Seattle Journal for Social Justice

Volume 4 | Issue 1 Article 43

November 2005

Confirming the Right to Meaningful Access to the Courts in Non-Criminal Cases in Washington State

James Bamberger

Confirming The Constitutional Right of Meaningful Access to the Courts in Non-Criminal Cases in Washington State

James A. Bamberger[1]

[T]he right to access to the courts is fundamental to our system of justice. Indeed, it is the right "conservative of all other rights". . . . [M]eaningful access requires representation. Where rights and responsibilities are adjudicated in the absence of representation, the results are often unjust. If representation is absent because of a litigant's poverty, then likely so is justice, and for the same reason.[2]

I. JUSTICE IS WANTING

Carol is a single mom who earns her living as a teacher's aide. She has a twelve-year-old daughter, Elsie, who has Down Syndrome. Carol's neighbors have been complaining about Elsie, saying that she "acts out" and is disruptive of other tenants in the apartment complex. After receiving a number of complaints about Elsie, Carol's landlord advises her that she and Elsie will have to move. When Carol explaines that they have nowhere else to go and that much of Elsie's conduct is due to her developmental disability, her landlord tells her that he has no choice but to take legal steps to evict her. Apologizing, he hands her a summons and complaint for unlawful detainer. The court papers say that Carol is to appear before the Superior Court in a week and prove why she should not be evicted.

If Carol and Elsie are evicted, they will be homeless. Frightened, she calls the CLEAR legal hotline and asks for an attorney.[3] She is told that the legal aid program that serves her community is overwhelmed and has closed intake. She is referred to her local pro bono program. Upon contacting that program, she is told that they, too, are overwhelmed, and no pro bono

attorney is available to take her case. She will have to defend the eviction alone.

Carol shows up at the courthouse on the date and time of the hearing. Presiding Judge A. Fair Law calls her case. The landlord's attorney submits numerous declarations from tenants documenting the allegedly disruptive nature of Elsie's conduct. No witnesses are called. Carol pleads with Judge Law, telling him she has no place to move and that the claims regarding Elsie's conduct are blown out of proportion. She tells him that she tried to get a lawyer to help her, but was unsuccessful. She asks Judge Law to appoint an attorney to help her defend and preserve her housing. Judge Law says that he cannot appoint a lawyer for her, because she has not been charged with a crime. He then asks whether she has any witnesses or other evidence to offer. She says she has none. Apologizing, the judge tells Carol that he has no choice but to issue an order granting the landlord's request for a writ of restitution, and that she will have to be out of the apartment within ten days. Looking down while signing the order, Judge Law calls the next case.

> The administration of American justice is not impartial, the rich and poor do not stand on an equality before the law, the traditional method of providing justice has operated to close the doors of the courts to the poor, and has caused a gross denial of justice in all parts of the country to millions of persons. . . . There is something tragic in the fact that a plan and method of administering justice, honestly designed to make efficient and certain that litigation on which at last all rights depend, should result in rearing insuperable obstacles in the path of those who most need protection, so that litigation becomes impossible, rights are lost and wrongs go unredressed.[4]

A week ago, Thomás flew into a rage and beat his wife, Anna, in front of their two young children. It was not the first time that Thomás had done this; he has been abusing Anna for years. But things were different this time. The abuse frightened nine-year-old Luís so badly, that he ran into the

back room and called 911. The police arrived, subdued Thomás, and took him away. Anna was taken by ambulance to the hospital where she was treated for a multiple injuries.

Thomás was arraigned on charges of second degree assault. Indigent and unable to pay for an attorney, he was appointed a public defender to represent him. A no-contact order was entered in accordance with the Revised Code of Washington 10.99.040, and Thomás was released pending trial.

Resolved to break free from the abusive relationship and protect her children, Anna decided to seek a divorce from Thomás. She talked to an attorney who required a $5,000 retainer. Not having any money, she sought help from her local pro bono program. The issues of domestic violence added complexity to the case. It was also likely that Thomás would contest Anna's request the children be placed primarily with her, because she would ask the court to restrict his contact with them. No local attorney was willing or able to take her case on a pro bono basis. She was encouraged to talk with the local courthouse facilitator, who could show her the forms necessary to file the case on her own. Frustrated, Anna cried out, "he beats me and he gets a lawyer. I get beaten and need protection and I get nothing. Where is justice?!"

> The law permits every [person] to try [her] own case, but 'the lay vision of every man his own lawyer has been shown by all experience to be an illusion.' It is a virtual impossibility for a [person] to conduct even the simplest sort of a case under the existing rules of procedure, and this fact robs the in forma pauperis proceeding of much of its value to the poor unless supplemented by the providing of counsel. . . . We can end the existing denial of justice to the poor if we can secure an administration of justice which shall be accessible to every person no matter how humble, and which shall be adjusted so carefully to the needs of the present day world that it cannot be dislocated, or the evenness of its operation be disturbed, by the fact of poverty.[5]

Carol and Anna are among the thousands of Washington state residents who need the protection of the civil court system. They do not have a chance to realize justice in a matter that is of the utmost importance to them and their families because they are poor and unable to obtain attorney assistance. Carol and Anna are powerless to assert and enforce their legal rights without legal representation. The court system cannot deliver justice in their cases because justice is grounded in legal formality and constructed on procedural and substantive legal frameworks that presume the availability of attorney representation. For Carol and Anna, the civil court system is functionally inaccessible and irrelevant. In its worst characterization, it is an instrument of institutionalized oppression.

Nearly a century ago, a young Chicago attorney named Reginald Heber Smith chronicled the failures of our system of administering justice in his treatise, *Justice and the Poor*.[6] With amazing clarity and clairvoyance, Smith documented deep and systemic failures of the justice system, and predicted that the system would become increasingly irrelevant and unresponsive to the needs of the poor unless direct action was invoked.

Central to Smith's indictment of the American justice system was its failure to provide adequate and effective legal representation to the millions of poor people who cannot afford counsel to assert, enforce, and defend important personal rights. He explained that:

> [T]he substantive law, however fair and equitable itself, is impotent to provide the necessary safeguards unless the administration of justice, which alone gives effect and force to substantive law, is in the highest sense impartial. It must be possible for the humblest to invoke the protection of the law, through proper proceedings in the courts, for any invasion of rights by whomsoever attempted, or freedom and equality vanish into nothingness.[7]

Given the unique nature of the law and complexity of judicial proceedings, Smith asserted that a comprehensive system was needed to ensure representation for those whose rights were the subject of

adjudication and who, because of their poverty, could not secure essential legal assistance.

In the years since, the crisis painstakingly documented by Smith has deepened.[8] Poor litigants like Carol and Anna, who face the prospect of extraordinary personal loss (housing for Carol, and personal and family safety and security for Anna) cannot meaningfully defend or enforce their substantive legal rights in the courts of this state. They stand helpless, as the machinery of justice grinds them down to nothing. It is profoundly ironic that, on the one hand, a poor person facing the prospect of spending but a single night secure in the county jail is entitled to the assistance of counsel at public expense while, on the other hand, those faced with the imminent loss of housing through eviction or foreclosure and the consequent insecurity of homelessness, those who must contend with immediate threats to their personal and family safety, or those who cannot meet the basic needs of their families because they have been denied essential governmental subsistence benefits are left to navigate the court system on their own.

Both nationally and in Washington State, judges preside over a system that continues to lose face with the public in large measure because it systematically denies meaningful access to those who need its protection the most—the poor, the vulnerable, the victimized, and the socially or culturally disenfranchised. Efforts to assert a right to counsel as an incident to constitutional guarantees of due process and equal protection have been rebuffed,[9] and the poor are left to rely on a grossly under-funded network of legal aid programs, pro bono programs, and an ever expanding array of self-help pamphlets and web-sites.

The failures of the system Smith painstakingly documented persist. The result is a continuing erosion of the citizenry's perception of the integrity of our court system and its capacity to disseminate fair and impartial justice.[10] If democracy is to remain relevant, the judicial system must be restored to a position of respect. This can only be achieved if those who need the

protection of that system can secure timely and meaningful access—and to do this, they will need legal counsel.

The purpose of this article is to explore the potential sources of a state constitutional right of meaningful access to the civil court system in Washington State,[11] to explore the degree (if any) to which such a right manifests itself in the requirement that counsel be appointed at public expense in certain non-criminal cases, and, to the extent that such a requirement exists, offer an analytical framework to help judges determine when and under what circumstances appointment of counsel is constitutionally mandated.

This article concludes that, under Washington's constitution, individuals have a fundamental right of access to the courts, that the judicial branch has a corresponding constitutional obligation to facilitate that right, and that the intersection of this right and duty must manifest itself in a rebuttable presumption in favor of a right to counsel at public expense in non-criminal cases.

The analysis and theories developed in this article are grounded in state constitutional law. They do not flow from traditional federal constitutional due process considerations,[12] nor are they grounded in considerations or jurisprudence relevant to determining when, and under what circumstances indigent criminal defendants are entitled to appointed counsel under the Sixth Amendment to the United States Constitution or the parallel Washington State Constitutional provision, Article I, Sec. 22. In contrast to such analyses, this discussion of the right to counsel in non-criminal cases expounds on ideas of an access-based right which have been the subject of increasing conversation within the state and national equal justice communities.[13]

The balance of this article will more fully explore the crisis in civil access to justice. It also explores historical antecedents of the individual's right of access to the courts within the context of our constitutional and natural rights legal traditions, and the state's corresponding duty to facilitate that

right. The article reviews Washington State's constitutional framework and jurisprudential history relating to these considerations, finding a somewhat scattered and substantially undeveloped analytical framework for considering when and how the right of access should be facilitated. The article proposes a more logical framework for both the enforcement and practical administration of this right within the context of both the open courts and within the privileges and immunities provisions of the Washington Constitution. Finally, the article explores the substantial parallels between the right of meaningful access to the courts within the Washington State constitutional context and within emerging international jurisprudential norms and requirements.

II. THE PROBLEM: WASHINGTON STATE'S COURT SYSTEM IS FUNCTIONALLY INACCESSIBLE TO LOW-INCOME PEOPLE WITH CIVIL LEGAL PROBLEMS

Washington establishes and maintains courts to administer justice and provide a forum for the assertion, protection, and defense of constitutional, statutory, contractual, and common law rights and responsibilities.[14] As designed, courts serve as truth-finding, conflict resolution forums. In the tradition of the Anglo-American experience, courts are designed to achieve resolution of conflicts through competition of opposing factual and legal arguments.

Given the court's purpose, design, and operation, certain core competencies are central to any litigant's ability to effectively assert or defend important legal rights and claims in the Washington State trial and appellate court system. These include

- knowledge and understanding of the relevant law (constitutional, statutory, regulatory, case, and common law—including applicable precedent relevant to the matters that are implicated in the particular legal proceeding);

- knowledge and understanding of the jurisdiction and rules of practice and procedure in the court in which the proceeding is pending;
- capacity to develop and effectively present evidence to the court, both in support of the individual's position and to rebut or negate evidence offered by the opposing party;
- some understanding of legal reasoning and the process of making a legal argument; and
- ability to provide informed and objective judgment in service of the client's objectives.

Lawyers have been trained in these competencies. Lay people have not. So central are these competencies to the capacity of the courts to perform their proper functions that persons untrained in these competencies may not appear before the courts except in a self-representational or *pro se* capacity.[15]

This is not surprising. The law involves a special language with many dialects that must be mastered in order for one to be in a position to effectively navigate the judicial system. Legal proceedings are foreign and confusing to lay people who are untrained in the law and legal practice. It follows that those who are untrained in the substance and language of the law and legal practice cannot reasonably expect to successfully assert, enforce, or defend their legal rights in the courts of this state.[16] This truth echoes in Washington Supreme Court Justice Richard Sanders' observation that "legal representation [is such] a practical necessity that those knowledgeable in the law would have to admit that the man who represents himself has a fool for a client."[17]

The Civil Legal Needs Study recently published by the Washington Supreme Court's Task Force of Civil Equal Justice Funding confirms that legal representation is the key to achieving effective outcomes to civil legal problems.[18] The study found that while nearly two-thirds of low-income respondents who were able to secure legal assistance were satisfied with the justice experience and the resulting outcome of their legal problems

(regardless of whether they substantively achieved what they had hoped to at the outset of their case), 75 percent of those without legal representation experienced outcomes that were inconsistent with their expectations.[19]

The Civil Legal Needs Study documents the depth of the gap between the numbers of low-income people needing legal assistance in connection with a civil legal problem and those who are able to secure that assistance. Every year more than 80 percent of all low-income households experience at least one civil legal problem for which legal assistance is indicated.[20] Of these households, nearly nine out of ten face the problem without legal help of any kind.[21] Statistical and anecdotal information confirms that a growing number of civil litigants are unrepresented by legal counsel on matters that implicate many of the most personal rights and interests—personal and family safety, dissolution, child residential placement, child support, eviction defense, defense against housing foreclosures, protection against abusive consumer practices, and predatory lending schemes, just to name a few.

The Civil Legal Needs Study also confirms that many low-income people who have claims that should be brought to the judicial system cannot do so because they are unable to secure legal assistance.[22] Examples include housing and employment discrimination problems, problems arising from the administration of governmental, educational, municipal services and benefits, and problems involving the rights of disabled people to appropriate accommodations.[23]

The chronic inability to obtain legal representation on matters that present themselves in the courts of this state (or, if counsel were available, would likely be presented) effectively denies justice to thousands of low-income residents in Washington every year. Conversely, it converts the court system of this state—an enterprise established and maintained by the state for the purpose of ensuring the fair and impartial administration of justice—into a captive enterprise that enables those who, through no special merit other than they can afford to retain necessary legal assistance, are able

to secure a decided advantage in the presentation of their claims and defenses against the unschooled and unrepresented lay litigant.

III. ACCESS TO THE COURT SYSTEM: A FUNDAMENTAL AND ENFORCEABLE INDIVIDUAL RIGHT

Modern Anglo-American legal systems are grounded in seventeenth and eighteenth century concepts of natural law and individual rights theory. In essence, these theories start from the presumption that all individuals are blessed with full rights and liberties, and that they are free to exercise and enjoy them as they please. Free individuals may elect to live in a community in order to gain certain advantages not otherwise available to them. In the course of organizing the communities within which they live, and to establish general norms of conduct applicable to all, such individuals will cede a portion of their natural rights and liberties to the community itself. On this point, the English legal commentator William Blackstone noted:

> [Natural law sums up these rights in the appellation] "natural liberty of mankind." This natural liberty consists properly in the power of acting as one thinks fit, without any restraint or control, unless by the law of nature. . . . But every man, when he enters into society, gives up a part of his natural liberty, as the price of so valuable a purchase; and, in consideration of receiving the advantages of mutual commerce, obliges himself to conform to those laws, which the community has thought proper to establish.[24]

Natural law theory recognizes three categories of "absolute rights": the rights to (1) personal security, (2) personal liberty, and (3) private property.[25] These rights have been recognized as either being natural in origin, intrinsic to the individual, or granted by society in exchange for the rights and benefits of society itself—including the right to protection of such rights. In one characterization or another, these core or absolute rights have been articulated and rearticulated in every statement of individual rights and freedoms from the *Magna Carta* to the Declaration of

Independence, to the United Nations Declaration of Human Rights, and to more recent statements of the inherent rights of individuals.[26] In the Anglo-American experience, protection of these absolute rights has served as the expressed *raison d'etre* of constitutional government. Blackstone explained it this way: "[T]he first and primary end of human laws is to maintain and regulate [the] *absolute* rights of individuals . . . the principal view of human laws is, or ought always to be, to explain, protect, and enforce such rights as are absolute . . . "[27]

The Washington State Constitution is grounded in a natural law approach to the relationship between the individual and government. Washington Constitution Article I, Sec. 1, declares that "All political power is inherent in the people, and governments derive their just powers from the consent of the governed, *and are established to protect and maintain individual rights*."[28]

While natural law theory recognized three areas of "absolute rights," the maintenance and protection of which is the "first and primary end of human laws," it was also understood that such rights are meaningless if there is no means for their enforcement. Consequently, the Anglo-American tradition recognized a class of subordinate rights, the primary purpose of which is to enable the individual to protect and enforce his or her primary or absolute rights. Among these subordinate rights is the right to seek and secure relief in the courts. As Blackstone explained in his *Commentaries*:

> A third subordinate right of every Englishman is that of applying to the courts of justice for redress of injuries. Since the law is in England the supreme arbiter of every man's life, liberty, and property, *courts of justice must at all times be open to the subject, and the law be duly administered therein*. The emphatical words of *Magna Carta,* spoken in the person of the king, who in judgment of law (says sir Edward Coke) is ever present and repeating them in all his courts, are these; "*nulli vendemus, nulli negabimus, aut differemus rectum vel justitiam:* [To no man will we sell, or deny, or delay, right or justice] and therefore every subject," continues the same learned author, "for injury done to him *in bonis, in terris,*

> *vel persona,* by any other subject, be he ecclesiastical or temporal without any exception, may take his remedy by the course of the law, and have justice and right for the injury done to him, freely without sale, fully without any denial, and speedily without delay."[29]

This right of access is fundamental and has been affirmed and reaffirmed throughout the course of the nation's and Washington State's history. Chief Justice John Marshall observed in the landmark case of *Marbury v. Madison* that "[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection."[30] A century later, the Supreme Court declared that "[t]he right to sue and defend in the courts is the alternative of force. In an organized society it is the right conservative of all other rights, and lies at the foundation of orderly government. It is one of the highest and most essential privileges of citizenship."[31] Alternatively, Reginald Heber Smith characterized it as follows:

> Not only was the right to freedom and equality of justice set apart with those other cardinal rights of liberty and of conscience which were deemed sacred and inalienable, but *it was made most important of all* because on it all the other rights, even the rights to life, liberty and the pursuit of happiness, were made to depend. In a word, it became the cornerstone of the Republic.[32]

These pronouncements demonstrate that the American tradition carries forward *both the substance and rationale* of the natural right of access to the courts described by Blackstone.[33] While the Anglo-American legal tradition clearly recognizes a fundamental individual right of access to the courts, the following subordinate questions arise.

A. What is the Scope of the Right?

In its simplest characterization, it is a *right of access* to the courts established by the people through their government for the fair and proper administration of justice. In Washington State constitutional parlance, it

means that "[j]ustice in all cases shall be administered openly and without unnecessary delay."[34] This language descends directly from Blackstone. It plainly means that the justice available to citizens through the courts of the state must be administered openly and that it must be equally available to all.

The essential purpose of judicial administration is to ensure the "fair and proper administration of justice."[35] In the context of court proceedings, this purpose is discharged by ensuring that justice is done in those cases and controversies that are presented to the court. It follows, *a fortiori*, that access for the sake of access, without the corresponding ability to meaningfully participate in the system *to the end that justice is capable of being done* is the antithesis of the constitutional promise and its underlying historical rationale.

For example, no one would argue that there would be access to the courts in the sense contemplated by the Anglo-American tradition were the courthouse doors physically open to all, but the law itself (i.e., the statutes, cases, court rules, etc.) is made available only to those who could pay a fee or those who owned property in the jurisdiction.[36] All would agree that institutionalizing a system that limits access to applicable law and procedure to a select few would effectively preclude everyone else's ability to use the court for the purpose for which it has been established—to assert, enforce, and defend important rights.[37] Thus, it is manifest that access (i.e., the ability to walk into the courthouse) simply for the sake of access cannot be the standard.

> Our court system is the central mechanism for the orderly resolution of disputes that arise between citizens and between citizens and the government. Moreover, it is manifest that there is a direct relation between access to the courts and the exertion of power within the system relative to the evaluation and resolution of citizens' grievances. Failure to provide equal access to the courts . . . is fraught with the dangers of alienating our citizenry from the

> system and encouraging self-help with concomitant breaches of the peace and likely overtones of violence.[38]

To vindicate the essential purpose of the right of access to the courts, the constitutional standard must be a right of "meaningful access."[39] "Meaningful access" can be defined as the capacity to appear and effectively participate in proceedings properly presented to the court in a manner that will allow the court to carry out its adjudicative function to the end that justice can be done.[40]

B. Where is the Right of Meaningful Access Recognized Within the Washington State Constitution?

There are two sources of a right of meaningful access to the courts in non-criminal cases in Washington State's Constitution. The first is expressed, the second is implied. Like more than forty other states,[41] Washington's Constitution Article I, Sec. 10 includes a provision directing that "[j]ustice in all cases shall be administered openly, and without unnecessary delay."[42] Simple and elegant, this provision incorporates the natural law rights of access understood to be necessary to the fair and proper ordering of society and the resolution of disputes involving the rights of citizens and their relations with the government.[43] It confirms and renders enforceable the fundamental right of "meaningful access" to the courts in cases where significant interests are implicated and where the court is the forum within which such rights are adjudicated.[44]

In addition to the expressed right of access to the courts set out in Washington Constitution Article I, Sec.10, the right of all citizens to have equal access to the machinery of justice, such that the courts of the state may fairly perform the constitutional function, is implied in the privileges and immunities clause of the state constitution, Washington Constitution Article I, Sec. 22. This section prohibits the state from maintaining a civil court system that grants a decided advantage to, and unmerited privilege of access in favor, of those who can afford to secure the assistance of persons

with the professional competencies necessary to enable to them to meaningfully assert and defend their legal interests within the judicial tribunal at the expense of those who cannot. This source of the right and its practical implications are discussed more fully below in section V.

C. What is the Rationale and Constitutional Significance of this Right?

The right of meaningful access serves two distinct but complementary constitutional objectives. First, it enables the citizenry to effectively assert, enforce, and defend personal rights, liberties, and prerogatives. In so doing, it operates to implement the natural law contract between the citizenry and the state.[45] Second, and equally important, the right ensures the proper functioning of the judicial branch to the end that it is capable of fairly and impartially resolving disputes[46] between citizens and between citizens and their government,[47] such that "justice is done in the cases that come before the court."[48] From this perspective, the right of "meaningful access" ensures that the judicial branch is perceived to be legitimate in the eyes of the public (as opposed to being perceived as the captive forum operated for the exclusive benefit of those with means to secure legal representation).

At common law, the right of access to the justice system was fundamental and deemed necessary to the ability of citizens to assert, enforce, defend, and protect absolute rights.[49] Unfortunately, the Washington Supreme Court's constitutional jurisprudence is less than cogent and hardly consistent when it comes to defining, characterizing, and identifying the source of a fundamental right of access to the court system. At one point the court firmly declared such a right existed and grounded it in Washington Constitution Article I, Sec. 4, and the equal protection guarantees read into Article I, Sec. 12.[50] A year later, it reaffirmed the existence of the right, but concluded that it could not be grounded in either of the provisions relied upon in *Carter I*.[51] The court in *Carter* then declared that there is no fundamental right of access to the courts,[52] only to retreat from this novel observation a year later by acknowledging the

existence of such a right and by holding that the right includes a litigant's ability to engage in pretrial discovery.[53] Amazingly, given the state of constitutional development over more than a century, no case has expressly considered the obvious claim that the individual right of access to the courts arises under the most logical of provisions—Article I, Sec. 10.

Nevertheless, and despite the Washington Supreme Court's less than distinguished analysis over the years, the origins and purpose of the right of access to the courts along with its express embodiment in Washington's constitution confirms its fundamental significance to the relationship between the citizens of the state and their government. As a right conservative of all other substantive rights, it is essential to the ordered operation of society and the preservation of individual liberty.[54]

D. Is the Right of Meaningful Access Individually Enforceable?

Inherent in the natural rights of the individual citizen, and to the degree that it is essential to the assertion, defense, and enforcement of other important rights and prerogatives, the right of "meaningful access" to the courts of the state must be understood to be held by the individual and enforceable against the state. If there is any ambiguity on this point, some additional constitutional provisions make this clear.

First, both the open courts provision and the privileges and immunities clauses were written into the first article of the state constitution—that which is a declaration of the rights of individual citizens and the corresponding limitations on the powers of the government that was being constituted in the subsequent articles. Thus, to the extent that rights and prohibitions are expressed in Article I, the reference is to the rights of individuals and prohibitions against the state that interfere with the free exercise of these rights.

Second, Washington Constitution Article I, Sec. 29 declares that "[t]he provisions of this Constitution are mandatory, unless by express words they are declared to be otherwise."[55] To the extent that Washington Constitution

Article I, Sec. 10 confirms the rights of citizens to meaningful access to the courts of the state, it also establishes a corresponding mandatory duty on the state—and, in particular, the state judiciary—to ensure that the courts are open, accessible, and that justice is freely administered without delay. Similarly, to the extent that Washington Constitution Article I, Sec. 12 prohibits the granting of special access to the courts for those able to afford the professional legal assistance required to effectively participate in these tribunals, the provision also constitutionally empowers those who are effectively denied meaningful access the right to demand the same.

Finally, Washington Constitution Article I, Sec. 32 directs that a "frequent recurrence to fundamental principles is essential to security of individual right."[56] Added at the last minute (and adapted from the Wisconsin, Illinois, and New Hampshire Constitutions),[57] this provision is the vehicle through which the framers intended that natural law concepts continue to guide state constitutional interpretation. In this context, it is the vehicle through which the Anglo-American understandings of the purpose, rationale, and enforceability of the right of access must be read into Washington Constitution Article I, Sec. 10.[58]

IV. INDEPENDENT STATE CONSTITUTIONAL ANALYSIS: A REBUTTABLE PRESUMPTION IN FAVOR OF A RIGHT TO COUNSEL IN NON-CRIMINAL CASES IS NECESSARY TO EFFECTUATE THE INDIVIDUAL RIGHT OF MEANINGFUL ACCESS TO THE COURTS[59]

In our adversarial system of justice the truth is determined by the neutral judge, magistrate, or jury. The adversarial system is based on the idea that justice can be achieved only if the parties to a legal dispute are able to adduce their evidence and test their opponent's evidence under conditions of reasonable equality. The system is constructed on the premise that the assistance of counsel is necessary in order for an individual to meaningfully participate in the civil courts of this state. This notion is reflected in the myriad rules and procedures applicable to civil practice in the courts, the

range of competencies required of those who practice in the civil courts, and the corresponding limitations on non-lawyer representation. The failure to provide legal counsel to indigent unrepresented litigants fundamentally prejudices their right of "meaningful access" to the courts in matters in which they are (or should be) parties. It also compromises the ability of the court to perform its essential constitutional function—to receive and objectively consider all the relevant facts and apply the applicable law in the matters before it to the end that justice is done.[60]

There being no express reference of a right to counsel in non-criminal cases in Washington Constitution Article I, Sec. 10 (or any other provision),[61] this article does not argue in favor of a universal right to counsel for indigents in *all* non-criminal cases.[62] On the other hand, and in light of the central role that attorneys play in enabling the courts to perform their constitutional functions and to effectuate the individual right of "meaningful access" to the courts (embodied in Washington Constitution Article I, Sec. 10), there must be a substantially expanded understanding of the constitutional right and the corresponding duty of the courts to provide counsel to indigent litigants in non-criminal cases at public expense.

The Washington Constitution Article I, Sec. 10 contemplates "meaningful access" as, "the capacity to appear and effectively participate in proceedings properly presented to the court in a manner that will allow the court to carry out its adjudicative function to the end that justice can be done." This definition commands two complementary areas of inquiry. The first focuses on the right and capacity of the individual to participate; the second focuses on the capacity of the tribunal to perform its constitutional function. Consequently, in determining when, under what standard, and in what contexts counsel should be appointed at public expense to indigent litigants in non-criminal cases, the analysis must look to the intersecting constitutional obligations of the court to (a) respect and operationalize the individual's Article I, Sec. 10 right of access and (b) ensure "the fair and impartial administration of justice [to the end] that

justice is done in the cases that come before [it],"[63] and that it credibly serves as "the central mechanism for the orderly resolution of disputes that arise between citizens and between citizens and the government."[64]

Given the nature of the court system and the competencies required to participate effectively therein, the aforementioned constitutional considerations logically dictate the creation of a rebuttable presumption in favor of the appointment of counsel at public expense for indigent litigants in non-criminal cases. Under this presumption, counsel should be appointed at public expense to unrepresented indigent persons who are forced to respond to a civil proceeding, or who must initiate civil proceedings in the courts of this state to assert and enforce their legal rights. The court may decline to appoint counsel only if it determines, on the basis of considerations relevant to the circumstances of the case, that (a) the unrepresented litigant can fairly and ably present and defend his or her case on relatively equal footing with the opposing side, *and* (b) the court can effectively discharge its duty to ensure that justice can be done in the matter before it. These are independent inquiries. The first flows from the individual's right of "meaningful access;" the second flows from the Washington Constitution Article IV duty of the court to ensure the fair and impartial administration of justice. The duty to appoint counsel can only be avoided if the court finds that both conditions are met.

The presumption will readily be overcome within some contexts. An obvious example are cases that arise in small claims court, a judicial forum established by the Washington State Legislature to resolve cases involving relatively small (less than $4,000) amounts.[65] Because the rules of the court are simple, forms are readily available, evidentiary issues are not complex, and the trial judge has been granted substantial latitude to deviate from the traditional neutral magistrate function to more of an inquisitor in service of finding a "right, just, and equitable" resolution of the controversy, the Legislature has concluded that the involvement of attorneys is neither necessary nor desirable in this forum.[66] As conceived and operated within

the context of the limited jurisdiction of the forum and the issues presented therein, justice can generally be achieved without the assistance of counsel.

Outside the small claims context, matters become more complex. The key, then, is to develop a set of relevant criteria and a practical approach to their operation. These criteria must be grounded in the realities of judicial practice and procedure and must be applied in a manner that facilitates the low-income[67] individual's right of "meaningful access" and ensures effective discharge of the constitutional duty of the court to ensure the fair and proper administration of justice. They must also be applied in ways that recognize and respect the scarcity of public resources and avoid the expenditure of public funds for counsel in matters in which the private market should allow the individual to secure legal representation.

A non-exclusive list of relevant considerations should, at a minimum, include: (1) the jurisdiction and function of the court within which the case appears (or should appear) and the rules of practice, procedure, discovery, and evidence applicable to the proceeding; (2) the capacity of the litigant to develop and present evidence and legal arguments relevant to her claim and to respond to evidence and legal arguments presented by the other side; (3) complexity of the applicable law; (4) the practical consequences (in terms of outcomes realized) likely to be experienced by the unrepresented litigant as a result of not being represented by counsel in the proceeding (*i.e.,* would the appointment of legal counsel likely make a significant difference in the outcome of the case?); (5) the availability of counsel on a pro bono or contingency fee basis; and (6) the importance of the issues presented from the perspective of the unrepresented litigant.

In contrast to the first five considerations, the sixth involves a subjective inquiry into the importance of the matter from the perspective of the individual litigant. The analysis is driven by the following question: *If the unrepresented litigant had the resources, would she find the matter sufficiently important to purchase the services of an attorney?* To avoid its application in ways that render absurd results, the question must be used as

a guide to understanding when counsel should be appointed. Because litigation can be motivated by a wide range of considerations, there are some who may make the subjective determination that they would "pay what it takes" to pursue a cause when a more "objective" person under similar circumstances might suggest that the benefits to be realized were not worth the costs involved. While judges must exercise prudence and discretion in weighing this consideration, the analysis should mechanically operate in favor of the appointment of counsel in those cases where the opposing party has found the matter to be of sufficient importance to warrant his or her retention of counsel.

Application of these six factors starts from the presumption that counsel is to be appointed. The presumption may be overcome *only* if the court makes the following specific findings of fact:

a) The nature of the case is such that, under the market conditions prevailing in the jurisdiction, a private attorney would normally be willing to take the matter on a contingency fee basis;[68] or
b) The court has identified a pro bono attorney able and willing to represent the litigant in the matter before the court;[69] or
c) The matter is neither factually nor legally complex and the litigant has the resources, education, experience, substantive knowledge, and intellectual capacity to effectively present, promote, and defend her legal interests; *and*
d) In the absence of attorney representation, it can be expected that the relevant facts will be adduced and the appropriate legal arguments on both sides will be presented such that the court can perform its constitutional duty to ensure that justice is done.

So, how will this analysis work in the context of cases typical of those experienced by low-income people in Washington State? A couple of examples are helpful.

Example 1:

This example involves the case of a family in conflict. The parents have separated; there are claims of domestic violence; domestic violence protection orders have previously been issued; there are young children at issue who allegedly have witnessed the violence and abuse; the father is working and makes a living wage; the mother and children have been forced to leave the home and currently reside in a community-based shelter; the mother is not working and has no income. The father has retained an attorney and initiated divorce proceedings. He seeks primary residential placement of the children, limitations on contact between the children and their mother, child support, and award of the family home. Both parents have high school educations. The mother has been served with an *ex parte* temporary restraining order and an order to show cause why the court should not enter a further order awarding temporary residential placement of the children with the father, limiting her access to the children, and directing that she stay away from the family home. The mother cannot afford legal counsel. She has filed a declaration stating that she has been unsuccessful in her effort to secure assistance from both the local legal aid program (intake is closed) and the pro bono program. An analysis of the relevant considerations follows:

1. Jurisdiction and function of the court within which the case appears (or should appear) and the rules of practice, procedure, discovery, and evidence applicable to the proceeding.

The superior court is a constitutional court of record with original and exclusive jurisdiction in all family law matters.[70] The court has statutory authority to entertain the father's request and grant appropriate relief. Practice in the superior court is governed by myriad rules (state and local), timelines, and procedures. The judge presides in the capacity of a neutral magistrate, with responsibility to hear, weigh, and decide the case on the basis of the information that comes before it. The judge may not help one

side or the other present his or her case or otherwise engage in any conduct that manifests bias in favor of a party litigant.[71]

Family law practice in the superior court is governed by numerous statutes,[72] including the Civil Rules (CR's) and the local rules applicable in the county. Discovery rules are applicable as are the Rules of Evidence (ER's). While some judges grant latitude to *pro se* litigants, effective development and presentation of the mother's case requires substantial familiarity of and a corresponding ability to comply with these rules. The mother's lack of knowledge and understanding of these rules places her at a decided disadvantage. This is particularly true where, as in this instance, the opposing party is represented by counsel learned in the rules and who will, consistent with his duty of zealous representation, seek to use the mother's inability to comply with applicable rules, procedures, and evidentiary requirements to his client's advantage.

2. The mother's capacity to develop and present evidence and legal arguments relevant to her claim and respond to evidence and legal arguments presented by the other side.

The mother is a high school graduate, untutored in family law statutes, case law, practice, and procedure. Access to a courthouse facilitator[73] or other sources of self-help assistance[74] may result in her ability to obtain necessary forms and copies of applicable court rules.

Because the father is represented by counsel, the advantage in presenting claims, evidence, and defenses tips decidedly in his favor. Even if the mother, in her *pro se* capacity, is able to secure an order appointing a *guardian ad litem* (GAL) to make an independent assessment of the needs of the children and make recommendations regarding residential placement, limitations, and support, she remains at a significant disadvantage when it comes to developing her evidence, having the evidence admitted, conducting discovery, cross-examining the father and his witnesses, cross-examining the GAL and others, defending against hostile cross-

examination, and subpoenaing and protecting the witnesses she may bring on her behalf.[75]

3. Complexity of the law applicable to the dispute (statutes, regulations, case law, etc.).

A wealth of statutes, regulations, court rules, and case law will govern the disposition of the legal and factual issues relating to the dissolution, including the terms of the parenting plan, whether and what restrictions or limitations on contact between the parents and the children are indicated, the amount of child support, the allocation of community and non-community property, and other matters arising from the dissolution of the parties' marriage.[76] The mother in this case is a lay person untrained and unschooled in the art of reading and applying case law. Even if she can access applicable statutes and court rules, she will not know how to access, understand the implications of, and use case law to her advantage.

4. The practical consequences (in terms of outcomes realized) likely to be experienced by the unrepresented litigant as a result of not being represented by counsel in the proceeding.

Resolution of this case will directly affect core rights and interests of the mother, not the least of which will be the nature and scope of her relationship with her children. The father has filed for dissolution and primary residential placement. He seeks limitations on the mother's contact with the children and award of the family home. There is a real legal and factual contest here. Absent the assistance of counsel, the mother will be unable to develop and present her evidence, defend herself in the initial temporary hearing, meet and contest the father's proofs, and establish an evidentiary basis for securing an award of primary residential placement and other appropriate relief. Justice, which is otherwise unavailable in the absence of legal counsel, would be within the mother's reach upon appointment of counsel.

5. The importance of the issues presented from the perspective of the unrepresented litigant.

The central issue involves the mother's rights to residential placement of, and contact with, her children. This is a profoundly personal matter that implicates core family considerations. While not a parental rights termination proceeding,[77] the relief requested by the father would, if granted, substantially limit the mother's statutory rights and constitutionally protected liberties[78] to care, support, provide for, and experience the companionship of her children. Moreover, to the extent that the father seeks an award of child support and transfer of the family home to him, the relief requested will also directly affect the mother's future economic conditions and her housing situation. Surely, if the mother had the resources, she would retain counsel in this case.

6. The availability of counsel on a pro bono or contingency fee basis.

The mother filed a declaration affirming the unavailability of legal aid and pro bono assistance. Contingency fees are not authorized in family law cases.[79]

Absent the assistance of counsel, the proceeding is likely to be a decidedly one-sided affair and, despite the best efforts of the trial judge, a judicial farce. No lay person in the mother's position could be expected to effectively defend herself against the claims and underlying allegations that have been made against her, and to effectively assert and enforce her legal rights in the proceeding. Nor can the court perform its constitutional function. The court is prohibited from developing evidence for the mother. Yet, it is duty-bound to decide the case on the evidence properly admitted. In this case, properly admitted evidence will most likely be limited to the evidence presented by the father's attorney. Justice cannot be done when only one side of the story is told.

Applying the considerations set forth above, the presumption in favor of the appointment of counsel cannot be rebutted in this case. Pro bono counsel is unavailable, and the matter is not one for which a private attorney can undertake representation on a contingency fee basis. The matter is factually and legally complex. The mother does not have the resources,

education, experience, substantive knowledge, and intellectual capacity to effectively present, promote, and defend her legal interests. Finally, in the absence of attorney representation, it cannot be expected that the relevant facts will be adduced, and it cannot be expected that the appropriate legal arguments on both sides will be presented such that the court can perform its constitutional duty to ensure that justice is done. Under the circumstances presented here, it becomes the state's responsibility to provide counsel at public expense, because it established and maintains the judicial system within which the mother's rights are to be adjudicated.

Example 2:

A case recently reported by the Northwest Justice Project is representative of another of the many types of cases where legal counsel is necessary to effectuate the right of "meaningful access" guaranteed by Washington Constitution Article I, Sec. 10.[80] Many low-income individuals and families face legal problems relating to their ability to acquire or retain permanent shelter.[81] This case involves an eviction proceeding filed by a landlord against a woman whose father had broken into her apartment and assaulted her friend. While the father was arrested and jailed for the criminal assault, the landlord determined that the breach of peace associated with the assault violated the terms of the woman's lease. Represented by an attorney, the landlord filed an unlawful detainer proceeding. He claimed a right to evict both on the basis of the events surrounding the assault, and also on the basis of non-payment of rent (despite the fact that rent had been prepaid and that the tenant actually had a credit on her account). The individual in this case was lucky; she was able to secure the assistance of a state-funded legal aid attorney. But many others like her are not as lucky, and they are forced to defend themselves against similar claims without legal help. The following analysis assumes that counsel was not available and the indigent tenant, unable to afford private counsel, was faced with the prospect of proceeding alone.

1. Jurisdiction and function of the court within which the case appears (or should appear) and the rules of practice, procedure, discovery, and evidence applicable to the proceeding.

The superior court has original jurisdiction in unlawful detainer proceedings.[82] Resorting to self-help is no longer sanctioned by state law.[83] Therefore, the unlawful detainer procedure is the exclusive means of involuntarily terminating a tenancy and restoring the landlord to possession. Practice before the court is governed by a myriad of state and local rules, timelines, and procedures. The judge presides in the capacity of a neutral magistrate with responsibility to hear, weigh, and decide the case on the basis of the information that comes before it. The judge may not help one side or the other.

The unlawful detainer proceeding is a special statutory process established to quickly address disputes regarding rights to possession of property under lease.[84] The statutory process is highly technical.[85] Proceedings are subject to the Civil Rules and the Evidence Rules. In this type of proceeding, there is a limited ability to conduct discovery, and proceedings before the court are often quite summary. Strict time limits apply; non-compliance can result in the summary grant of a writ of restitution despite the defendant having good legal or factual defenses.[86]

Failure to timely respond, or to respond appropriately, will result in the summary issuance of a writ of restitution, depriving the tenant of her right to continue to live in the apartment.[87] While the matter may ultimately proceed to a trial on the merits, she will have been deprived of the single most important aspect of her right—the right to continue to live in the apartment. She risks not only of the loss of the motion for issuance of the writ but, as a direct consequence of such loss the prospect of homelessness. If the writ wrongly issues and is executed, no subsequent relief can undo the harm that she will have experienced.

2. The tenant's capacity to develop and present evidence and legal arguments relevant to her defense and respond to evidence and legal arguments presented by the landlord.

The tenant is unschooled in the law. There are some self-help materials on-line to help the tenant draft and file a response. However, given the complexity of the case and the corresponding statutory time lines involved, it is not likely that this tenant will be able to prepare and timely file the necessary documents to defend her tenancy.

Because the landlord is represented by counsel, he has a substantial advantage in presenting his claim of right to possession. In contrast, the unrepresented tenant might miss necessary deadlines, fail to properly authenticate or submit evidence on time, or otherwise be unable to present necessary legal and factual arguments because she is ignorant of relevant substantive law[88] and legal process as well as the special statutory process applicable to unlawful detainer actions.

3. Complexity of the law applicable to the dispute (statutes, regulations, case law, etc.).

In addition to the Residential Landlord-Tenant Act and the Unlawful Detainer Act, the tenant has rights under numerous other statutes, including state and federal fair housing statutes. Additionally, substantial case law has developed in the area. In this case, recent amendments to the Residential Landlord-Tenant Act provided a substantive defense to the eviction.[89] In the absence of effective legal assistance, it is unlikely that a defense based on the tenant's status as a victim of violence would ever be identified or asserted.

4. The practical consequences (in terms of outcomes realized) likely to be experienced by the unrepresented litigant as a result of not being represented by counsel in the proceeding.

There is no question that the assistance of legal counsel would have a material effect on the outcome of this case. The tenant had both legal and factual defenses.[90] Without legal counsel, she would in all likelihood

neither know of nor understand the process by which she could perfect her ability to assert these defenses. Legal assistance would be the difference between continued residency in her apartment or homelessness.

5. The importance of the issues presented from the perspective of the unrepresented litigant.

At issue is the tenant's right to continued residency in the apartment under the terms and conditions of her lease. If the landlord is successful, the tenant faces eviction and homelessness. From the subjective perspective of the tenant, the threat to her ability to remain in safe, secure housing is significant. If she had the resources, she would no doubt seek the assistance of legal counsel.

6. The availability of counsel on a pro bono or contingency fee basis.

The facts of this case presume that legal aid services are not available. Due to the fact that the proceeding is being limited to adjudication of the competing claims to possession, there is no potential damages award from which a contingency fee could reasonably be secured.

As with the previously discussed case, the circumstances of the present case compel the appointment of counsel. No court could make the findings necessary to overcome the constitutional presumption in favor of a right to counsel. Pro bono counsel is not available nor is there a potential for contingency fee representation. Undertaking the relevant inquiry, the circumstances of the case would compel judicial findings that (a) the matter is factually and legally complex; (b) the tenant does not have the resources, education, experience, substantive knowledge, and intellectual capacity to effectively present, promote, and defend her legal interests; and (c) in the absence of attorney representation, it cannot reasonably be expected that (i) the relevant facts will be adduced, and (ii) the appropriate legal arguments on both sides will be presented such that the court can perform its constitutional duty to ensure that justice is done. Consequently, in this statutorily mandated legal proceeding, the guarantee of "meaningful access"

embodied in Washington Constitution, Article I, Sec. 10 requires the appointment of legal counsel to represent the indigent tenant.

The cases described above are representative of the wide range of cases where the constitutional presumption in favor of a right to counsel should hold. While judges in some cases may find that counsel is available on either a pro bono or contingency fee basis, it must be anticipated that legal counsel will have to be appointed for the substantial majority of indigent litigants whose cases involve important personal and family interests, rights relating to housing, enforcement of laws relating to discrimination and protection of civil rights, access to governmental assistance, health care (including mental health care), educational services, and other cases where the opposing party is represented by legal counsel.

V. THE PRESUMPTION IN FAVOR OF APPOINTED COUNSEL IN NON-CRIMINAL CASES PROTECTS AGAINST THE STATE UNCONSTITUTIONALLY GRANTING UNMERITED SPECIAL RIGHTS AND PRIVILEGES OF ACCESS TO THE COURTS IN FAVOR THOSE WHO CAN AFFORD TO RETAIN LEGAL COUNSEL.

The right of "meaningful access" to the justice system for enforcement and defense of important rights is an outgrowth of the Anglo-American natural rights legal philosophy upon which our state and federal constitutions are grounded. Originating in the promises of Article 40 of the *Magna Carta*[91] and affirmed by many states in their constitutions well-prior to the ratification of the federal Constitution,[92] an unfettered and meaningful right of access to the courts of the state was understood to be essential to the ability of the citizens to secure and defend their rights, liberties, and property. Thus, even in the absence of a separate constitutional provision confirming and making it individually enforceable, the right of "meaningful access" to the courts is so central to and conservative of other personal rights that it must be understood to be both fundamental *and* incidental to the rights that flow from one's status as a citizen of the state. This latter

point—that free and "meaningful access" to the justice system is a right incidental to citizenship—is central to a claim that failure to provide counsel in those cases where counsel is necessary to secure "meaningful access" to the court[93] violates the privileges and immunities clause of Washington State's Constitution.[94]

Article I, Sec. 12 of Washington's Constitution directs that "[n]o law shall be passed granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which upon the same terms shall not equally belong to all citizens, or corporations."[95] In the absence of a state constitutional provision that parallels the equal protection clause of the Fourteenth Amendment, this provision has historically served as the source of state-based equal protection constitutional inquiries.[96] In recent years, and in response to a crescendo of academic encouragement[97] and jurisprudential developments in the states from which Washington's privileges and immunities clause was borrowed,[98] the Washington Supreme Court has determined that Article I, Sec. 12 is capable of serving as an independent source of protection for certain individual rights and that it may be interpreted to impose a corresponding set of limitations on state governmental conduct.[99]

Grant County II involved a challenge to the statutory petition method for municipal annexations. While upholding the statutory scheme under challenge in the case, the Washington Supreme Court for the first time expressly held that the special privileges and immunities prohibition embodied in Article I, Sec. 12 was intended to offer protection distinct from that available under traditional equal protection analysis, and that an independent inquiry is appropriate to determine whether governmental action affords special rights and privileges in violation of that section.[100]

According to the court, a violation of the prohibition against special privileges and immunities in Washington Constitution Article I, Sec. 12[101] will be found if the law, *or its application*, confers a "privilege" to a particular class of citizens to the exclusion of others. Thus, the inquiry

turns to what is a "privilege" within the meaning of the state constitution. The court defined privileges as "those fundamental rights that are incidental to state citizenship."[102] The court quoted with approval its early interpretation of the privileges and immunities clause in *State v. Vance,*[103] where it held that:

> The privileges and immunities therein referred to pertain alone to those fundamental rights which belong to the citizens of the state by reason of such citizenship. These terms, as they are used in the constitution of the United States, secure in each state to the citizens of all states the right to remove to and carry on business therein; the right, by usual modes, to acquire and hold property, and to protect and defend the same in the law; the rights to the usual remedies to collect debts, and to enforce other personal rights; and the right to be exempt, in property or persons, from taxes or burdens which the property or persons of citizens of some other state are exempt from.[104]

The quoted language from *Vance* places the right of "meaningful access" to the courts in its proper Washington Constitution Article I, Sec. 12 context and affirms that, regardless of its source (*i.e.*, whether originating in the common law, as a result of "recourse to fundamental rights" or the language of Article I, Sec. 10), such a right is a "privilege" within the meaning of that clause. According to the court, "privileges" protected by Washington Constitution Article I, Sec. 12 are those "fundamental rights which belong to the citizens of the state by reason of such citizenship." It affirms that such rights include, but are not necessarily limited to, the right to "protect and defend [property] in the law; the rights to the usual remedies to collect debts, and to enforce other personal rights."[105]

Thus, even independent of Washington Constitution Article I, Sec. 10, the right of "meaningful access" to the courts is a "privilege" within the meaning of Washington Constitution Article I, Sec. 12. But the inquiry does not end here. One additional obstacle exists before it can be concluded that the protections offered by this provision manifest in an affirmative duty

on the part of the state to facilitate "meaningful access" to the courts for those unable to secure the professional legal assistance that is essential to their ability to effectively assert and defend their rights in the forum.

The text of Washington Constitution Article I, Sec. 12 is prohibitive in its construction. It reads "[n]o law shall be passed . . . " The framers of the constitution adopted this provision in part in response to concerns with the excesses and influences that private interests had obtained through the courting of special legislative favors.[106] That the language prohibits affirmative legislative grants of special preferences is, therefore, not surprising. But there is little difference between affirmative grants of special privileges, on the one hand, and passive conduct that, in the course of performing governmental functions, effectively confers special privileges, on the other. Moreover, there is little distinction between legislative conduct in granting special privileges and executive or judicial conduct that accomplishes the same result. All such conduct is repugnant to the purposes that the framers intended to accomplish; *i.e.*, protection against governmental conduct that confers special, unmerited privileges and immunities. It is also repugnant to the class of rights that it is designed to protect, i.e., those rights that are fundamental incidents of state citizenship. Whether active or passive, and whether legislative, executive, or judicial, all statues, rules, and procedures that effectively operate to confer special privileges or immunities relating to the exercise of fundamental rights incidental to citizenship must fall within the prohibitions of Washington Constitution Article I, Sec. 12.

Part of the problem with current privileges and immunities jurisprudence—both in Washington and in those other states that undertake an independent analysis—is that the cases focus on challenges to affirmative legislative acts that grant special rights ('undue favoritism') or single out classes of individuals on the basis of some distinguishing characteristics.[107] No case has considered the situation where the state

1) undertakes to perform a constitutionally mandated function;[108]

2) does so in a palpably even-handed manner (*i.e.*, does not expressly single out specific classes of citizens for favored treatment);
3) employs rules and procedures that, on their face, apply generally to all without distinction; but
4) in the course of performing the constitutional function in an even-handed manner, effectively erects insurmountable barriers to the ability of certain classes of citizens[109] to avail themselves of the governmentally established and maintained enterprise, and
5) as a consequence denies these same classes of persons fundamental rights;[110] while
6) exercising unmerited favoritism in providing access to the governmental enterprise.[111]

Yet, this is precisely the situation that exists with Washington State's court system. Washington Constitution Article IV establishes the judicial branch of state government and charges it with the fair and proper administration of justice.[112] The court system that has developed is governed by complex substantive, evidentiary, and procedural rules which *presume* the availability and effective assistance of legal counsel. These rules apply generally to all who come before the courts. However, in doing so, they operate to foreclose "meaningful access" to the courts for those who are unable to secure legal counsel, while at the same time offering special advantages to those who have the assistance of an attorney. As a consequence, the design, structure, and operation of the court system effectively confers unmerited special rights of access to those with the ability to secure legal counsel while effectively denying the fundamental right of access to those without this ability.

The key, once again, is the interrelationship between the constitutionally mandated governmental function (establishment and maintenance of courts for the fair and impartial administration of justice) and the fundamental

right of "meaningful access" that all citizens have to it. Where, as here, the right of access to a governmental enterprise (the court system) is fundamental, Washington Constitution Article I, Sec. 12 imposes upon the government that develops and maintains that enterprise an affirmative duty to ensure that such an enterprise is designed, operated, and maintained in a way that enables the citizenry to realize such a right of access. Conversely, this provision prohibits the government from creating a court system that, on the one hand, inherently requires the assistance of legal counsel in order for citizens to effectively assert and defend legal rights and prerogatives but, on the other, refuses to provide such counsel where the citizen is unable to secure it on his or her own. Such a system effectively operates to confer special rights of access to, and enjoyment of, the justice system (which is constitutionally mandated to be open to all) to those who can afford legal counsel at the expense of those who cannot.

Under our constitutional form of government, the justice system is maintained by the judicial branch.[113] The legitimacy of any system of justice is a function of its capacity to treat people equally before the law. In the words of the *Magna Carta*, "[t]o no one will we sell, to no one will we refuse, or delay, right or justice."[114] Or, as Alexander Hamilton observed in Federalist Paper No. 78, the purpose of the judicial branch is "to secure a steady, upright, and impartial administration of the laws."[115] Impartiality is not achieved in a system which confers special privileges on one class of participants to the decided and systemic disadvantage of another.

As the civil legal system is conceived, designed, structured, and maintained, lawyers are essential to parties' effective participation in most types of proceedings hosted within that civil court system. By designing a system that requires attorney representation to realize effective outcomes and, at the same time, declining to appoint counsel to indigent litigants in matters where counsel is essential to their ability to meaningfully participate in the proceeding, the judicial branch passively fosters special rights of access to the system. This special right of access operates as a privilege

within the meaning of Washington Constitution Article I, Sec. 12 in favor of those who can afford legal counsel while effectively denying similar rights to those who cannot. No affirmative statutory classification is employed to effectuate this distinction or grant of special privilege. It inheres in the structure and design of the system itself. Consequently, the system operates to deny the fundamental right of access to some while conferring unmerited special rights of access to others; in so doing, it unconstitutionally grants special rights and privileges in violation of Washington Constitution Article I, Sec. 12.

Here, as in the analysis under Washington Constitution Article I, Sec. 10, the overarching consideration is the right of "meaningful access." Just as the right does not manifest itself in an absolute right to appointed counsel for indigent litigants in all civil cases within the art. 1, sec. 10 analysis, neither does it under the privileges and immunities analysis of Washington Constitution Article I, Sec. 12. The rebuttable presumption outlined in section IV above effectively ensures the appointment of counsel in those cases where legal representation is essential to the indigent litigant's meaningful participation in the court proceeding while, at the same time, protecting against the appointment of counsel in cases where it is not constitutionally required.

VI. EMERGING INTERNATIONAL JURISPRUDENCE PROVIDES COMPLEMENTARY GUIDANCE AND SUPPORT FOR A REBUTTABLE PRESUMPTION IN FAVOR OF THE APPOINTMENT OF COUNSEL IN NON-CRIMINAL CASES

The analytical approach to recognizing and enforcing the individual's right of "meaningful access" to the courts under Washington Constitution Article I, Sec. 10 discussed above is consistent with the approach employed by the European Court of Human Rights in interpreting a nearly identical provision of the Convention for the Protection of Human Rights and

Fundamental Freedoms. Article 6-1 of the Convention reads in relevant part:

> In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.[116]

Like Washington Constitution Article I, Sec. 10,[117] Article 6-1 of the Convention does not affirmatively direct the appointment of counsel in civil or criminal cases. It merely speaks to the right of individuals to "a fair and public hearing." Yet, two cases interpreting Article 6-1 make clear that, under the proper circumstances, the provision operates to require the appointment of counsel in a broad range of non-criminal cases.

The first such case is *Airey v. Ireland*.[118] Seeking relief under the right of access to justice affirmed by Article 6, the petitioner in *Airey* sought appointment of counsel to petition the High Court of Ireland for a judicial separation from her husband. Rejecting the Government of Ireland's assertion that Ms. Airey's personal circumstances (*i.e.,* her poverty) created the barrier to her ability to secure otherwise authorized judicial relief, the European Court of Human Rights ruled that the appointment of counsel was mandatory to effectuate her "right of access" secured under Article 6-1 of the Convention. The court looked to many of the factors outlined in the approach suggested in Section IV above, including the nature of the forum, the nature of the proceeding, the difficulties of proof and procedure, the nature of the petitioner's rights at stake, and the likelihood that justice could be realized without the effective assistance of counsel.[119] The court concluded that it is "most improbable that a person in Mrs. Airey's position [reference omitted] can effectively present his or her own case . . . [and that] the possibility of appearing before a court in person [i.e., *pro se*] before the High Court does not provide the applicant with an effective right of access."[120]

Although it concluded that appointment of counsel was required under the totality of circumstances presented in Ms. Airey's case, the court made clear that Ireland was not obligated to appoint counsel in all cases, and that it was free to develop such other approaches as it might deem appropriate to ensure that the citizens of that country have an effective right of access to the courts. On this point, the court observed:

> [W]hilst Article 6-1 guarantees to litigants an effective right of access to the courts for the determination of their 'civil rights and obligations,' it leaves to the State a free choice of the means to be used towards this end. The institution of a legal aid scheme - which Ireland now envisages in family law matters . . . constitutes one of those means but there are others such as, for example, a simplification of procedure.[121]

But, in the absence of alternative means, the court concluded that Ireland was required to appoint counsel to enable Ms. Airey to secure the legal separation to which she was entitled under the law.[122]

A more recent case interpreting Article 6-1 is the case of *Steel and Morris v. The United Kingdom*.[123] The case was a complex libel action filed by McDonalds Corporation against two London-based individuals, Helen Steel and David Morris, who had engaged in an active anti-McDonalds publicity effort that, among other things, linked McDonalds' practices to global rainforest defoliation and deforestation, economic exploitation, collusion with corrupt third world nation leaders, exploitation of children, and inhumane slaughterhouse practices.[124] McDonalds sued the two seeking £100,000 in damages. Filed in 1990, the case involved multiple motions, more than twenty-eight days of hearings, and a trial that lasted 313 days. The defendants were denied counsel through the British Office of Legal Aid and, for the most part, defended themselves without the extended assistance of counsel.[125] McDonalds prevailed at the trial and, when the case was revised on appeal, judgments were entered in the amount of £36,000 against Ms. Steel and £40,000 against Mr. Morris.[126] After

exhausting all domestic appeals, Steel and Morris appealed to the European Court of Human Rights, alleging among other things that the denial of legal assistance operated to deprive them of their rights to a fair hearing within the meaning of Article 6-1 of the Convention.

The court evaluated the case under the criteria outlined in *Airey*, and concluded that, under the circumstances presented in the case, the denial of legal assistance to Ms. Steel and Mr. Morris violated Article 6-1.[127] The court first affirmed that the right of access to court in a democratic society is ensured by the right to a fair trial. Citing its decision in *Airey*, the court stated, "It is central to the concept of a fair trial, in civil as in criminal proceedings, that a litigant is not denied the opportunity to present his or her case effectively before the court and that he or she is able to enjoy equality of arms with the opposing side."[128] Characterizing the state of the law with respect to the right to counsel under Article 6-1 of the Convention, the Court continued:

> Article 6-1 leaves to the State a free choice of the means to be used in guaranteeing litigants the above rights. The institution of a legal aid scheme constitutes one of those means but there are others, such as for example simplifying the applicable procedure.

The question whether the provision of legal aid is necessary for a fair hearing must be determined on the basis of the particular facts and circumstances of each case and will depend *inter alia* upon the importance of what is at stake for the applicant in the proceedings, the complexity of the relevant law and procedure and the applicant's capacity to represent him or herself effectively.[129]

The benchmark in determining whether and under what circumstances Article 6-1 requires appointment of counsel is whether, under the totality of the circumstances, "each side is afforded a reasonable opportunity to present his or her case under conditions that do not place him or her at a substantial disadvantage vis-à-vis the adversary." [130] The court identified a

number of indicators in determining whether, under the circumstances of any given case, counsel would be required. These included:

- whether the litigants initiated proceedings or were forced by the conduct of others (those who sued them) to defend important rights and prerogatives in a forum chosen by those who initiated the action;[131]
- the nature of the legal rights at issue (the court observed, for example, that a case involving family relations is presumptively important because it not only affects the rights and relations between the two litigants, but also has implications for any children of the relationship);[132]
- whether potential financial implications may, in light of other circumstances, so threaten personal rights of the parties as to require the effective assistance of legal counsel (*i.e.,* legal aid may be required even in cases where damages are the only relief requested);[133]
- the complexity of substantive law and legal procedure.[134] Indicators include the number of witnesses, volume of transcript, duration of proceedings, number of motions filed, amount of documentary evidence required to be produced, the existence of highly technical factual materials, the length of the judgments entered in the case, etc.;
- the extent to which the unrepresented party is able to bring an effective defense despite the absence of legal counsel.[135]
- the extent to which there is a disparity between the respective levels of legal assistance enjoyed by the parties and the degree to which such disparity would, under the totality of the circumstances of the case, give rise to unfairness, despite the best efforts of the judges who preside over the proceedings; and
- whether, under the totality of the circumstances, the lack of access to legal counsel operates to deprive the party of the

> opportunity to present his or her case effectively before the court and, as a consequence, contribute to an unacceptable inequality of arms with the opposing party.[136]

Applying these criteria to the facts of the proceeding before it, the court concluded that counsel should have been appointed to defend Ms. Steel and Mr. Morris against the libel charges filed against them.[137]

The parallels between Article 6-1 of the Convention for the Protection of Human Rights and Fundamental Freedoms and Article I, Sec. 10 of the Washington Constitution are manifest. The former declares that "everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law." The latter declares that "[j]ustice in all cases shall be administered openly, and without unnecessary delay." The Convention requires appointment of counsel in cases where the unrepresented litigant would be placed at a decided disadvantage in presenting his or her claims to the tribunal and in meeting the proofs offered by the other side (i.e., *Airey, Steel and Morris*). Grounded in similar philosophy and legal traditions, Washington Constitution Article I, Sec. 10 must be read to require the same. The rebuttable presumption in favor of the appointment of counsel outlined in section IV above effectively serves this end.

VII. CONCLUSION

Washington State's civil court system was established and is maintained to enable citizens of the state to secure a fair, proper, and effective resolution to their civil disputes. Washington Constitution Article I, Sec. 10 promises that the civil court system will be "open and available to all" for the resolution of disputes "without delay."

In practical operation, the court system is neither open nor available to those who often need its protection the most: low-income individuals facing civil legal problems implicating the most critical of life's necessities such as shelter, personal safety, personal and familial security, and governmental

accountability. For these people, the lack of access to legal counsel routinely deprives them of the ability to defend, assert, and enforce "absolute" rights to individual and family security, personal liberty, and private property. Maintenance of a judicial system that requires the effective assistance of counsel for a fair and proper defense or assertion of legal rights and prerogatives and then fails to provide counsel to those who cannot afford it threatens to transform the judicial system into a province where justice will be available only to those with resources. If this threat remains unaddressed, the judicial system will lose the credibility necessary to preserve its very legitimacy and, with it, the essential character of our legal tradition so boldly carved into the parapet of the United States Supreme Court building—Equal Justice Under Law.

Washington State's Constitution confers a right of meaningful access to the judicial system upon all its citizens. Within the legacy of Anglo-American natural law-based legal traditions, the right of meaningful access is a fundamental incident of citizenship. This right is individually enforceable and is grounded in those constitutional provisions which require open courts, which mandate recurrent resort to fundamental principles, and which prohibit conferring special privileges. It dictates the appointment of counsel at public expense in those cases where such is necessary to allow an indigent litigant to appear and effectively participate in a proceeding in a manner that will allow the court to carry out its adjudicative function to the end that justice is done.

---

[1] James A. Bamberger is the Director of the Washington State Office of Civil Legal Aid, an independent judicial branch agency that administers and oversees state appropriated legal aid funding. The legal analysis and theories presented in this article represent those of the author and not the Office of Civil Legal Aid.

The author expresses his deepest appreciation to Leonard Schroeter, accomplished civil rights and trial attorney and equal justice legal philosopher, for his continuing inspiration and passion in promoting access to justice as a core and fundamental constitutional right. Mr. Schroeter's many writings on the subject of access to justice and the right to counsel can be found at http://www.wsba.org/atj/publications/jurisprudence.

The author wishes also to thank Hugh Spitzer, Seattle University School of Law Professors Lisa Brodoff and Raven Lidman, Deborah Perluss, Nicholas Gellert, Paul Marvy, and others who reviewed drafts of this article, helped test the legal theories, shape the analytical approach, and who provided indispensable editorial guidance.

[2] Miranda v. Sims, 991 P.2d 681, 687 (Wash. Ct. App. 2000) (Ellington, J., concurring) (quoting Chambers v. Baltimore & Ohio R.R. Co., 207 U.S. 142, 148 (1907)).

[3] Coordinated Legal Education Advice and Referral ("CLEAR") is a toll-free legal intake, advice and referral system developed and maintained by the Northwest Justice Project. The system is a primary point of contact for low-income people facing important civil legal problems. Information about CLEAR is available at http://www.nwjustice.org.

[4] REGINALD HEBER SMITH, JUSTICE AND THE POOR 8, 15 (Patterson Smith Publishing 3d ed. 1972) (1919).

[5] *Id.* at 32, 240.

[6] *See* SMITH, *supra* note 4 *Id*. at 8, 15,

[7] *Id.* at 5.

[8] Every recent study of unmet civil legal needs documents that the vast majority of low-income people who experience legal problems are unable to secure necessary legal assistance. *See*, *e.g.,* Legal Services Corporation, Documenting the Justice Gap in America (September 2005), *available at* http://www.lsc.gov/press/documents/LSC%20Justice%20Gap_FINAL_1001.pdf; AMERICAN BAR ASS'N, LEGAL NEEDS AND CIVIL JUSTICE: A SURVEY OF AMERICANS – MAJOR FINDINGS FROM THE COMPREHENSIVE LEGAL NEEDS STUDY (1994); ALA. STATE BAR, ASSESSING THE LEGAL NEEDS OF THE POOR: BUILDING AN AGENDA FOR THE 1990'S (1992); CENTER FOR SURVEY RESEARCH AND ANALYSIS, CIVIL LEGAL NEEDS AMONG LOW-INCOME HOUSEHOLDS IN CONNECTICUT (2003); FLA. BAR FOUND., LEGAL NEEDS AMONG LOW- AND MODERATE-INCOME HOUSEHOLDS IN FLORIDA (1995); HAW. COMM'N ON ACCESS TO JUSTICE, ASSESSMENT OF CIVIL LEGAL NEEDS OF LOW- AND MODERATE-INCOME PEOPLE IN HAWAII (1993); CHICAGO BAR ASS'N ET AL., THE LEGAL AID SAFETY NET: A REPORT ON THE LEGAL NEEDS OF LOW-INCOME ILLINOISANS (2005); KAN. BAR ASS'N, LOW-INCOME CIVIL LEGAL NEEDS STUDY (1988); MAINE BAR FOUND., THE REPORT OF THE MAINE COMM'N ON LEGAL NEEDS – (1990); MD. LEGAL SERVICES CORP., LEGAL NEEDS OF THE POOR IN MARYLAND (1987); MINN. LEGAL SERVICES COALITION, LEGAL NEEDS OF THE POOR IN MINNESOTA – AN ASSESSMENT OF THE UNMET NEED (1984); LEGAL SERVICES OF N. J., LEGAL PROBLEMS, LEGAL NEEDS: THE LEGAL ASSISTANCE GAP FACING LOWER INCOME PEOPLE IN NEW JERSEY (2002)**;** N.Y. STATE BAR ASS'N, NEW YORK LEGAL NEEDS STUDY (1989); N.C. LEGAL SERVICES PLANNING COUNCIL, NORTH CAROLINA STATEWIDE LEGAL NEEDS ASSESSMENT (2003); OHIO STATE BAR ASS'N, AN ASSESSMENT OF THE UNMET CIVIL LEGAL NEEDS OF OHIO'S POOR, FINAL REPORT (1991); D. MICHAEL DALE, STATE OF ACCESS TO JUSTICE IN OREGON, PART I: ASSESSMENT OF LEGAL NEEDS, (2000); PA. BAR ASS'N, REPORT OF PENNSYLVANIA BAR ASSOCIATION TASK FORCE FOR LEGAL SERVICES TO THE NEEDY (1990); TENN. ALLIANCE FOR LEGAL SERVICES, REPORT FROM THE STATEWIDE COMPREHENSIVE LEGAL NEEDS SURVEY FOR 2003 (2004); STATE BAR OF TEXAS, LEGAL NEEDS OF THE POOR ASSESSMENT PROJECT (1991); VA. STATE BAR, PRO BONO AND THE LEGAL

NEEDS OF INDIGENT VIRGINIANS (1991); WASH. STATE SUPREME COURT TASK FORCE ON CIVIL EQUAL JUSTICE FUNDING, THE WASHINGTON STATE CIVIL LEGAL NEEDS STUDY (2003), *available at* http://www.courts.wa.gov/newsinfo/newsinfo_reports/taskforce/CivilLegalNeeds.pdf [hereinafter CIVIL LEGAL NEEDS STUDY]; PRO BONO REFERRAL PROJECT ADVISORY COMMITTEE OF THE W. VA. STATE BAR, REPORT ON THE LEGAL NEEDS OF LOW-INCOME HOUSEHOLDS IN WEST VIRGINIA (1990).

[9] *See* Lassiter v. Dept. of Soc. Servs., 452 U.S. 18 (1981); Housing Authority v. Saylors, 557 P.2d 321 (Wash. 1976) [hereinafter *Housing Authority*].).

[10] *See* GMA RESEARCH CORP., HOW THE PUBLIC VIEWS THE COURTS (1999), *available at* http://www.courts.wa.gov/newsinfo/newsinfo_reports/?fa=newsinfo_reports.judicialsurvey. The surveys looks at public perceptions of the court system conducted under contract with the Washington State Office of the Administrator for the Courts. Seventy-nine percent of all respondents believe that the wealthy receive better treatment by the court system than they do.

[11] This article focuses exclusively on cases and matters that are heard in the state's trial and appellate court system. No effort is made to explore the degree to which a right to counsel at public expense obtains in non-judicial fora.

[12] The analysis presented here is, consequently, not limited by the relatively narrow scope of right defined by the U.S. Supreme Court in *Lassiter*, 452 U.S. at 25-27 (adopting the three part interests-based test outlined in Matthews v. Eldridge, 424 U.S. 319 (1976), to establish a presumption against a constitutional right to counsel at public expense in cases that do not threaten a litigant's personal freedom).

[13] *See, e.g.,* Leonard W. Schroeter, Civil Gideon: If Not, Why Not? (June 21, 1999) (a paper prepared for the Washington State Access to Justice Conference); Deborah Perluss, *Washington's Constitutional Right to Counsel in Civil Cases: Access to Justice v. Fundamental Interest*, 2 SEATTLE J. FOR SOC. JUST. 571 (2004).

[14] *See* Iverson v. Marine Bancorporation, 517 P.2d 197, 199 (Wash. 1973).

[15] WASH. ST. CT. GENERAL R. 24, *available at* http://www.courts.was.gov/court_rules (last visited Oct. 31, 2005) (defining the practice of law); WASH. ST. A.P.R. 1; WASH. REV. CODE § 2.48.170 (2005) (stating that only individuals who have passed the bar exam, which requires obtaining the necessary training and successfully demonstrating their knowledge, by passing the bar examination may practice law before the courts of the state).

[16] As Reginal Heber Smith observed nearly a century ago:

> With a vast body of ever changing law, which a man after a lifetime of devotion is only beginning to master, it is apparent that the layman, in order to understand his rights, what he can and cannot do, must have the assistance of counsel. We do not, as in Nero's time, write our laws in small letters at the top of high columns, but the multitudinous laws in our voluminous case books and statute books are as hard to learn. Similarly, the procedural law, in accordance with which litigation must be conducted, is a maze to the uninitiated; it is a science in itself. The law permits every man to try his own case, but "the lay vision of every man his own lawyer" has been shown by all experience to be

> an illusion. It is a virtual impossibility for a man to conduct even the simplest sort of a case under the existing rules of procedure, and this fact robs the in forma pauperis proceeding of much of its value to the poor unless supplemented by the providing of counsel.

It is not easy to convey in few words a true impression of the enormous importance of the attorney in our system of achieving justice, but the mention of the broad outlines of his work is suggestive. He must start the case properly by satisfying all the requirements of venue, jurisdiction, service, entry, and the law of pleadings. When the case is before the court, our system contemplates the doing of justice by applying general laws to the facts of the particular case. In many cases the attorney must be ready to assist the court in determining the law applicable, and in every case he must have ascertained the facts by investigation, must have selected the material facts admissible according to the law of evidence, must have the witnesses and documents at hand, and must present the case in accordance with the rules governing trials. When judgment is rendered, he must transform that into an execution, and finally undertake to satisfy such execution by levy on the defendant's property. At every stage, the attorney supplies the motive power; without him the judicial machinery would never move.
SMITH, *supra* note 4, at 31-32.

[17] Richard Sanders, Access to Justice: A Noble Principle in Beggar's Rags (June 25, 1999) (unpublished paper delivered to Washington State Access to Justice Conference), http://www.justicesanders.com/ATJ062599.htm (last visited Oct. 31, 2005).

[18] CIVIL LEGAL NEEDS STUDY, *supra* note 8, at 55.

[19] *Id.*

[20] *Id.* at 23.

[21] *Id.* at 25. The Civil Legal Needs Study did not distinguish between those who had legal problems that resulted in the need to either initiate or defend against claims in the state's judicial system and those that did not.

[22] *Id.* at 47, Fig. 19.

[23] *Id.* at 26, Figs. 3, 4.

[24] WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND VOL. 1: OF THE RIGHTS OF PERSONS 121 (U. Chicago Press 1979) (1765).

[25] *Id*. at 125.

[26] *See, e.g.*, International Covenant on Civil and Political Rights, Mar. 23, 1976, *available at* http://www.unhchr.ch/html/menu3/b/a_ccpr.htm (last visited Oct. 31, 2005).

[27] BLACKSTONE, *supra* note 24, at 120-21 (emphasis in original).

[28] WASH. CONST. art. I, § 1 (emphasis supplied). Washington State's first draft constitution (drafted by a convention that convened in Walla Walla in 1878 and ratified by the citizenry, but not approved by Congress) expressly embraced the natural law basis of government that runs uninterrupted through the Anglo-American experience and the fundamentality of "absolute rights" to life, liberty, property, and the pursuit of happiness. Article V, section Art. I, sec. 1 of the draft constitution declared that "[a]ll political power is inherent in the people, and all free governments were founded on their authority." WASH. CONST. art. V, § 1 (proposed draft 1878). Article V, section . . ." Art. I, sec. 3 observed that:

> All persons are by nature free, and equally entitled to certain natural rights; among which are, those of enjoying and defending their lives and liberties; of acquiring, possessing and protecting property; and seeking and obtaining happiness. To secure these rights, governments are instituted, deriving their just powers from the consent of the governed.

Id. at. § 3.

The grounding of the 1889 constitution in natural rights philosophy is affirmed by the contemporaneous writings of W. Lair Hill, the most influential non-delegate to the 1889 Constitutional Convention. On the eve of the convening of the Constitutional Convention, Hill published a draft constitution and accompanying commentary in the Portland Oregonian and provided a copy to every delegate to the convention. Much of Hill's original language found its way into the constitution that was ratified by the people of Washington Territory, and his contemporaneous rationale and historical insights shed substantial light on the philosophy that guided the convention's delegates as they worked to craft the proposed constitution. As Hill observed in his discussion on the extent to which state power should be crystallized in the constitutions, those who craft and adopt a constitution determine:

> how far natural liberty shall be subjected to the common necessities of law and order, and what restrictions shall be placed upon the selection of methods, by legislative, executive, and judicial authority, for the enforcement and protection of private rights and the promotion of public good. . . . All government is a system of compromises, and all true statesmanship is in the wise differentiating between personal liberty and that degree of personal restraint which is necessary to the orderly conduct of public affairs, the preservation of peace, and the promotion of those common interests in which a whole society, as contradistinguished from the individual member, is concerned.

W. Lair Hill, *Washington: A Constitution Adapted to the Coming State*, MORNING OREGONIAN, July 4, 1889, at v-vi. Speaking of the purpose of a Bill of Rights, Hill observes, "[i]t has been universally deemed expedient and proper to formulate and embody in the constitution an assertion of these natural rights of man, and to declare in those provisions specifically under what circumstances and to what extent such rights must yield to social requirements." *Id.* at vii.

[29] BLACKSTONE, *supra* note 24, at 137 (English italics supplied, Latin italics in original, underscoring supplied).

[30] Marbury v. Madison, 5 U.S. 137, 163 (1803).

[31] Chambers v. Ohio R.R. Co., 207 U.S. 142, 148 (1907).

[32] SMITH, *supra* note 4, at 4 (emphasis added).

[33] The right-remedy relationship is captured in the common law rule *ubi jus, ibi remedium* – where there is a wrong, there is a remedy. This rule has long been embraced by the Washington Supreme Court. *See* Griffin v. Eller, 922 P.2d 788, 795 (Wash. 1996) (Talmadge, J., dissenting) (citing Mills v. Orcas Power & Light Co., 355 P.2d 781 (Wash. 1960)).

[34] WASH. CONST. art. I, § 10.

[35] Major Prods. Co. v. Northwest Harvest Prods, 979 P.2d 905, 907 (Wash. Ct. App. 1999), *review denied* 989 P.2d 1141 (Wash. 1999). Thus, the supreme court asserts and exercises its rule making authority "to promote justice by ensuring a fair and expeditious process." WASH. ST. CT. GENERAL. R. 9(a). *Accord* WASH. EVID. E.R. 102 (stating that the rules of evidence "shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined"); WASH. R. SUPER. CT. CIV. R. 1 (stating that Civil Rules for superior court are to be interpreted to the end of achieving a "just . . . determination of every action"); WASH. REV. CODE § 2.04.180 (2005) (stating that the supreme court has an affirmative responsibility to adopt rules of practice and procedure that are "most conducive to the due administration of justice").

[36] Limiting access to the law along these lines would, however, not be without historical parallel, one that resulted in a successful public demand for access. During the period following restoration of the Roman Constitution, a closed judicial system was established where knowledge of the laws and legal practice was held exclusively by patrician magistrates but was unavailable to the plebeians. This continued until the plebeians threatened to leave town *en mass* (the so-called Second Secession of the Plebs) until the patrician magistrates agreed to inscribe the laws on twelve bronze tablets which were set up in the marketplace for all to see. H. F. JOLOWICZ, HISTORICAL INTRODUCTION TO THE STUDY OF ROMAN LAW 12 (2d ed. reprinted 1954).

[37] Even prisoners have a constitutionally recognized fundamental right of access to the law and necessary legal materials. State v. Dougherty, 655 P.2d 1187, 1190 (Wash. Ct. App. 1982) (citing with approval Bounds v. Smith, 430 U.S. 817 (1971), "the fundamental 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 libraries or adequate assistance from persons trained in the law").

[38] Carter v. Univ. of Wash., 536 P.2d 618 (Wash. 1975) [hereinafter *Carter I*]. While the holding in *Carter I* was overruled a year later in *Housing Authority*, Justice Finley's observations in the former case relating to the purpose and functions of the court system endure with increasing relevancy.

[39] Or, in the language of Justice Finley in *Carter I*, 536 P.2d at 620-621, "effective access."

[40] *Cf.* Iverson*,* 517 P.2d 197. Under Washington Constitution article VI, section 1 and section 30, it is the duty of the judiciary to ensure "the fair and impartial administration of justice and the duty to see that justice is done in the cases that come before the court." *Id.*

[41] Most of these state constitutional provisions predate the Oregon and Indiana constitutions from which Washington's open courts provision originated. *See, e.g.*,WIS. CONST. art. I, § sec. 9 ("Remedy for wrongs. SECTION 9. Every person is entitled to a certain remedy in the laws for all injuries or wrongs which he may receive in his person, property, or character; he ought to obtain justice freely, and without being obliged to purchase it, completely and without denial, promptly and without delay, conformably to the laws.") MINN. CONST. art. I, § sec. 8 ("REDRESS OF INJURIES OR WRONGS).

Every person is entitled to a certain remedy in the laws for all injuries or wrongs which he may receive to his person, property, or character, and to obtain justice freely and without purchase, completely and without denial, promptly and without delay, conformable to the laws."); OHIO CONST. §sec. 1.16 ("All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay."); KY. CONST. §sec. 14 ("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").

[42] WASH. CONST. art. 1 § 10.

[43] *Id.* The language of article I, section 10 is more succinct than that included in the draft Constitution of 1878. The language in the 1878 Constitution more closely tracked the more expansive language embodied in other state constitutions. Article V, sec. I, sec. 9 of that Constitution provided that:

> [e]very person in the State shall be entitled to a certain remedy in the law, for all wrongs and injuries which he may receive in his person, character or property; justice shall be administered to all freely and without purchase; completely and without denial; promptly and without delay; and all courts shall be open to the public.

Compare OR. CONST. art. I, § sec. 10, (stating that "[n]o court shall be secret, but justice shall be administered, openly and without purchase, completely and without delay, and every man shall have remedy by due course of law for injury done him in his person, property, or reputation."). While employing different language, there is nothing in the constitutional deliberations of the 1889 convention (*see generally*, THE JOURNAL OF THE WASHINGTON STATE CONSTITUTIONAL CONVENTION 1889 (Beverly Paulik Rosenow ed., 1999) [hereinafter JOURNAL OF CONVENTION]) to suggest that the drafters intended to deviate in either purpose or substance from the right expressed in the earlier constitutional endeavor or that which was embodied in the constitutions of Washington's sister states. *See generally*, THE JOURNAL OF THE WASHINGTON STATE CONSTITUTIONAL CONVENTION 1889 (Beverly Paulik Rosenow ed., 1999) [hereinafter JOURNAL OF CONVENTION]. The provision is clearly intended to carry forward the two great promises of Anglo-American tradition—(1) full access to the courts by all citizens "without purchase" (in the language of the *Magna Carta*, the 1878 draft, and the Hill draft), so that all may effectively assert and defend personal rights and secure timely access to a remedy at law, (*see* King v. Olympic Pipeline Co., 16 P.3d 45, 57-58 (Wash. Ct. App. 2000); and (2) maintenance of a justice system that is open and subject to public scrutiny, and freedom from star chamber-like proceedings or other secret trials.

[44] *See* Bullock v. Roberts, 524 P.2d 385 (Wash. 1974) (access to the courts in a dissolution action is a fundamental right); Whitney v. Buckner, 734 P.2d 485, 488-489 (Wash. 1987) (absent a countervailing state interest, even prisoners, who have lost many civil rights upon conviction and incarceration, must be "afforded meaningful access to the courts"). Doe v. Puget Sound Blood Center, 819 P.2d 370 (Wash. 1991); King, 16 P.3d at 57-58; State v. Dorsey, 914 P.2d 773, 776-77 (Wash. Ct. App. 1996) (persons required to settle disputes through the judicial process must be afforded "meaningful

access" to the courts). The decisions in *Whitney* and *Dorsey* were not grounded in the article. I, sec. 10, but in traditional notions of due process. Nevertheless, they affirm that a right of meaningful access to the courts exists in Washington State.

[45] In exchange for the grant of governing powers to the state—including the power to establish and maintain a system of justice—the citizen reserves such rights and liberties that have not been conceded, as well as the right of access to the system of justice for the effective assertion and defense of such rights and liberties. Richard Sanders & Barbara Mahoney, *Restoration of Limited State Constitutional Government: A Dissenter's View,* 59 N.Y.U. ANN. SURV. AM. L. 269 (2003).

[46] Iverson, 517 P.2d at 199 (saying "Const. art. IV, s. 1 and s. 30, vests the judicial power in the supreme court, court of appeals, and superior courts of this state. Upon creation, these courts assumed certain powers and duties. [citations omitted]. These duties include, among others, the fair and impartial administration of justice and the duty to see that justice is done in the cases that come before the court")

[47] See Justice Finley's observations in *Carter I*., 536 P.2d at 620-21.

[48] Iverson, 517 P.2d at 199.

[49] *See* discussion and text, *supra* notes 12-17.

[50] Carter I*,* 536 P.2d at 625.

[51] Housing Authority*,* 557 P.2d at 327 (observing that "[a]ccess to the courts is amply and expressly protected by other provisions").

[52] Carter I*,* 536 P.2d. *Accord* Ford Motor Co. v. Barrett, 800 P.2d **at** 367 (Wash. 1990).

[53] Doe*,* 819 P.2d (though no source of the right itself is disclosed).

[54] *See* Miranda*,* 991 P.2d at 687 ("[T]he right of access to the courts is fundamental to our system of justice. Indeed, it is the right "conservative of all other rights." [citation omitted] . " . . . [M]eaningful access requires representation. Where rights and responsibilities are adjudicated in the absence of representation, the results are often unjust. If representation is absent because of a litigant's poverty, then likely so is justice, and for the same reason.").

[55] That the provisions of the Constitution were intended, through the operation of Washington Constitution article. CONST. art. I, section 29 to be individually enforceable, was confirmed by Convention Delegate (and later Supreme Court Justice) Theodore Stiles. Writing nearly twenty-five years after the 1889 convention, Stiles observed:

> There have been some excellent provisions in the constitution from which the people have had no benefit, because they depend for operation upon action by the legislature, and that body has neglected to do its duty in the premises. Considering that by section 29 of the first article every direction contained in the constitution is mandatory unless expressly declared to be otherwise, it is at least surprising that in some instances no attempt has been made whatever to set these provisions at their legitimate work.

Theodore L. Stiles, *Effects of State Constitution on Public Interests,* WASHINGTON HISTORICAL QUARTERLY, Vol. IV, No. 4 WASH. HIST. Q. 281, 286 (1913).

[56] WASH. CONST. art. 1, § 32.

[57] *See* JOURNAL OF CONVENTION, *supra* note 43, at 516-17 (Beverly Paulik Rosenow ed. 1999). These referenced provisions were not unique to Wisconsin, Illinois or New

Hampshire. They incorporate and carry forward an uninterrupted history of state constitutions expressly recognizing fundamental principles as tools for constitutional interpretation as society evolves. *See, e.g.,* PA. CONST. of 1776, art. XIV (asserting "[t]hat a *frequent recurrence to fundamental principles*, and a firm adherence to justice, moderation, temperance, industry, and frugality are absolutely necessary to preserve the blessings of liberty, and keep a government free: the people ought therefore to pay particular attention to these points in the choice of officers and representatives, and have a right to exact a due and constant regard to them, from their legislatures and magistrates, in the making and executing such laws as are necessary for the good government of the state.") (emphasis supplied); VA. CONST. of 1776, § 15 (asserting "[t]hat no free government, or the blessings of liberty, can be preserved to any people, but by a firm adherence to justice, moderation, temperance, frugality, and virtue, and by *frequent recurrence to fundamental principles*.") (emphasis supplied).

[58] For further discussion on this point, *see* Perluss, *supra* note 1312, at 584. *See also* State v. Seeley, 940 P.2d 604, 621 (Wash. 1997) (noting that art. I, sec. 32 is most often employed by the courts as an "interpretive mechanism" to determine the substance and scope of individual rights that find their origins under natural rights theory); Brian Snure, *Comment, A Frequent Recurrence to Fundamental Principles: Individual Rights, Free Government, and the Washington State Constitution*, 67 WASH. L. REV. 669, 676 (1992).

[59] This discussion does not look to (nor is it bound by) precedent interpreting the due process, equal protection and privileges and immunities clauses of the federal constitution and the Fourteenth Amendment. Washington State stands in relation to the federal government as a co-equal grantor of powers. In this sense, it predates the federal constitution and is host to the first line of delegated sovereignty and constitutional inquiry. Given the hierarchy of sovereignty relationships and conferrals of authority in our federal system (i.e., the people grant limited sovereignty to the state, which in turn grants an even more limited scope of authority to the federal government), independent analysis of state declarations of rights is, and must be, the first order of constitutional inquiry. *See* State v. Gunwall, 720 P.2d 808 (Wash. 1986); *See also* State v. Smith, 814 P.2d 652, 662 (Wash. 1991) (Utter, J. concurring) (stating "[s]tate constitutions were originally intended to be the primary devices to protect individual rights, with the federal constitution a secondary layer of protection. Accordingly they were intended to provide broader protection [than their federal counterpart]."). The purpose of the state constitution—including that portion of the constitution that articulates and affirms fundamental individual rights and imposes limitations on the government that is being created —is different from that of its federal counterpart. There being no federal counterpart to Washington Constitution article. Const. art. I, sec. 10, *Gunwall* and its progeny make clear that an independent analysis of the state constitutional provision is indicated.

[60] As Justice Sutherland explained in the context of the right to counsel in criminal cases:

> The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself

> whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel, he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he has a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. If that be true of men of intelligence, how much more true is it of the ignorant and illiterate, or those of feeble intellect. If in any case, civil or criminal, a state or federal court were arbitrarily to refuse to hear a party by counsel, employed by and appearing for him, it reasonably may not be doubted that such a refusal would be a denial of a hearing, and, therefore, of due process in the constitutional sense.

Powell v. Alabama, 287 U.S. 45, 68-69 (1932).

[61] *Compare* WASH. CONST. art. I, § 22 (referencing an individual's right to appear by counsel in criminal cases).

[62] Although, such a right has long existed in English statutory law. *See* 11 Hen. 7, ch. 12 (1495), *reprinted in* 2 STAT. OF THE REALM 578 (1969). In recent years, the right has been effectuated through the English legal aid system. *See* Perluss, *supra* note 13, at 586-87.

[63] Iverson*,* 517 P.2d at 199.

[64] Carter I, 536 P.2d at 620.

[65] *See* WASH. REV. CODE § 12.40.010 (2005).

[66] WASH. REV. CODE § 12.40.080 (2005) reads:

> Hearing. (1) No attorney at law, legal paraprofessional, nor any person other than the plaintiff and defendant, shall appear or participate with the prosecution or defense of litigation in the small claims department without the consent of the judicial officer hearing the case. A corporation may not be represented by an attorney at law or legal paraprofessional except as set forth in WASH. REV. CODE § 12.40.025.
> (2) In the small claims department it shall not be necessary to summon witnesses, but the plaintiff and defendant in any claim shall have the privilege of offering evidence in their behalf by witnesses appearing at trial.
> (3) The judge may informally consult witnesses or otherwise investigate the controversy between the parties and give judgment or make such orders as the judge may deem to be right, just, and equitable for the disposition of the controversy.

[67] The right attaches in favor of those who meet the standard of indigency applicable to proceeding *in forma pauperis*.

[68] If private counsel is available, no right to counsel at public expense would attach.

[69] *See* Major Prods. Co., 979 P.2d at 907-8 (appointing the University of Washington Legal Clinic to assist the unrepresented respondents).

[70] WASH. CONST. art. IV, § 6.

[71] *See generally* WASH. ST. CT. CODE OF JUDICIAL CONDUCT (CJC), Cannon 3(A).
[72] *See, e.g.,* WASH. REV. CODE § 26.09.006 (2005) (mandatory use of approved forms); WASH. REV. CODE § 26.09.181 (2005) (procedure for establishing a parenting plan).
[73] Acting pursuant to WASH. REV. CODE § 26.12.240, most counties have hired full or part time courthouse-based family law facilitators who provide basic information and services to *pro se* family law litigants. Activities of courthouse facilitators are governed by WASH. ST. CT. GENERAL R. 27, *available at* http://www.courts.was.gov/court_rules (last visited Dec. 2, 2005). They may not provide individualized legal advice or assistance.
[74] Scores of self-help information packets are available on the statewide Washington Law Help website maintained by the Northwest Justice Project are available at www.washingtonlawhelp.org.
[75] The proliferation of self-help materials contributes to a false sense that low-income people can represent themselves competently in complex, contested family law matters. As one superior court judge recently explained:

> When designing a delivery system, we need to continue to remind ourselves, and the low- and moderate-income litigants, that they cannot represent themselves effectively. What with all the mandatory and other forms, facilitators and the like, the implicit message to folks is not only can they represent themselves but they can do it effectively. Allowing that implicit message to continue misrepresents how the system works to low- and moderate-income people. Self-representation may be the only option for low-/moderate-income people, but we still owe them a duty to be honest about the process.

CIVIL LEGAL NEEDS STUDY, *supra* note 8, at 82.
[76] Comprehensive substantive and procedural laws governing dissolution, parenting plans / child residential placement / basis for limitations, property disposition, child support, etc. are codified in Washington statute. WASH. REV. CODE § 26.09.
[77] The state must appoint counsel for parents in state-initiated dependency proceedings. WASH. REV. CODE § 13.34.090(2) (2005). Civil proceedings under Title 26.09 do not currently require the appointment of counsel for unrepresented parents.
[78] Regarding a parent's constitutionally protected substantive due process-based liberty interests regarding child rearing decisions, *see* In re the Parentage of: C.A.M.A, 109 P.3d 405, 408 (Wash. 2005)*;* In re Smith, 969 P.2d 21, 27 (Wash. 1998); Troxel v. Granville, 530 U.S. 57, 65-66 (2000).
[79] WASH. R. PROF. CONDUCT 1.5(d)(1).
[80] NORTHWEST JUSTICE PROJECT, FOURTH QUARTER 2004 ADVOCACY REPORT 14 (2004). Northwest Justice Project (NJP) is the principal statewide legal aid provider in Washington State. Review of this report provides additional insight into a broad spectrum of civil cases where counsel must be required in order for individuals to secure meaningful access to the courts.
[81] Housing related legal problems represent one-sixth of all issues reported in the Civil Legal Needs Study. *See* CIVIL LEGAL NEEDS STUDY, *supra* note 8, at 34.
[82] WASH. REV. CODE § 59.12.050 (2005).

[83] WASH. REV. CODE § 59.18.290 (2005).
[84] Munden v. Hazelrigg, 711 P.2d 295, 298 (Wash. 1985).
[85] The procedure is outlined in the state statute. WASH. REV. CODE § 59.12.010-030 (2005); WASH. REV. CODE §§ 59.18.365-410 (2005).
[86] §§ 59.18.365-410.
[87] *Id.*
[88] *E.g.,* Washington's Law Against Discrimination, WASH. REV. CODE § 49.60.010 (2005); Fair Housing Act, 42 U.S.C.S. § 3601 *et seq*.; Americans with Disabilities Act, 42 U.S.C. § 12101.
[89] See WASH. REV. CODE § 59.18.580 (2005) (prohibiting actions to terminate a tenancy on the basis of a tenant's status as a victim of domestic violence), which statute ultimately served as the basis for the court's dismissal of the landlord's claim with prejudice.
[90] Factually, the rent had been paid. Legally, provisions in the Residential Landlord Tenant Act protect residents from eviction due to the tenant's status as a victim of domestic violence or sexual assault. § 59.18.580.
[91] MAGNA CARTA art. 40.
[92] *See, e.g*., MD. CONST. 1776, art. XVII, XVIII (1776).
XVII. That every freeman, for any injury done him in his person or property, ought to have remedy, by the course of the law of the land, and ought to have justice and right freely without sale, fully without any denial, and speedily without delay, according to the law of the land.
XVIII. That the trial of facts where they arise, is one of the greatest securities of the lives, liberties and estates of the people.
See also THE FUNDAMENTAL CONSTITUTIONS FOR THE PROVINCE OF EAST NEW JERSEY IN AMERICA (1689), art. XIX:

> That no person or persons within the said Province shall be taken and imprisoned, or be devised of his freehold, free custom or liberty, or be outlawed or exiled, or any other way destroyed; nor shall they be condemned or judgment pass'd upon them, but by lawful judgment of their peers: neither shall justice nor right be bought or sold, deferred or delayed, to any person whatsoever: … And in all courts persons of all persuasions may freely appear in their own way, and according to their own manner, and there personally plead their own causes themselves, or if unable, by their friends, no person being allowed to take money for pleading or advice in such cases . . .

See also N.C. CONST. 1776, art. XIV (1776) (stating "[t]hat in all controversies at law, respecting property, the ancient mode of trial, by jury, is one of the best securities of the rights of the people, and ought to remain sacred and inviolable").
[93] This discussion incorporates the earlier discussion of what is meant by "meaningful access." As employed in the analysis of Washington Constitution article. CONST. art. I, sec. 10, "meaningful access" is "the capacity to appear and effectively participate in proceedings properly presented to the court in a manner that will allow the court to operate properly carry out its adjudicative function to the end that justice can be done."
[94] WASH. CONST. art. I, § 12.

[95] *Id.*
[96] *See* State v. Manussier, 921 P.2d 473, 482 (Wash. 1996) (stating that "[t]his court has consistently construed the federal and state equal protection clauses identically and considered claims arising under their scope as one issue."). *See also* Grant County Fire Protection Dist. No. 5 v. Moses Lake, 83 P.3d 419, 425 (Wash. 2004) [hereinafter *Grant County II*] (explaining that because of the unique development (or lack thereof) of federal case law since the Slaughter-House Cases, 83 U.S. 36 (1872), the state privileges and immunities clause, art. 1, sec. 12, has been compared with the federal equal protection clause rather than its more logical counterpart, the federal privileges and immunities clause, U.S. CONST., art. IV, § sec. 2).
[97] The criticism and encouragement had come from members of the court itself (*e.g.,* State v Smith, 814 P.2d at 662, and from commentators. *See, e.g*., David Schuman, *The Right to "Equal Privileges and Immunities": A State's Version of "Equal Protection,"* 13 VT. L. REV. 221, 221 (1988); Jonathan Thompson, *The Washington Constitution's Prohibition on Special Privileges and Immunities: Real Bite for "Equal Protection" Review of Regulatory Legislation?,* 69 TEMP. L. REV. 1247, 1251 (1996); Jeffrey M. Shaman, *The Evolution of Equality in State Constitutional Law,* 34 RUTGERS L .J. 1013, 1043 (2003); Barbara Mahoney, The Meaning of the Privileges and Immunities Clause in the Washington State Constitution (2001) (unpublished manuscript, on file with author and referenced in Justice Sanders' dissent in Grant County Fire Protection Dist. No. 5 v. Moses Lake, 42 P.3d 394, 416 (Wash. 2002)) [hereinafter *Grant County I*].
[98] Rosenow observes that art. I, sec. 12 was borrowed from the Oregon, Hill draft (borrowed from California) and Indiana constitutions. JOURNAL OF CONVENTION, *supra* note 43, at 501 n. 1. In recent years both the Oregon and Indiana Supreme Courts have deviated from the traditional conclusion that the rights protected by these state privileges and immunities clauses were coextensive with those protected under federal equal protection analysis, and have developed an independent state constitutional framework for considering claims that legislative classifications confer special privileges or immunities in violation of these provisions. *See, e.g.,* State v. Clark, 630 P.2d 810, 814-815 (Or. 1981) (noting that the state privileges and immunities clause "forbids inequality of privileges or immunities not available 'upon the same terms,' first, to any citizen, and second, to any class of citizens."); Collins v. Day, 644 N.E.2d 72, 77 (Ind. 1994) (reasoning that the Indiana privileges and immunities clause intended to preclude the legislature from conferring affirmative and special privileges to some citizens, but was not intended to be an assurance of equal protections of the laws). Unfortunately, the jurisprudence that has developed in each of these states turns out to be more in the nature of a highly deferential equal-protection analysis than an independent assessment of the constitutionality of state conduct that interferes with "fundamental rights that are incidents of state citizenship." *See, e.g.,* In Re Marriage of Crocker, 22 P.3d 759, 766 (Or. 2001); Humphreys v. Clinic for Women,,796 N.E.2d 247, 253 (Ind. 2003); Morrison v. Sadler, 821 N.E.2d 15, 21 (Ind. Ct. App. 2005). *See also*, Jon Laramore, *Indiana Constitutional Developments: The Wind Shifts,* 36 IND. L. REV. 961, 964 n.29 (2003).
[99] Grant County II, 83 P.3d 419.
[100] *Id.* The scope of individual protections and the corresponding limitations on governmental conduct established by the privileges and immunities clause are likely to be

addressed in greater detail when the Washington Supreme Court issues its opinion in Andersen v. King County, No. 3-75934-1 (argued Mar. 8, 2005).
[101] The special privileges and immunities inquiry is independent of the equal protection inquiry conducted under the same section, jurisprudential authority for which did not appear to be affected by the Grant County II decision.
[102] Grant County II*,* 83 P.3d at 428.
[103] State v. Vance, 70 P. 34, 41 (Wash. 1902).
[104] *Id.* (citing THOMAS COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATE OF THE AMERICAN UNION 597 (1868)).
[105] *Id.*; *See also* The Slaughter-House Cases , 83 U.S. 36, 37 (1872) (Bradley, J., dissenting), citing the famous observation of Justice Bushrod Washington in Corfield v. Coryell, to the effect that that the privileges and immunities of the citizens of the several states (as opposed to citizens of the United States) at the time of the ratification of the federal constitution included, among the many rights that would be "more tedious than difficult to enumerate," is the right "to institute and maintain actions of any kind in the courts of the state.").
[106] *See* Grant County II*,* 83 P.3d at 426 (citing Thompson, *supra* note 97, at 1253). *See also* Hale v. Port of Portland, 783 P.2d 506, 515 (Or. 1989) (noting that "[t]he original target of this constitutional prohibition was the abuse of governmental authority to provide special privileges or immunities *for* favored individuals or classes, not discrimination *against* disfavored ones.").
[107] Grant County II involved a statutory scheme granting annexation petition rights to some but not others.
[108] Washington Constitution article. CONST. art. IV, section, § 1 is a grant of authority to the judiciary to establish and maintain a system for the fair, proper, and equitable administration of justice.
[109] In this case, the class includes those who need the assistance of legal counsel to meaningfully participate in court proceedings, but who cannot afford to do so and, as a consequence, are effectively denied the ability to assert, enforce, or defend their legal rights in said court proceedings.
[110] For example, the fundamental right of meaningful access.
[111] Those who have the ability to retain legal counsel and meaningfully participate in the judicial forum.
[112] Iverson*,* 517 P.2d at 199.
[113] WASH. CONST. art. IV, § 1.
[114] MAGNA CARTA, art. 40.
[115] The Federalist No. 78 (Alexander Hamiliton, FEDERALIST NO. 78, THE JUDICIARY (McLean's ed., May 28, 1788).
[116] Convention for the Protection of Human rights and Fundamental Freedoms art. 6, Nov. 4, 1950, art. 6, para. 1, 213 U.N.T.S. 222, 228 (emphasis supplied).
[117] Compare this language with Washington Constitution article. CONST. art. 1, sec. § 10, which states that "[j]ustice in all cases shall be administered openly, and without unnecessary delay."

[118] Airey v. Ireland, 32 Eur. Ct. H.R. Rep. (ser. A) 305 (1979), *available at,* http://www.worldlii.org/eu/cases/ECHR/1979/3.html (last visited Nov. 5, 2005).
[119] *Id*.
[120] *Id*. at ¶ 24.
[121] *Id*. at ¶ 26.
[122] *Id.* at ¶ 26, 28.
[123] Steel & Morris v. U.K., 41X Eur. Ct. H.R. Rep. 22, (2005), *available at,* http://www.worldlii.org/eu/cases/ECHR/2005/103.html.
[124] *Id.* at ¶ 12.
[125] Under England's Legal Aid Act of 1988, libel actions were categorically excluded from those cases for which legal counsel would be provided. *Id.* at para. 41.
[126] *Id.* at ¶ 35.
[127] *Id*. at ¶ 72.
[128] *Id.* at ¶ 59.
[129] *Id.* at ¶ 60-61.
[130] *Id.* at ¶ 62.
[131] *Id.* at ¶ 63.
[132] *Id.*
[133] *Id.*
[134] *Id.* at ¶ 64, 66.
[135] *Id.* at ¶ 67.
[136] *See id.* at ¶ 72.
[137] *Id.*