right to counsel for indigents but, noted the Court recently, "[i]t is now established beyond doubt that prisoners have a constitutional right of access to the courts."<sup>222</sup> States must provide trial records to inmates unable to purchase them;<sup>223</sup> indigent prisoners must be allowed to file appeals and habeas corpus petitions without payment of docket fees;<sup>224</sup> prisoners must be permitted to assist each other with habeas corpus applications and other legal matters;<sup>225</sup> and, in the Court's most recent opinion involving access to courts by prisoners, "the fundamental constitutional right of access to the courts requires prison authorities to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law

---

U.S. 656 (1973), in which the Court failed to define as fundamental the constitutional right of access to the courts in these two fact situations.

216. In the opinion of one commentator, those interests which might be offered by a state as compelling—"the discouragement of frivolous, malicious, or harassing litigations; fairness to opponents; the protection of existing interests; and economy for the state"—are simply not substantial enough to justify the denial of the right of access to the courts by requiring indigent litigants to pay litigation costs and fees. Goodpaster, *supra* note 214, at 256-63.

217. Comment, *supra* note 8, at 131-33.

218. 287 U.S. 45 (1932).

219. *Gideon v. Wainwright*, 372 U.S. 335 (1963).

220. *Argersinger v. Hamlin*, 407 U.S. 25 (1972).

221. Comment, *supra* note 8, at 131.

222. *Bounds v. Smith*, 97 S. Ct. 1491, 1494 (1977).

223. *Griffin v. Illinois*, 351 U.S. 12, 20 (1956). See also *Bounds v. Smith*, 97 S. Ct. 1491, 1495 n.8 (1977).

224. *Smith v. Bennett*, 365 U.S. 708 (1961); *Burns v. Ohio*, 360 U.S. 252, 257 (1959).

225. *Johnson v. Avery*, 393 U.S. 483 (1969).

libraries or adequate assistance from persons trained in the law.”<sup>226</sup> Clearly, what the Court deems “the fundamental constitutional right of access to the court” extends to indigents in criminal proceedings and to prisoners desirous of exercising this right.

In contrast to the fundamental rights at stake in criminal proceedings, civil proceedings rarely involve fundamental rights as defined by the Court.<sup>227</sup> As a result, application of the “fundamental right” rule in the civil arena works hardships on most indigent litigants by depriving them of the forum necessary to redress their injuries. This principle is best seen in recent Supreme Court cases.

The 1971 case of *Boddie v. Connecticut*<sup>228</sup> marked the first time the United States Supreme Court recognized the absolute right of a litigant to a waiver of court costs and filing fees in a civil case. *Boddie* was a class action on behalf of all female welfare recipients in Connecticut who were prevented from filing for divorce by a statute requiring payment of court fees and costs for service of process. Such prepayment operated as a condition precedent to court access. The Court held that Connecticut’s refusal to admit the women to its courts to obtain divorces was “the equivalent of denying them an opportunity to be heard upon their claimed right to a dissolution of their marriages, and, in the absence of a sufficient countervailing justification for the State’s action, a denial of due process.”<sup>229</sup>

Commentators hailed *Boddie* as the initial step in providing meaningful access to courts for indigents in civil litigation.<sup>230</sup> Such rejoicing, however, was short-lived. In *United States v. Kras*<sup>231</sup> and *Ortwein v. Schwab*,<sup>232</sup> the Court dealt heavy blows to the developing concept of a fundamental right of indigents to initiate judicial proceedings without prepayment of court costs or fees.

226. *Bounds v. Smith*, 97 S. Ct. 1491, 1498 (1977). See also *Chaffin v. Stynchcombe*, 417 U.S. 17 (1973); *Cruz v. Beto*, 405 U.S. 319 (1972); *Younger v. Gilmore*, 404 U.S. 15 (1971); *Cruz v. Hauch*, 404 U.S. 59 (1971).

227. One commentator argues, however, that

[t]he economic and psychological ramifications of civil litigation can be just as serious [as criminal litigation] in some cases. To some, the loss of their home, job, or wages can be more debilitating socially and psychologically than the loss of their liberty for a short period of time. Divorce, child custody proceedings, and deportation hearings can have the same traumatic effects on the participants as would a criminal trial.

Comment, *supra* note 8, at 133 n.21.

228. 401 U.S. 371 (1971).

229. *Id.* at 380-81.

230. See Comment, *Indigent's Access to Civil Court*, 4 COLUM. HUMAN RIGHTS L. REV. 267 (1972); Comment, 76 DICK. L. REV. 749 (1972); Comment, 22 CATH. U.L. REV. 427 (1973); Comment, 8 WAKE FOREST L. REV. 437 (1972).

231. 409 U.S. 434 (1973).

232. 410 U.S. 656 (1973).

In *Kras*, the Court refused to hold unconstitutional a statute requiring advance payment of a \$50 filing fee in a bankruptcy proceeding. The Court noted that

[b]ankruptcy is hardly akin to free speech or marriage or those other rights . . . that the Court has come to regard as fundamental and that demand the lofty requirement of a compelling state interest before they may be significantly regulated . . . [B]ankruptcy legislation is in the area of economics and social welfare . . . . This being so, the applicable standard, in measuring Congress' classification, is that of rational justification.<sup>233</sup>

The Court further distinguished the statute in *Kras* from the one invalidated in *Boddie*, observing that the interest in eliminating one's debt burden does not rise to the same constitutional level as the interests jeopardized in *Boddie*; specifically, bankruptcy is not the only method for adjusting one's legal relationship with creditors, whereas the judicial process is the only mechanism for dissolving a marriage.<sup>234</sup>

Despite the majority's earnest efforts to justify its position, the decision cannot fail to strike lawyers and laymen as bizarre. Reduced to its bare essentials, *Kras* had reached a new low in American society: he was too poor to claim bankruptcy. A better case could hardly be found to bolster the opinion that the legal mind is one that can think about something that is related to something else without thinking about the something else to which it is related.

Two months later the Court decided *Ortwein v. Schwab*.<sup>235</sup> Ortwein, a welfare recipient, disputed a \$39 monthly reduction in his old-age assistance check. Following an administrative hearing which upheld the county agency's decision, Ortwein petitioned the Oregon Supreme Court for a writ of mandamus to require that court to hear his appeal from the agency decision. The Oregon Supreme Court denied the petition solely because Ortwein was unable to pay the \$25 appellate court filing fee. The United States Supreme Court affirmed, holding that the filing fee requirement was not a denial of due process because Ortwein had received an agency pretermination evidentiary hearing, which, in the Court's opinion, satisfied due process requirements.<sup>236</sup> The Court noted that the purpose of the suit—increased welfare payments—had “far less constitutional significance than the

---

233. 409 U.S. at 446.

234. *Id.*

235. 410 U.S. 656 (1973).

236. *Id.* at 659–60.

interest of the *Boddie* appellants.”<sup>237</sup> The Court saw “‘no fundamental interest that is gained or lost depending on the availability’ of the relief sought by appellants.”<sup>238</sup> The Court also held that the fee requirement did not deny equal protection or unconstitutionally discriminate against the poor because the fees were needed to meet court expenses.<sup>239</sup>

Both *Kras* and *Ortwein* were five-to-four decisions, with Justices Brennan, Douglas, Marshall, and Stewart voicing strong dissents. In *Kras*, Justices Douglas and Brennan stated that “[t]he invidious discrimination in the present case is a denial of due process because it denies equal protection within our decisions which makes particularly ‘invidious’ discrimination based on wealth or race.”<sup>240</sup> Justice Stewart, joined by the other three dissenters, believed that *Boddie* was controlling;<sup>241</sup> and Justice Marshall viewed *Kras* as “involving the right of access to the courts, the opportunity to be heard when one claims a legal right, and not just the right to a discharge in bankruptcy.”<sup>242</sup>

The *Ortwein* dissents were similarly reasoned.<sup>243</sup> Justice Marshall perceived the majority’s faulty logic:

The majority’s statement that “[t]his Court has long recognized that, even in criminal cases, due process does not require a State to provide an appellate system,” [citation omitted] is thus true, but irrelevant and misleading. The cases cited by the majority all involve efforts to secure appellate review of a decision by a lower court. Here, in contrast, no court has ever examined appellants’ claims on the merits. Appellants assert only that they must have *some* access to *some* court to contest the legality of administrative action adversely affecting them.<sup>244</sup>

In contrast to the Federal Constitution, Florida specifically provides for the right of access to the courts. The Florida provision is clearly in addition to the state due process provision of article I, section 9 and the equal protection provision of article I, section 2. Thus the

---

237. *Id.* at 659.

238. *Id.*

239. *Id.* at 660–61.

240. 409 U.S. 434, 458 (1973).

241. *Id.* at 454–57.

242. *Id.* at 462.

243. Justices Douglas and Brennan again argued that both the due process and equal protection clauses were violated. Justice Marshall would have held that it was unconstitutional to deny access to the courts because of indigence; and Justice Stewart adhered to his dissent in *Kras*, that it is a denial of due process to make the right of appeal dependent on the ability to pay. 410 U.S. at 661–66.

244. 410 U.S. at 665.

questioning by Justice Rehnquist and Chief Justice Burger as to the existence or nonexistence of a constitutional right of access to the courts is inapplicable under Florida law. Framers of Florida's constitutions throughout the years have considered this right of sufficient importance to raise it to the level of a constitutional right.

The Florida Legislature has enacted numerous laws specifically directed toward facilitating court access for the indigent in both civil and criminal proceedings.<sup>245</sup> For example, Florida has an in forma pauperis statute, section 57.081, which requires a waiver of litigational costs upon a showing of insolvency.<sup>246</sup> The statute, however, is limited in that it (1) applies only to plaintiffs; (2) requires the indigent plaintiff to have an attorney willing to represent her without charge;<sup>247</sup> and (3) does not extend to appeals. Cases relating to access to courts for indigents are usually decided on the basis of the in forma pauperis statute rather than on article I, section 21. Such cases are relatively few in number.

In *State ex rel. Shellman v. Norvell*,<sup>248</sup> Ms. Shellman, an indigent living in Dade County, sought a divorce from her husband in St. Lucie County. The sheriff of St. Lucie County refused to serve the summons, contending that the language of section 57.081, Florida Statutes, precluded his serving a resident of another county.<sup>249</sup> In an original mandamus action, the Fourth District Court of Appeal, relying "squarely" on *Boddie*, held that "[t]he limitation on the sheriff's duty imposed by the . . . language of the statute . . . is at variance with the due process clause of the Fourteenth Amendment to the United States Constitution . . . . Hence, the statute should be given effect without regard to such limitation."<sup>250</sup>

The relevance of *Dade County v. Womack*,<sup>251</sup> a five-sentence per

---

245. See FLA. STAT. § 27.53(2), (3) (Supp. 1976) (representation of indigents by public defender); FLA. STAT. § 49.10(1)(b) (1975) (notice of action by posting); FLA. STAT. § 57.081 (1975) (in forma pauperis statute); FLA. STAT. § 903.03 (1975) (release on recognizance for indigents); FLA. STAT. § 914.06 (1975) (witnesses for indigents in criminal proceedings); FLA. STAT. 922.04 (1975) (discharge of prisoner unable to pay fine); FLA. STAT. § 924.17 (1975) (costs when appellant is indigent).

246. The statute provides: "Insolvent and poverty-stricken persons having actionable claims or demands shall receive the services of the courts, sheriffs, and clerks of the county in which they reside without charge." FLA. STAT. § 57.081(1) (1975).

247. *Id.* "The affidavits [of insolvency] shall be supported by a written certificate signed by a member of the bar of the county that he . . . intends to act as attorney for applicant without compensation." *Id.*

248. 270 So. 2d 417 (Fla. 4th Dist. Ct. App. 1972).

249. The relevant portion of the language under consideration reads: "Insolvent . . . persons . . . shall receive the services of the . . . sheriffs . . . of the county in which they reside without charge." FLA. STAT. § 57.081(1) (emphasis added).

250. 270 So. 2d at 419.

251. 285 So. 2d 441 (Fla. 3d Dist. Ct. App. 1973).



curiam opinion on the in forma pauperis statute, is unclear. Ms. Womack, an indigent parent desiring to change the names of her minor children, could obtain service of process on the missing parent only by publication. The Dade County Circuit Court ordered the county to pay the cost of publication, and the county appealed. The Third District Court of Appeal reversed, holding that the county was not required to pay such cost.<sup>252</sup>

The *Womack* opinion was predicated upon the appellate court's prior decision in *Grissom v. Dade County*.<sup>253</sup> Ms. Grissom, an indigent seeking to adopt a child whose natural mother could not be located, challenged the constitutionality of the publication statute as applied to her. The Third District Court of Appeal upheld the statute as applied to indigents. Ms. Grissom appealed to the Florida Supreme Court. Four months after *Womack*, *Grissom*—the basis for the decision in *Womack*—was reversed.<sup>254</sup> The Florida Supreme Court likened the proceeding in *Grissom* to the dissolution of marriage proceeding in *Boddie*. The court held that application of the publication statute to Ms. Grissom, an indigent, effectively denied her court access in a matter involving fundamental human rights where no other method for effecting those rights was available.<sup>255</sup> Writing for the majority, Justice McCain asserted:

The publication statutes are therefore unconstitutional as applied and the State should be required to pay the costs of publication in such cases as these. If, however, the cost in cases of this nature becomes excessive upon the treasury of this State, the Legislature should provide a less costly alternative method of obtaining jurisdiction.<sup>256</sup>

*Grissom* was decided on the basis of the due process and equal protection provisions of the state and federal constitutions. Article I, section 21 was not mentioned, although the court did quote from an early access-to-courts case.<sup>257</sup> Reading *Grissom* strictly, it would appear to have no effect on *Womack*, since the right involved in *Womack*—to change the names of one's minor children—would not be deemed

---

252. *Id.*

253. 279 So. 2d 899 (Fla. 3d Dist. Ct. App. 1973), *rev'd*, 293 So. 2d 59 (Fla. 1974).

254. 293 So. 2d 59 (Fla. 1974).

255. *Id.* at 63.

256. *Id.* The Legislature apparently heeded the court's suggestion. In 1975 the Legislature enacted chapter 75-205 to authorize notice of action by posting rather than by publication in certain cases brought by indigents. Act of June 25, 1975, ch. 75-205, 1975 Fla. Laws 445. This provision was subsequently upheld in *Sheppard v. Sheppard*, 329 So. 2d 1 (Fla. 1976).

257. 293 So. 2d at 63.

"fundamental," even though no other method exists for effecting such a name change.

Such a result is clearly inequitable and flies in the face of section 21. By looking to federal precedent, the Florida Supreme Court completely ignores its own state constitution, which *mandates* a right of court access. The Florida court errs by following the approach of the United States Supreme Court, namely, to pick and choose—depending on the interest involved—those cases in which indigents have a right of court access. As long as section 21 remains in the constitution, access to court itself is a constitutionally protected right, regardless of other rights sought to be enforced. The court, it appears, has failed to make this crucial connection.

## VII. STANDING TO SUE IN FLORIDA

Another major area of conflict relating to article I, section 21 is that of standing. The constitutional language is clear—"the courts shall be open to every person for redress of *any* injury."<sup>257.1</sup> Yet Florida courts continue to require that the injury allegedly suffered by a plaintiff be a "special injury differing in kind from that suffered by the public generally."<sup>258</sup>

The "special injury" rule first arose under common law in public nuisance cases.<sup>259</sup> A nuisance was "an interference with the use or enjoyment of land, or with a right of easement or servitude over the land."<sup>260</sup> A nuisance may be public or private.<sup>261</sup> The latter is the "invasion of interests in the use or enjoyment of land;" it is a tort, and its remedy lies exclusively with the person whose rights have been disturbed.<sup>262</sup> A public nuisance, on the other hand, is "a species of catch-all low-grade criminal offense, consisting of an interference with the rights of the community at large."<sup>263</sup> Since the commission of an act resulting in a public nuisance was viewed as a violation of the Crown's rights, it was indictable and punishable by fine and imprisonment—and in some cases, by corporal punishment.<sup>264</sup>

For a private person to bring suit to recover for an injury caused by a public nuisance, the common law required that the individual must

---

257.1 (emphasis added).

258. *United States Steel Corp. v. Save Sand Key, Inc.*, 303 So. 2d 9, 12 (Fla. 1974).

259. Comment, 26 U. FLA. L. REV. 360 (1974).

260. Prosser, *Private Action for Public Nuisance*, 52 VA. L. REV. 997 (1966).

261. *Id.* at 999.

262. *Id.*

263. A public nuisance can range from indecent exposure to a gaming house to blocking a highway. *Id.*

264. Comment, *supra* note 259, at 361.

have suffered some special injury different from that suffered by the common public.<sup>265</sup> The rationale for this rule was that the offending party would be liable to countless injured parties absent a special injury requirement.<sup>266</sup>

In 1838 the United States Supreme Court accepted the common law rule for standing in public nuisance actions. In the words of the Court:

The principle then is, that in the case of a public nuisance, where a bill is filed by a private person, asking for relief by way of prevention, the plaintiff cannot maintain a stand in a court of equity; unless he avers and proves some special injury.<sup>267</sup>

In 1869 the Florida Supreme Court announced its acceptance of the common law special injury doctrine in *Alden v. Pinney*.<sup>268</sup> Considering whether the plaintiff had standing to bring suit to compel defendants to remove their icehouse from a waterfront lot, the court stated:

If this ice-house . . . will . . . impede or transgress the rights of the public . . . , the remedy to correct this public evil, while it exists in the State courts, is not at the suit of an individual citizen. He can only seek a court of law or equity in cases of special damage to himself. Such special damage, in case of a public nuisance, must be beyond and in addition to that which falls alike upon all, and he must seek relief in a court of law or equity, as the nature of his special injuries and the remedies for them should determine to be appropriate.<sup>269</sup>

Quite notably, Florida's constitution at the time of *Alden* contained no access-to-courts/remedy-for-every-injury provision.<sup>270</sup> The Florida Constitution of 1868 had inexplicably dropped this guarantee;<sup>271</sup> all three previous constitutions had provided it.<sup>272</sup> Therefore,

---

265. *Id. See, e.g.,* *Pain v. Patrick*, 87 Eng. Rep. 191 (K.B. 1691); *William's Case*, 77 Eng. Rep. 163 (K.B. 1592).

266. *Id.*

267. *Mayor of Georgetown v. Alexandria Canal Co.*, 37 U.S. 91, 99 (1838).

268. 12 Fla. 348 (1869).

269. *Id.* at 390.

270. FLA. CONST. of 1868. This was the only constitution in Florida's history which did not provide the access-to-courts guarantee.

271. The journal of the 1868 constitution revision proceedings provides no clue as to why the court access provision was excluded. The committee on the section on declaration of rights apparently received unanimous approval of its entire Declaration of Rights proposal. *Journal of the Proceedings of the Constitutional Convention of the State of Florida* (Tallahassee 1868).

until 1885 *Alden* and other special injury cases<sup>273</sup> posed no constitutional conflict.

With the adoption of the 1885 Constitution, however, Floridians were once again guaranteed that "every person for any injury . . . shall have remedy."<sup>274</sup> A review of the 1885 constitution revision proceedings fails to disclose the impetus for returning the right of remedy by court access to constitutional protection.<sup>275</sup> Whatever the reason, subsequent court decisions failed to differentiate between the special injury requirement absent the guarantees of section 4 and the same requirement subject to section 4.

In 1894 the Florida Supreme Court in *Jacksonville, Tampa, and Key West Railway v. Thompson*<sup>276</sup> further refined the special injury rule to require that a private party suing to abate a public nuisance "must have suffered some special damage, differing not only in degree, but in kind, from the damages sustained by the community at large."<sup>277</sup> The court saw the rule as necessary "chiefly to avoid multiplicity of actions."<sup>278</sup>

Courts have continued to apply the special injury rule in public nuisance cases<sup>279</sup> and have extended the requirement to apply in zoning cases.<sup>280</sup> The rule also was quickly adopted by Florida courts as a re-

---

A commentary on the Declaration of Rights of 1885 indicates that "[t]here were also a number of omissions [in the 1868 Constitution] which may or may not have been significant." West, Odle, & McCaughan, *Personal Civil Liberties Under the Florida Constitution Declaration of Rights*, 15 FLA. L. JOUR. 210, 215 (1941). For a brief history of the "internal strife and original failure of the 1868 Constitutional Convention," see *id.* at 214-15.

272. FLA. CONST. of 1838, art. I, § 9; FLA. CONST. of 1861, art. I, § 9; and FLA. CONST. of 1865, art. I, § 9. See FLA. STAT. ANN. Decl. of Rights § 4, Historical Note (1975).

273. In 1875, the Florida Supreme Court reaffirmed the special injury rule by stating that "if special injury be threatened, [those parties so threatened] may demand that their property be protected against injury by such permanent obstructions and nuisances." *Lutterloh v. Mayor and Council*, 15 Fla. 306, 308 (1875). See also *Garnett v. Jacksonville, St. Augustine & Halifax River Ry.*, 20 Fla. 889 (1884).

274. FLA. CONST. of 1885, Decl. of Rights § 4.

275. *Journal of the Proceedings of the Constitutional Convention of 1885* (Tallahassee 1885).

276. 16 So. 282 (Fla. 1894).

277. *Id.* at 283 (emphasis added).

278. *Id.*

279. *Town of Flagler Beach v. Green*, 83 So. 2d 598 (Fla. 1955); *Page v. Niagara Chem. Div.*, 68 So. 2d 382 (Fla. 1953); *Doherty & Co. v. Joachim*, 200 So. 238 (Fla. 1941); *Deering v. Martin*, 116 So. 54 (Fla. 1928); *State ex rel. Gardner v. Sailboat Key, Inc.*, 295 So. 2d 658 (3d Dist. Ct. App. 1974).

280. See, e.g., *Renard v. Dade County*, 261 So. 2d 832 (Fla. 1972); *Boucher v. Novotny*, 102 So. 2d 132 (Fla. 1958); *Upper Keys Citizens Assoc., Inc. v. Wedel*, 341 So. 2d 1062 (3d Dist. Ct. App. 1977); *Skaggs-Albertson's Properties, Inc. v. Michels Belleair Bluffs Pharmacy, Inc.*, 332 So. 2d 113 (2d Dist. Ct. App. 1976); *Jack Eckerd Corp. v. Michels Island Village Pharmacy*, 322 So. 2d 57 (2d Dist. Ct. App. 1975); *Carroll v. City of West Palm Beach*, 276 So. 2d 491 (4th Dist. Ct. App. 1973).

quirement for standing in taxpayers' challenges. In *Rickman v. Whitehurst*,<sup>281</sup> the 1917 Florida Supreme Court enunciated what today is known as the *Rickman* rule. Rickman, a citizen and taxpayer of DeSoto County, sought to enjoin the county commissioners and bond trustees from using monies raised from bond sales to construct local roads and bridges, except under contract to be let to the lowest responsible bidder.<sup>282</sup> While recognizing "[t]he right of a citizen and taxpayer to maintain a suit to prevent the unlawful expenditure by public officials of public monies,"<sup>283</sup> the court severely circumscribed that right by holding:

In a case where a public official is about to commit an unlawful act, the public by its authorized public officers must institute the proceeding to prevent the wrongful act, unless a private person is threatened with or suffers some public or special damage to his individual interests, distinct from that of every other inhabitant, in which case he may maintain his bill.<sup>284</sup>

The Florida Supreme Court in 1972 announced an exception to the *Rickman* rule in *Department of Administration v. Horne*.<sup>285</sup> Taxpayers<sup>286</sup> asserted that certain sections of the 1971 General Appropriations Act were unconstitutional.<sup>287</sup> The lower court refused to dismiss the case on a standing challenge; the defendant department brought an interlocutory appeal to the supreme court. The court found that "where there is an attack upon constitutional grounds based directly upon the Legislature's *taxing and spending* power, there is standing to sue without the *Rickman* requirement of special injury, which will still obtain in other cases."<sup>288</sup>

281. 74 So. 205 (Fla. 1917).

282. The special legislative act which empowered the commissioners to undertake the construction prescribed that contracts for such construction be awarded to the lowest responsible bidder. *Id.* at 206.

283. *Id.* at 207.

284. *Id.*

285. 269 So. 2d 659 (Fla. 1972).

286. The "ordinary citizens and taxpayers" who challenged the suit also happened to be "eminent members of The Florida Senate." *Id.* at 660.

287. Fifty-five sections of the Appropriations Act were attacked on the following grounds:

(1) It is an attempt to enact substantive law in an appropriations act in violation of Fla. Const. art. III, § 12, and earlier authorities of this Court.

(2) The subject matter is not included in the Act's title, in contravention of Fla. Const. art. III, § 6.

(3) It constitutes "logrolling" which circumvents or curtails the Governor's veto power in violation of Fla. Const. art. III, §§ 8 and 12.

*Id.* (footnote omitted).

288. *Id.* at 663. The court found "direct precedent for this exception in *Flast v.*

The Florida Legislature may, of course, statutorily authorize exceptions to the special injury rule. The first such statute was enacted in 1917 to permit private parties in certain public nuisance situations to bring suit in the name of the state on the relation of the private party.<sup>289</sup> Still in force, this statutory grant of standing applies only in an action abating or enjoining a defined public nuisance.<sup>290</sup>

The Florida Administrative Procedure Act [APA]<sup>291</sup> provides another vehicle for citizens to challenge governmental action without a showing of special injury differing in kind and degree from that suffered by the general public.<sup>292</sup> In addition to facilitating citizen participation at the administrative level, the APA provides that "[a] party who is adversely affected by final agency action is entitled to judicial review. A preliminary, procedural, or intermediate agency action or ruling is immediately reviewable if review of the final agency decision would not provide an adequate remedy."<sup>293</sup>

This procedure greatly expands citizen access to courts without a requirement of special injury.<sup>294</sup> At the same time, however, such

---

Cohen," 392 U.S. 83 (1968), where a federal taxpayer was held to have standing to challenge the constitutionality of congressional action under the taxing and spending clause.

289. Act of May 24, ch. 7367, §§ 2-4, 1917 Fla. Laws 215 (current version at FLA. STAT. §§ 60.05-.06 (1975)).

290. See, e.g., *Orlando Sports Stadium, Inc. v. State ex rel. Powell*, 262 So. 2d 881 (Fla. 1972); *National Container Corp. v. State ex rel. Stockton*, 189 So. 4 (Fla. 1939); *Merry-Go-Round, Inc. v. State ex rel. Jones*, 186 So. 538 (Fla. 1939); *Gulf Theatres, Inc. v. State ex rel. Ferguson*, 185 So. 862 (Fla. 1939); *Pompano Horse Club, Inc. v. State ex rel. Bryan*, 111 So. 801 (Fla. 1927).

291. FLA. STAT. ch. 120 (1975 Supp. 1976).

292. See, e.g., *City of Key West v. Askew*, 324 So. 2d 655 (Fla. 1st Dist. Ct. App. 1975); *D & W Oil Co., Inc. v. O'Malley*, 293 So. 2d 128 (Fla. 1st Dist. Ct. App. 1974). In *City of Key West*, the First District Court of Appeal criticized the liberalized standing requirements under the APA:

The rationale of the prior decisions requiring a plaintiff to allege a special injury separate in kind comports with logic, especially in this age of seemingly unending litigation. It would seem to be most illogical to permit "Citizen Petitioners", who testify before sundry House and Senate committees against the enactment of a proposed bill, to subsequently litigate in the courts the wisdom of the legislature in enacting same. Although the proceedings now sought to be reviewed are analogous to the legislative process, apparently, logic has been supplanted by the new Administrative Procedure, [sic] Act. (footnote omitted.)

*Id.* at 658. For discussion of APA use in the environmental area, see Note, *A Proposal for Revision of the Florida Constitution: Environmental Rights for Florida Citizens*, 5 FLA. ST. U.L. REV. 809 (1977).

293. FLA. STAT. § 120.68(1) (1975). The former APA permitted review of judicial or quasi-judicial actions only. Act of June 22, 1961, ch. 61-280, 1961 Fla. Laws 538. The new act allows review of all final agency actions. *City of Titusville v. State Pub. Employees Relations Comm'n*, 330 So. 2d 733 (Fla. 1st Dist. Ct. App. 1976); *Broward County v. Administration Comm'n*, 321 So. 2d 605 (Fla. 1st Dist. Ct. App. 1976).

294. Although a party seeking court review must be both substantially and adversely affected, this requirement does not rise to the rigid special injury requirement.

access is legislatively created; unlike section 21's permanence, what the legislature creates today it may take away tomorrow. And if not withdrawn altogether, citizen standing under the APA may yet be curtailed by agency rules.<sup>295</sup>

A third statutorily defined exception to the standing requirement of special injury is the Florida Environmental Protection Act of 1971 [FEPA].<sup>296</sup> The Act provides that "a citizen of the state"<sup>297</sup> may bring suit against:

1. Any governmental agency or authority charged by law with the duty of enforcing laws, rules, and regulations for the protection of the air, water, and other natural resources of the state to compel such governmental authority to enforce such laws, rules, and regulations;
2. Any person, natural or corporate, governmental agency or authority to enjoin such persons, agencies, or authorities from violating any laws, rules or regulations for the protection of the air, water, and other natural resources of the state.<sup>298</sup>

As pointed out by one commentator, however, the failure of the Act to specifically abrogate the special injury doctrine potentially could allow courts to construe the statute narrowly to require that a special injury be pleaded.<sup>299</sup> But this construction, according to the commentator, would be incorrect for several reasons:

First, if the legislature had intended to retain the "special injury" doctrine, then there was no purpose in providing citizens with standing pursuant to the EPA: citizens already enjoyed "special injury" standing under the common law. Secondly, application of the special injury rule in effect closes the courthouse doors to environmentally concerned citizens. This result would fly in the face of the apparent legislative and constitutional intent to preserve and protect the natural resources of the state; opening the courts to concerned citi-

---

295. In the words of one commentator: "Such broad-based citizen standing is not guaranteed, however. While agencies have not promulgated rules restricting participation, they may do so in the future." Note, *supra* note 292, at 822.

296. FLA. STAT. § 403.412 (1975). An in-depth review is beyond the scope of this Note; however, for such presentation, see Note, *The Florida Environmental Protection Act of 1971: The Citizen's Role in Environmental Management*, 2 FLA. ST. U.L. REV. 736 (1974) [hereinafter *Citizen's Role*]. See generally, Note, *Standing on the Side of the Environment: A Statutory Prescription for Citizen Participation*, 1 ECOLOGY L.Q. 561 (1971) [hereinafter *Statutory Standing*].

297. FEPA also provides for actions brought by the Department of Legal Affairs or any political subdivision or municipality of the state. FLA. STAT. § 403.412(2)(a) (1975).

298. *Id.*

299. Note, *Citizen's Role*, *supra* note 296, at 755.

zens would help to ensure that laws passed for protection of the environment are enforced.

Additionally, a restrictive interpretation of the standing provision would distort the language and organization of the statute. Subsection 2(a) of the statute authorizes standing for citizens. Nowhere in that subsection does the language refer to "special injury." Moreover, the Department of Legal Affairs, political subdivisions and municipalities are granted standing in the same clause. As governmental bodies, these entities were never restricted by the special injury rule from initiating environmental suits at common law. Thus a special injury requirement for private citizens' standing seems inconsistent with the remainder of the subsection.<sup>300</sup>

Case law to date construing the Act appears to be in agreement with the suggested liberal construction. In *Orange County Audubon Society, Inc. v. Hold*, the Audubon Society brought suit to compel the Orange County Board of County Commissioners to enforce the environmental law.<sup>301</sup> The circuit court dismissed for lack of standing. The Fourth District Court of Appeal reversed, holding that the term "citizen" in the Act included artificial as well as natural persons, granting corporations standing to sue under the Act.<sup>302</sup>

With the enactment of Section 403.412 the legislature has declared that the protection of the environment is a collective responsibility. To treat a corporation as a "citizen" is consistent with this legislative declaration and the "intent to be gathered from the context and the general purpose of the whole legislation".<sup>303</sup>

In the same year, the Second District Court of Appeal liberally construed the Act in *Save Our Bay, Inc. v. Hillsborough County Pollution Control Commission*.<sup>304</sup> A nonprofit corporation sought to enjoin utility companies from polluting local waters. Dismissed in circuit court for lack of standing to sue, the corporation found the appeals court friendly to its plea:

On the authority of the statute and this court's opinion in the case of *Save Sand Key, Inc. v. United States Steel Corporation*, the appellant does have *standing to sue* and is not required to show special injury beyond that sustained by the general public.<sup>305</sup>

---

300. *Id.* (footnotes omitted).

301. 276 So. 2d 542 (Fla. 4th Dist. Ct. App. 1973).

302. *Id.* at 543-44.

303. *Id.* at 543.

304. 285 So. 2d 447 (Fla. 2d Dist. Ct. App. 1973).

305. *Id.* at 449 (citation omitted).



Unfortunately, however, it is difficult to assign much weight to this case, for the *Save Sand Key* district court opinion so heavily relied upon in *Save Our Bay* was reversed by the Florida Supreme Court the following year.<sup>306</sup> Yet *Save Sand Key* did not involve an environmental challenge pursuant to FEPA. Rather, *Save Sand Key* involved an effort by a nonprofit Florida corporation to enjoin United States Steel from interfering with certain alleged rights of the general public—including corporation members—to use a portion of the soft sand beach area of Sand Key.<sup>307</sup> The Second District Court of Appeal, in a cogent and well-reasoned opinion, had held that a person may sue for relief or redress whether or not such right is special to her—thus providing *Save Sand Key* the necessary standing to sue.<sup>308</sup> The district court reached this conclusion through specific consideration of section 21, observing that

the trend in Florida and in the federal courts is to broaden "standing to sue" . . . . Moreover, this trend is indeed mandated . . . by our recently amended constitutional provision relating to access to our courts. . . . This language is clearly less restrictive than that of its precursor . . . . It is the obvious present intent of the people of Florida that the right to judicial relief be without express limitation.<sup>309</sup>

The supreme court, in a four-to-three decision to reverse, affirmed its adherence to the special injury requirement for standing to sue.<sup>310</sup> Merely quoting from previous decisions on this issue, the court avoided any meaningful consideration of the merits for abolishing the special injury rule. Rather, the court preferred once again to close its eyes to the undeniable conflict between the special injury requirement and section 21.<sup>311</sup>

The special injury rule is clearly inconsistent with the remedy-for-any-injury language of section 21. The doctrine of special injury was

---

306. *United States Steel Corp. v. Save Sand Key, Inc.*, 303 So. 2d 9 (Fla. 1974).

307. *Id.*

308. 281 So. 2d 572, 577 (Fla. 2d Dist. Ct. App. 1973). For commentary applauding the district court decision, see Comment, *supra* note 259.

309. 281 So. 2d at 575.

310. 303 So. 2d at 11.

311. Justice Ervin dissented. Curiously, he relied not on section 21, but on "the rights of citizens to corporately organize (legally assemble) in a nonprofit corporation under the First Amendment to the United States Constitution for the purpose of protecting the general public's right in common to the use and enjoyment of public property." *Id.* at 13-14. This basis for his dissent is unusual in that his earlier opinions specifically cited section 21 as the primary rationale, and section 21 had provided the basis for the appellate court's opinion below.

incorporated into Florida case law at a time when the predecessor provision of section 21 was absent from the Florida Constitution.<sup>312</sup> For sixteen years the special injury rule did not conflict with any constitutional guarantee. In 1885, however, the reinsertion of the access-to-courts/remedy-for-any-injury provision should have made the special injury doctrine no longer applicable. Yet courts continuously over the decades have failed to fulfill the constitutional guarantee that "the courts shall be open to every person for redress of any injury" by adhering to the special injury doctrine.

This adherence may be attributable to the same requirement of special injury, or injury-in-fact, for standing to sue in federal courts.<sup>313</sup> It should be noted, however, that the federal law of standing "is the offspring of the 'case or controversy' requirement" of article III, section 2 of the United States Constitution.<sup>314</sup> From its "case or controversy" limitation, the United States Supreme Court has inferred that a litigant must have a specifically ascertainable interest in a controversy<sup>315</sup> in order to have standing to sue. The federal concept of standing has been criticized as "too complex,"<sup>316</sup> "something of an enigma,"<sup>317</sup> and "confusing and inconsistent."<sup>318</sup> The Court itself has called standing "a complicated specialty of federal jurisdiction."<sup>319</sup>

Federal requirements for standing to sue, therefore, are totally separate and distinct from those mandated by state constitutions.

By and large, the state courts follow the common law attitudes in governing judicial review . . . , so that the judicial doors are widely open to anyone who asserts a legitimate interest; one who is hurt in fact has standing unless a statute or a "public policy" requires otherwise. The resulting law of standing is both simple and satisfactory. So is the state law that goes further and even allows any "citizen" or "resident" to raise questions about proper behavior of public officials. Opening the doors so widely does not mean that the courts are overrun with cases that ought not to be decided. It does mean that litigation about the law of standing is rather slight.<sup>320</sup>

---

312. See discussion at text accompanying notes 270-73 *supra*.

313. See, e.g., *Warth v. Seldin*, 422 U.S. 490 (1975); *Schlesinger v. Reservists Committee*, 418 U.S. 208 (1974); *Sierra Club v. Morton*, 405 U.S. 727 (1972).

314. Note, *Statutory Standing*, *supra* note 296, at 565.

315. *Frothingham v. Mellon*, 262 U.S. 447, 486-88 (1923).

316. Davis, *The Liberalized Law of Standing*, 37 U. CHI. L. REV. 450 (1970).

317. *Statutory Standing*, *supra* note 296, at 565.

318. Wolff, *Standing to Sue: Capricious Application of Direct Injury Standard*, 20 ST. LOUIS U.L. REV. 663 (1976).

319. *United States ex rel. Chapman v. FPC*, 345 U.S. 153, 156 (1953). For an excellent critique of federal standing requirements, see Tushnet, *The New Law of Standing: A Plea for Abandonment*, 62 CORN. L. REV. 663 (1977).

320. Davis, *supra* note 316, at 468.

Even the United States Supreme Court, in one of its few lucid observations on standing, observed that

[s]tanding is not to be denied simply because many people suffer the same injury. . . . To deny standing to persons who are in fact injured simply because many others are also injured, would mean that the most injurious and widespread Government actions could be questioned by nobody.<sup>321</sup>

The repeated rationale for adherence to the special injury doctrine has been "chiefly to avoid multiplicity of actions; for by the same reason that it may be brought by the plaintiff it may be maintainable by every person passing that way."<sup>322</sup> This argument was specifically—and convincingly—addressed by the district court in *Save Sand Key*:

We fear not multiplicitousness, as did the earlier courts, because such fear ignores both the deterring economic influences flowing from the great expense of litigation these days and the precedential value of a prior decided case on a given point. Furthermore, the increasing number of well-trying class actions tend to further limit litigation because of the principles which inhere within the doctrine of res judicata. Finally we observe, "spite suits" or harassment will not be tolerated any more in this type suit than in any other. In a word, the "multiplicity" argument is no longer there.<sup>323</sup>

In full support of the court's argument that cost is a deterrent to multiplicitousness, one commentator noted that a Michigan survey of attorneys involved in environmental litigation—such as the *Save Sand Key* suit—showed the average cost of litigation to be approximately \$10,000.<sup>324</sup> As another writer pointed out,

it usually requires a financial outlay to undertake a lawsuit, so that once launched on the lawsuit the ideological plaintiff has, at least, committed a sum of money and so, in some sense, has a financial investment to protect. But the very fact of investing money in a lawsuit from which one is to acquire no further monetary profit argues, to my mind, a quite exceptional kind of interest, and one peculiarly indicative of a desire to say all that can be said in the support of one's contention.<sup>325</sup>

---

321. *United States v. SCRAP*, 412 U.S. 669, 687-88 (1973).

322. *Jacksonville, T. & K.W. Ry. Co. v. Thompson*, 16 So. 282, 283 (Fla. 1894).

323. 281 So. 2d 572, 575 (Fla. 2d Dist. Ct. App. 1973) (footnote omitted).

324. Comment, *supra* note 259, at 364.

325. Jaffe, *The Citizen as Litigant in Public Actions: The Non-Hohfeldian or Ideological Plaintiff*, 116 U. PA. L. REV. 1032, 1037-38 (1968).

Judicial experience supports these assertions. As the United States Court of Appeals for the District of Columbia Circuit noted, "the dockets . . . have not increased appreciably as a result of new cases in which standing would previously have been denied."<sup>326</sup> Another commentator reported:

Many statutes, including the Food and Drug Act and the Communications Act, have long provided specifically for standing of "any person adversely affected" but litigation under these statutes seems to be no more voluminous than litigation under other statutes. Half or more of the specific statutes are as broad—"any person aggrieved," "any person disclosing a substantial interest," "any party in interest," but the litigation is in trickles, not floods.<sup>327</sup>

In addition to the cost analysis and judicial experience arguments against multiplicitousness of suits, Justice Douglas in *Flast v. Cohen*<sup>328</sup> identified another argument. "There need be no inundation of the federal courts if taxpayers' suits are allowed. There is a wise judicial discretion that usually can distinguish between the frivolous question and the substantial question, between cases ripe for decision and cases that need prior administrative processing, and the like."<sup>329</sup>

Four years prior to *Flast*, Justice Douglas was heartily advocating a change in federal standing law: "[T]he passage of time has indicated that more, rather than less, review is essential for responsible administrative action, not because the courts in fact materially curb the administrative process but because the prospect of judicial review makes administrative action more meticulous and conscientious."<sup>330</sup>

Unfortunately, the Florida Supreme Court continues to ignore the constitutional dictates of article I, section 21. By requiring a showing of special injury, the courts in Florida allow wrongs to go unremedied and remedies to remain unattainable. Or, in the words of Judge

---

326. *Scanwell Laboratories, Inc. v. Schaffer*, 424 F.2d 859, 872 (D.C. Cir. 1970) (citation omitted). See also *Scenic Hudson Preservation Conference v. FPC*, 354 F.2d 608, 617 (2d Cir. 1965), cert. denied, 384 U.S. 941 (1966): "We see no justification for the Commission's fear that our determination [to grant standing to sue] will encourage 'literally thousands' to intervene and seek review in future proceedings. We rejected a similar contention in *Associated Industries* . . . noting that 'no such horrendous possibilities' exist."

327. *Davis*, *supra* note 316, at 471.

328. 392 U.S. 83 (1967).

329. *Id.* at 112 (Douglas J., concurring). Justice Douglas cited in footnote the 1879 case of *Ferry v. Williams*: "The general indifference of private individuals to public omissions and encroachments, the fear of expense in unsuccessful and even in successful litigation, and the discretion of the court, have been, and doubtless will continue to be, a sufficient guard to these public officials against too numerous and unreasonable attacks." *Id.*, quoting *Ferry v. Williams*, 41 N.J.L. 332, 339 (Sup. Ct. 1879).

330. Douglas, *The Bill of Rights Is Not Enough*, 38 N.Y.U. L. REV. 207, 225 (1963).

McNulty in *Save Sand Key*, "many a 'right' [goes] without protection."<sup>331</sup>

### VIII. CONCLUSION

The history of Florida's constitutional provision guaranteeing a right of access to courts reflects continuity in interpretation and application. Both the earlier Declaration of Rights, section 4 and current article I, section 21 have been utilized to provide Florida residents supplemental equal protection and due process rights. Both provisions have also, however, stood on their own as grounds for challenging legislative abolishment or modification of existing judicial remedies. The *Kluger* rule satisfactorily defines for the legislative and executive branches parameters for actions affecting established causes of action or remedies.

Yet Florida courts have failed to grant Floridians full rights and protections as mandated by section 21. Courts deal comfortably with unreasonable infringements on these rights as evidenced by cases discussed in Part V. Where litigants exhort expansion of court access and remedy rights, however, the supreme court has declined to act. From the interspousal immunity doctrine and impact rule in tort to constitutional issues of standing and access to courts for indigents, the Florida Supreme Court has refused to find section 21 violations. Rather, the court too frequently turns to federal precedent for applicable standards of review in access to courts cases.

This reliance is misplaced. Florida's constitution expressly guarantees to its residents rights of court access and remedy; the United States Constitution, on the other hand, only implicitly recognizes these rights. As Justice Brennan asserted in a recent law review article:

[S]tate courts cannot rest when they have afforded their citizens the full protections of the federal Constitution. State constitutions, too, are a font of individual liberties, their protection often extending beyond those required by the Supreme Court's interpretation of federal law. The legal revolution which has brought federal law to the fore must not be allowed to inhibit the independent protective force of state law—for without it, the full realization of our liberties cannot be guaranteed.<sup>332</sup>

Justice Brennan's position underlines the need for Florida courts to utilize section 21 to its fullest, thereby developing its own access-

---

331. 281 So. 2d 572, 574 (Fla. 2d Dist. Ct. App. 1973).

332. Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 491 (1977).

to-courts law. The express language of the state constitution should be given heed, for it directly expresses the will of the people of the state; the federal decisions are inapposite.

Had the drafters of the 1968 Constitution considered the provision to be a meaningless anachronism, they could have struck article I, section 21 from the document. They did not do so. Instead they carried it forward, revising the language to an unmistakably plain command for access to the judicial system. It is time for the courts to observe that mandate.

If the courts decline to give full effect to the section, the remaining alternative is express constitutional change. This is a distinctly less desirable alternative, in part because the present provision should be adequate, in part because the process of constitutional change can be a very difficult one. But court decisions to date suggest that there may be no choice.

Constitutional change could be accomplished very simply. A sentence could be added to section 21, specifically abrogating the special injury rule for standing, as well as making clear that inability to pay fees shall not deny access to courts. Whether by constitutional revision or by court decision, it is vital that the step be taken.

Specifically addressing the issue of access to courts, Justice Brennan observed:

It is true, of course, that there has been an increasing amount of litigation of all types filling the calendars of virtually every state and federal court. But a solution that shuts the courthouse door in the face of the litigant with a legitimate claim for relief . . . seems to be not only the wrong tool but also a dangerous tool for solving the problem. The victims of the use of that tool are most often the litigants most in need of judicial protection of their rights— the poor, the underprivileged, the deprived minorities.<sup>333</sup>

Clearly the time has come for the Florida Supreme Court to provide full rights for Floridians via section 21 of the Florida Constitution. Such was the intent of the framers of our constitutions since 1838, and surely the people of Florida would welcome this step by the court or Constitution Revision Commission.

JUDITH ANNE BASS

---

333. *Id.* at 498.

