North Dakota Law Review

Volume 69 | Number 2 Article 6

1993

Sovereign Immunity: An Outdated Doctrine Faces Demise in a Changing Judicial Arena

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SOVEREIGN IMMUNITY: AN OUTDATED DOCTRINE FACES DEMISE IN A CHANGING JUDICIAL ARENA

I. INTRODUCTION

Sovereign immunity is a judicial doctrine which precludes a plaintiff from holding a state liable for tortious conduct committed by state agencies unless the state expressly consents to suit.[1] The proclaimed basis for sovereign immunity in North Dakota rests in article I, section 9 of the North Dakota Constitution.[2] Although the doctrine has been challenged numerous times in the past,[3] the North Dakota Supreme Court has continuously held that the abrogation of sovereign immunity is a function vested solely within the province of the legislature.[4] However, with the recent election of two new justices to the North Dakota Supreme Court, the former majority vote could swing in favor of abolishing sovereign immunity and thus render North Dakota accountable for the tortious actions of its agents.

The purpose of this Note is to illustrate that sovereign immunity, a doctrine which lacks historical accuracy, which has been misapplied from its inception in America, and which has been upheld on precedent alone should be abolished. This Note will trace the development of the doctrine of sovereign immunity from its origin in feudal England to its present application in North Dakota. Next, this Note will utilize the rules and standards of constitutional interpretation to illustrate that the current application of sovereign immunity in North Dakota is untenable. Finally, this Note will review changes which are likely to have an effect on the longevity of sovereign immunity in North Dakota, and conclude with recommendations for the abolition of this doctrine.[5]

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1. RESTATEMENT (SECOND) OF TORTS § 895B (1979); BLACK'S LAW DICTIONARY 1396 (6th ed. 1990).

2. Schloesser v. Larson, 458 N.W.2d 257, 258-59 (N.D. 1990). The court has consistently construed article I, section 9 as prohibiting suit against the State absent legislative authorization for such suit. *Id.* For a discussion of the constitutional basis for sovereign immunity in North Dakota *see infra* notes 94-100 and accompanying text.

3. See *infra* note 84 and accompanying text for a list of cases in which the doctrine of sovereign immunity has been challenged in North Dakota.

4. Leadbetter v. Rose, 467 N.W.2d 431, 434 (N.D. 1991). *See* Senger v. Hulstrand Constr., Inc., 320 N.W.2d 507, 510 (N.D. 1982). For a discussion of the legislature's authority to abolish sovereign immunity, see *infra* notes 123-26 & 132-34 and accompanying text.

5. The abrogation of sovereign immunity should not, however, subject all levels and functions of State government to liability for its actions. *See* Kitto v. Minot Park Dist., 224 N.W.2d 795, 804 (N.D. 1974) (stating that the acts and omissions of governmental entities that are traditionally considered judicial or quasi-judicial or legislative or quasi-legislative

II. THE DEVELOPMENT OF THE DOCTRINE OF SOVEREIGN IMMUNITY

A. SOVEREIGN IMMUNITY IN ENGLAND

The origin of sovereign immunity can be traced to 1215 A.D. when King John first granted liberties to his subjects through the Magna Charta.[6] The Magna Charta provided that "[t]o none will we sell, to none will we deny, or delay, right or justice."[7] These guarantees are a fundamental component of article I, section 9 of the North Dakota Constitution—the article which is viewed as the basis for North Dakota's sovereign immunity.[8] Apparently article I, section 11 of the Pennsylvania Constitution (the constitutional article after which North Dakota article I, section 9 is modeled)[9] attempted to paraphrase language in the Magna Charta.[10] However, the Magna Charta also granted to the king's subjects the right to be restored of "lands, castles, liberties, or right[s]" which had been taken without legal process,[11] and further declared that no concessions or liberties granted would be revoked or lessened.[12] In addition, it guaranteed that, if any right or privilege therein granted was revoked or lessened, such revocation would be null and void, and that the "thing" obtained would never be used.[13] Thus, even under the Magna Charta, sovereign immunity did not operate to completely bar claims against the king.[14]

At early common law, the doctrine of sovereign immunity

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should remain immune from suit). *See also* KEETON ET AL., *infra* note 172, at 1046. Governmental actions involving discretionary functions or policy decisions made by executive-branch employees should be protected from suit. *Id.*

6. THE MAGNA CHARTA, *reprinted in* 13 N.D. CENT. CODE 1-9 (1981).

7. *Id.* at 5 (40th provision).

8. Schloesser v. Larson, 458 N.W.2d 257, 258-59 (N.D. 1990). *See* Dickinson Pub. Sch. Dist. v. Sanstead, 425 N.W.2d 906, 911 n.2 (N.D. 1988) (Meschke, J., concurring) (noting that article I, section 9 of the North Dakota Constitution stems from the Magna Charta and a similar Pennsylvania constitutional provision).

9. See *infra* notes 94-95 and accompanying text for a discussion of the similarity of North Dakota Constitution article I, section 9 and Pennsylvania Constitution article I, section 11.

10. KFGO Radio, Inc., v. Rothe, 298 N.W.2d 505, 510 (N.D. 1980). The Magna Charta contained a clause which stated " '*Nulli vendemus, nulli negabimus aut differemus rectum vel justitiam*,' " which is translated to mean "[w]e neither sell nor deny, nor delay, to any person, equity or justice." BLACK'S LAW DICTIONARY 1067 (6th ed. 1990). This translation is paraphrased in the second clause of the first sentence of article I, section 9 (formerly article I, section 22) of the North Dakota Constitution. *Rothe*, 298 N.W.2d at 510. For the text of article I, section 9, see *infra* note 94 and accompanying text.

11. THE MAGNA CHARTA, *reprinted in* 13 N.D. CENT. CODE 6 (1981) (52nd provision).

12. *Id.* at 8 (62nd provision).

13. *Id.* The fact that the "thing" obtained would never be used seems to indicate that, if a right or privilege were taken away from the king's subjects, then the revoked right or privilege could not be used by the king to the detriment of his subjects. *Id.*

14. *See infra* notes 15-29 and accompanying text for a discussion of the qualified immunity of the king.

rarely denied relief for injuries inflicted by the crown and thus immunity of the sovereign is not an accurate reflection of English history. In the 13th century, ordinary writs were not enforceable against the king and he could not be directly subjected to the law; however, the king was required to do the same justice to his subjects as he required the subjects to do to each other.[15] The king was neither above the law nor obliged to defend in his own court.[16] Rather, the king was expected to obey the law, and in return the law gave the king a special position known as the king's prerogative.[17] In the 16th century, the king's powers became the state's powers and the king's prerogative became state sovereign immunity.[18]

The realization that immunity was a contradiction of the king's sovereignty dates back to ancient times when it was recognized that even though the sovereign could claim immunity, the right to sue was the primary purpose behind the creation and establishment of the king's courts.[19] It was admitted that the king, who served as the fountain of equity and justice, would not refuse to redress injuries when petitioned by his subjects because refusing redress would derogate from his honor.[20] It seemed inconceivable that what was equitable for a common person was not equitable for the king.[21] In fact, the maxim *rex non potest peccare* or "the king can do no wrong" was always subject to the qualification that, for all of the king's acts, some minister was liable and not

15. 9 W.S. HOLDSWORTH, A HISTORY OF ENGLISH LAW 9-10 (1926). *See also* Smith v. State, 473 P.2d 937, 941 (Idaho 1970).

16. 1 FREDERICK POLLOCK & FREDERIC W. MAITLAND, THE HISTORY OF ENGLISH LAW 515-18 (2d ed. 1968) (1895). "The king can do wrong; he can break the law; he is below the law, though he is below no man and below no court of law." *Id.* at 515-16. The authors further note that although the status of the king's court as the highest court arises by accident, this "accident" allows the king to refuse to answer in his own court. *Id.* at 518.

17. Ludwik Ehrlich, *Proceedings Against The Crown* (1216-1377), *in* OXFORD STUDIES IN SOCIAL AND LEGAL HISTORY 56-57 (Sir Paul Vinogradoff ed., 1921). This prerogative provided for new royal privileges, but neither allowed the king's charter to be denied nor allowed costs to be assessed against the king. *Id.* at 56-57. *See also* 1 POLLOCK & MAITLAND, *supra* note 16, at 512. Prerogative suggests that the king has the same rights as others at common law, but that these rights are intensified when applied to the king. *Id.* at 512.

18. Biello v. Pennsylvania Liquor Control Bd., 301 A.2d 849, 853 (Pa. 1973) (Nix, J., dissenting), *overruled by* Mayle v. Pennsylvania Dept. of Highways, 388 A.2d 709 (Pa. 1978).

19. RESTATEMENT (SECOND) OF TORTS Ch. 45A (1979).

20. 9 HOLDSWORTH, *supra* note 15, at 8.

21. *Biello*, 301 A.2d at 853 (Nix, J., dissenting). *Biello* involved a wrongful death action against a state agency. *Id.* at 850. In its opinion, the court discussed the history of sovereign immunity, construed article I, section 11 of the Pennsylvania Constitution as mandating sovereign immunity, and denied Biello's claim. *Id.* at 850-55. Article I, section 11 of the Pennsylvania Constitution and North Dakota Constitution article I, section 9 are virtually identical in wording. *See infra* notes 94-95 and accompanying text.

immune from suit.[22]

Although the king could not be sued and thereby compelled to answer in his own courts, there existed alternative methods of obtaining reparations for wrongs inflicted in the king's name. A subject who had been wronged could bring a petition of right against the king[23] or the Court of Exchequer could invoke its King's Bench power and award relief to the injured subject.[24] If the subject chose the petition of right, the government would give its permission by responding: "Let right be done."[25] However, the procedure which allowed a petition of right was never transferred to the United States.[26] Rather, when the monarchy was replaced by modern states, the erroneous justification for sovereign immunity, "that to allow a suit against a ruling government without its consent was inconsistent with the very idea of supreme executive power," was transferred to the states.[27] This transferred justification was erroneous because the individual states did not recognize that the English courts had been established to provide a method by which people injured by the king could obtain reparation for their injuries.[28] Therefore, the principle of "sovereign immunity" should be construed against its meaning as understood in America when it was adopted.[29]

B. SOVEREIGN IMMUNITY IN EARLY AMERICA

History is unclear regarding which American governmental entity was responsible for usurping the English doctrine of sovereign immunity to the United States. Neither the drafters of the United States Constitution nor early colonial legislative assemblies were responsible for the doctrine's development within

22. RESTATEMENT (SECOND) OF TORTS ch. 45A at 394 (1979).

23. 9 HOLDSWORTH, *supra* note 15, at 8. If the king acceded to the petition of right, the courts were then allowed to give the petitioner redress. *Id.* However, it was common to encounter many procedural steps and infinite delays even if the writ was endorsed. *Id.*

24. *Biello*, 301 A.2d at 853.

25. RESTATEMENT (SECOND) OF TORTS ch. 45A, at 394 (1979). "Let right be done" was the English government's method of endorsing the petition and thus providing for a resolution of the subject's claim in a proper court. *Id.*

26. *Id.* The individual states did not adopt the procedure of " 'Let[ting] right be done' " for injuries inflicted by the state. *Id.* Had individual states adopted that procedure, it would then have been possible for people injured by state actions to obtain redress for their injuries, and thus equity and justice would have been granted.

27. *Id.*

28. *Id.*

29. Jerome S. Sloan, *Lessons in Constitutional Interpretation: Sovereign Immunity in Pennsylvania*, 82 DICK. L. REV. 209, 223 (1978). Professor Sloan offers "observations on both history and charts, which ineluctably demonstrate that the lawyer-draftsman framers of the 1790 [Pennsylvania] Constitution could not possibly have said that [the state] is immune from all lawsuits without its consent." *Id.* at 211. Dickinson Pub. Sch. Dist. v. Sanstead, 425 N.W.2d 906, 911 n.2 (N.D. 1988) (Meschke, J., concurring).

America.[30] Nonetheless, courts adopted sovereign immunity as a common law doctrine following the Revolutionary War, based on the premise that the fledgling government was not financially secure enough to allow claims of negligence to be brought against it.[31]

Respublica v. Sparhawk[32] was the first United States case in which sovereign immunity was applied to bar recovery from a state. Sparhawk, a Pennsylvania citizen, placed 323 barrels of flour in a storage depot as mandated by the Pennsylvania board of war.[33] Sparhawk later brought suit to recover the price of 227 barrels of flour which were lost when the depot fell into enemy hands.[34] In denying Sparhawk recovery, the Court noted that the loss occurred *flagrante bello*[35] and concluded that many acts which are lawful during war are not lawful during a time of peace.[36] The Court opined that the removal of the flour was a "natural and necessary incident" of war which was lawful and reasoned that this "taking" was necessary for the public good and safety.[37] Thus, sovereign immunity began with a case which would have differed in outcome if not for the war.

The first nonwar court to adopt sovereign immunity in the United States was *Mower v. Leicester*.[38] Mower brought suit against an incorporated town for injuries caused to his horse while traversing a defective bridge.[39] The court noted that the action

30. 3 KENNETH C. DAVIS, ADMINISTRATIVE LAW TREATISE 438 (1958).

31. Campbell v. State, 284 N.E.2d 733, 734 (Ind. 1972). Authorities point to the English case of Russell v. Men of Devon, 100 Eng. Rep. 359 (1788), as being the stimulus for early America's adoption of sovereign immunity. Kitto v. Minot Park Dist., 224 N.W.2d 795, 798 (N.D. 1974). *Russell* involved a claim against an unincorporated county for damages caused to a wagon traversing a county bridge. *Russell*, 100 Eng. Rep. at 359-60. The court denied recovery on the ground that the county lacked a fund with which to pay damages and because it feared that an infinity of actions would accompany a decision holding the county liable. *Id.* at 362. *See* Kitto v. Minot Park Dist., 224 N.W.2d 795, 798 (N.D. 1974).

32. 1 U.S. (1 Dall.) 357 (1788).

33. Respublica v. Sparhawk, 1 U.S. (1 Dall.) 357, 357-58 (1788). The Pennsylvania board of war was acting pursuant to a congressional resolution which directed that measures be taken to prevent "provisions from falling into the hands of the enemy." *Id.* at 357.

34. *Id.*

35. *Id.* at 362. "Flagrante bello" is defined as "[d]uring an actual state of war." BLACK'S LAW DICTIONARY 639 (6th ed. 1990).

36. *Sparhawk*, 1 U.S. (1 Dall.) at 362. The Court recognized that seizure of the flour without compensation could "only be justified under this distinction" and stated that it was "better to suffer a private mischief, than a public inconvenience." *Id.* The "distinction" recognized by the court was that the seizure of the flour had occurred during a state of war rather than "in a time of peace." *Id.*

37. *Id.* at 363.

38. 9 Mass. 247 (1812). *See* Holytz v. City of Milwaukee, 115 N.W.2d 618, 620 (Wis. 1962).

39. *Mower v. Leicester*, 9 Mass. 247, 248 (1812).

arose under common law and without the town's knowledge of the defect, and stated that towns were not liable for the neglect of their duties unless a statute provided for such liability.[40] The court concluded by stating that "[t]he only action furnished by statute in this case [was] for double damages after notice," and reasoned that the lack of a fund with which to pay damages and the possible infinity of actions which might accompany a decision holding the town liable prevented Mower from recovering.[41] Thus, the early American judges who employed and modified the doctrine of sovereign immunity confused the outcome of a judgment holding an *unincorporated* county liable with the outcome of a judgment holding an *incorporated* county liable.[42]

C. SOVEREIGN IMMUNITY IN NORTH DAKOTA

In order to clearly understand the application of sovereign immunity in North Dakota, one must understand the *differences* between *governmental immunity* and *sovereign immunity.* Although there are numerous similarities between governmental immunity and sovereign immunity, the North Dakota Supreme Court recognizes a distinction between them.[43] However, the two terms are used interchangeably, and an argument advocating the applicability of one immunity inevitably involves a discussion of the other immunity.[44] Sovereign immunity is the state's immunity

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40. *Id.* at 250.

41. *Id.* The court stated that the reasoning in *Russell v. Men of Devon* with respect to damages was conclusive against allowing the action commenced by Mower. *Id. Russell v. Men of Devon*, 100 Eng. Rep. 359 (1788), involved a claim against an *unincorporated county* for damages caused to a wagon traversing a county bridge. *Id.* at 359-60. The *Russell* court denied recovery because the court could find no law or reason which supported the action, because the county lacked a fund with which to pay damages since it was unincorporated, and because of a fear of the resulting infinity of actions which might accompany a decision holding the county liable. *Id.* at 362. *However*, the town of Leicester was a "corporation created by statute, capable of suing and being sued." *Mower*, 9 Mass. at 249. Furthermore, the town was "bound by statute to keep the public highways in repair," and had "a treasury, out of which judgments recovered against [the town could] be satisfied." *Id.*

42. *See* 3 DAVIS, *supra* note 30, at 438. *See also* Muskopf v. Corning Hosp. Dist., 359 P.2d 457, 458 (Cal. 1961). "From the beginning there has been misstatement, confusion, and retraction. At the earliest common law [common law England] the doctrine of 'sovereign immunity' did not produce the harsh results it does today." *Id.* The maxim that "the King can do no wrong," meant "that the king must not, was not allowed, not entitled, to do wrong; his acts, if against the law, were not legal acts, but iniuriae, [sic] wrongs." EHRLICH, *supra* note 17, at 42. Thus, judges who treated sovereign immunity as barring claims against the state did not understand that despite sovereign immunity, claims *could* be brought against the King or ruling government.

43. Kitto v. Minot Park Dist., 224 N.W.2d 795, 800 (N.D. 1974).

44. *See* RESTATEMENT (SECOND) OF TORTS Ch. 45A. In a section dealing with governmental immunity, the author notes that what is "commonly called governmental immunity" is sometimes referred to as "sovereign immunity." *Id.*; Leadbetter v. Rose, 467 N.W.2d 431 (N.D. 1991). In *Leadbetter*, a party challenged sovereign immunity and the

from suit, and governmental immunity is the immunity given to political subdivisions such as counties, cities, park districts, school districts, and townships.[45] While sovereign immunity remains valid in North Dakota, governmental immunity was abolished in *Kitto v. Minot Park Dist.*[46] Hereinafter, sovereign immunity will refer to the immunity of the state.

The first case in Dakota Territory to consider governmental liability in tort was *Larson v. City of Grand Forks.*[47] Larson's leg was broken when an awning which overhung a sidewalk fell upon him.[48] The court, in sustaining a 1,500 dollar verdict against the City of Grand Forks, ruled that municipal corporations were liable for injuries caused by a lack of care in the maintenance of streets.[49]

The first North Dakota case to deny governmental liability in tort was *Vail v. Town of Amenia*,[50] in which Vail sued the town of Amenia for personal injuries he sustained while crossing a public bridge.[51] The court denied relief to Vail and stated its concern that a judgment for Vail would impose financial distress on a sparsely populated town and thereby delay further development and settlement.[52]

The current interpretation of sovereign immunity in North Dakota began in *Wirtz v. Nestos*,[53] a case in which the North Dakota Supreme Court first offered a constitutional basis for the application of this doctrine.[54] In *Wirtz*, depositors of insolvent

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court discussed both governmental immunity and sovereign immunity. *Id.* Kitto v. Minot Park Dist., 224 N.W.2d 795 (N.D. 1974). In *Kitto*, a party challenged governmental immunity and the court discussed both sovereign immunity and governmental immunity. *Id.*

45. *Kitto*, 224 N.W.2d at 800, 802.

46. *Id.* at 804; see *infra* notes 76-81 and accompanying text for a discussion of *Kitto*.

47. 19 N.W. 414 (1884).

48. Larson v. City of Grand Forks, 19 N.W. 414, 415 (1884).

49. *Id.* at 416. The court stated that its holding was "in conformity with the act of this territory, which provides that every person who suffers a detriment from the unlawful act or omission of another may recover, from the person in fault, compensation therefor in money, which is called damages." *Id.*

50. 59 N.W. 1092 (N.D. 1894).

51. Vail v. Town of Amenia, 59 N.W. 1092, 1093 (N.D. 1894), *overruled by* Kitto v. Minot Park Dist., 224 N.W.2d 795 (N.D. 1974). Vail was injured when the traction engine he was operating fell through a bridge owned and maintained by the town of Amenia. *Vail*, 59 N.W. at 1093. It was established that the bridge had become rotten and dangerous and that the condition of the bridge was known to the town months before the injury occurred. *Id.*

52. *Vail*, 59 N.W. at 1095-96. The court stated that "[o]ne judgment against the town in a case of the character and seriousness disclosed in the complaint in this case would involve the town in financial distress from which it could not be extricated for years, and would greatly retard its further settlement and progress." *Id.* at 1095.

53. 200 N.W. 524 (N.D. 1924).

54. Wirtz v. Nestos, 200 N.W. 524, 534 (N.D. 1924). *See* Schloesser v. Larson, 458 N.W.2d 257, 261 (N.D. 1990) (Meschke, J., dissenting). "This perverse constitutional interpretation did not begin until *Wirtz v. Nestos* . . . ." *Id.* Kitto v. Minot Park Dist., 224

banks brought a proceeding in equity against the Depositors Guaranty Fund Commission in an effort to compel the commission to pay the insolvent banks' receivers an amount sufficient to reimburse the depositors.[55] The North Dakota Supreme Court, in holding that the commission was not subject to suit absent the consent of the State, quoted article I, section 22 of the North Dakota Constitution in support of its holding.[56]

Although the court based its holding on article I, section 22, the court's reliance on this constitutional provision seems misplaced. This reliance is odd because the court *first* held that the commission was not subject to suit absent the consent of the state and *then* referred to article I, section 22 in an effort to ascertain whether or not the constitution or general statutes provided authority for maintaining this action.[57] This is unusual because the court had never before been given the opportunity to delineate a basis for sovereign immunity.[58] Since this issue was one of first impression, it would have been logical to *first* use article I, section 22 to provide a basis for the "sovereign immunity—consent required" holding and *then* ascertain if there was a constitutional or statutory basis for the suit. Since this was not done, there seems to be no substantive basis for the court's holding that consent was essential to the maintenance of a suit against the state.[59]

The interpretation that the *Wirtz* court gave this section of the North Dakota Constitution appears to be a mere afterthought in an attempt to resolve the main issue facing the court.[60] The court neither attempted to trace the history of article I, section 22,[61] nor attempted to ascertain the intent behind the adoption of

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N.W.2d 795, 799 (N.D. 1974). "The first reference to a constitutional basis for immunity suit for governmental units was in 1924 . . . ." *Id.*

55. *Wirtz*, 200 N.W. at 525-26.

56. *Id.* at 534.

57. *Id.*

58. *See supra* note 54 and accompanying text for a discussion of the first case in which the North Dakota Supreme Court dealt with the issue of sovereign immunity.

59. For a discussion of the main issue facing the North Dakota Supreme Court in the first case which dealt with the issue of sovereign immunity, *see infra* note 60 and accompanying text.

60. Schloesser v. Larson, 458 N.W.2d 257, 261 (N.D. 1990) (Meschke, J., dissenting). *See* Wirtz v. Nestos, 200 N.W. 524 (N.D. 1924). The *Wirtz* court was attempting to establish the priority of unsecured depositors in the proceeds of the guarantee fund. *Id.* at 526. At the time of *Wirtz*, the guarantee fund contained about $400,000 and was faced with $8,000,000 of claims by depositors of 80 insolvent banking institutions. *Id.* Thus, the main issue in *Wirtz* was the priority of the depositors' claims on the guarantee fund and not whether the state could be sued. *Id.*

61. Pursuant to North Dakota Century Code § 46-03-11.1, the North Dakota Constitution was renumbered as of the publishing of North Dakota Century Code volume 13 in 1981. *See* N.D. CENT. CODE § 46-03-11.1 (Supp. 1991). This renumbering was undertaken in an effort to "correlate and integrate all constitutional provisions in a

this section.[62] In fact, the *Wirtz* court could not have intended that its holding would become the basis and precedent for barring recovery by people injured through the State's tortious conduct.[63] To avoid this result, the court specified that State agencies were not above and beyond the law or the Constitution.[64] The court further stated that citizen's rights to due process, "to the equal protection of the law, and to the enjoyment of the rights guaranteed by the Constitution of the state and of the nation, [would] be open to vindication, and their violation to redress against [a state agency], no less than against any person, natural or artificial."[65] The *Wirtz* court concluded by stating that no rights of an injured party were at risk; but, if these rights were endangered by a State agency in the future, "*no injured person [would] be denied the redress or the remedies to which [they were] entitled under the fundamental law of the land.*"[66] This statement indicates that the court foresaw the need to allow recovery for tortious acts committed by the State, and that the court did not intend to establish sovereign immunity as a bar to such claims.

After *Wirtz*, article I, section 9 was not mentioned in a tort action against North Dakota until the 1958 case of *Spielman v. State*.[67] The *Spielman* court refused to allow Spielman to recover for injuries sustained when his vehicle was struck by a North Dakota State Highway Department truck.[68] The court deter-

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numbering arrangement that avoids ambiguity and duplication and that aids in placing constitutional amendments into the constitution." *Id.* As a result of this renumbering, article I, section 22 was renumbered as article I, section 9 and is thus a part of the Declaration of Rights provisions contained within the North Dakota Constitution. N.D. CONST. art. I. Hereinafter, former North Dakota Constitution article I, section 22, will be referred to as article I, section 9, even if this section is referred to in a time frame previous to the 1981 renumbering. For the text of article I, section 9, see *infra* note 94 and accompanying text.

62. *Schloesser*, 458 N.W.2d at 261. *See generally* Wirtz v. Nestos, 200 N.W. 524 (N.D. 1924). Although the *Wirtz* court quoted article I, section 22, it accepted the section on its face and did not address the conflict which occurs between the two clauses contained within the second sentence of that article. *See infra* notes 113-26 and accompanying text.

63. *Wirtz*, 200 N.W. at 535.

64. *Id.*

65. *Id.*

66. *Id.* (emphasis added).

67. 91 N.W.2d 627 (N.D. 1958).

68. Spielman v. State, 91 N.W.2d 627, 628-29 (N.D. 1958). Spielman brought an action against the State, the state highway department, and the highway department employee who was operating the truck involved in the collision. *Id.* at 628. The court determined that the State had not consented to suit and that the State and the state highway department were therefore immune. *Id.* at 630. However, the court noted that "governmental immunity does not protect an employee of the government from liability for negligent acts" committed by the employee and thus allowed the suit to proceed against the highway department employee. *Id.*

Contra Dickinson Pub. Sch. Dist. v. Sanstead, 425 N.W.2d 906, 908 n.3 (N.D. 1988). Today, the North Dakota Supreme Court treats a suit against a State official or against a State employee for acts or omissions undertaken in the employee's official capacity as

mined that although a statute existed which authorized the purchase of liability insurance,[69] the statute was merely permissive and did not waive the sovereign immunity of the State.[70]

The doctrine of sovereign immunity was asserted again in the 1971 case of *Wright v. State*,[71] in which the court failed to find a waiver of sovereign immunity even though liability insurance had been purchased for the State.[72] The court acknowledged that the State had an interest "in providing protection for its citizens who suffer injury at the hands of negligent State employees,"[73] but stated that this objective could be accomplished "by the purchase of liability insurance . . . without the State surrendering its constitutionally protected immunity from suit."[74] Therefore, the court construed the purchase of insurance not as a waiver of the State's sovereign immunity, but rather as the most flexible method of assuring that the government has "financially responsible employees."[75]

After *Wright*, the court did not refer to the sovereign immunity of the State until 1974 in *Kitto v. Minot Park District*.[76] Although *Kitto* involved a challenge to governmental immunity, its discussion is pertinent to any discussion of sovereign immunity since the protective measures taken when governmental immunity was abolished could be applied in a similar fashion if sovereign immunity were abolished. In *Kitto*, Mrs. Kitto brought suit against

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equivalent to a suit against North Dakota. *Id.*; Kristensen v. Strinden, 343 N.W.2d 67, 72 (N.D. 1983). *See* N.D. CENT. CODE § 32-12.1-15(2) (Supp. 1991). A State employee may not "be held liable in the employee's personal capacity for actions or omissions occurring within the scope of the employee's employment unless such actions or omissions constitute reckless or grossly negligent conduct, malfeasance, or willful or wanton misconduct." *Id.*

69. *Spielman*, 91 N.W.2d at 629.

70. *Id.* at 630. The court noted that it was clear "that the legislature did not intend by the mere enactment of the statute to waive in toto the state's immunity from liability resulting from injuries against which insurance might have been taken." *Id.*

71. 189 N.W.2d 675 (N.D. 1971).

72. Wright v. State, 189 N.W.2d 675, 679-80 (N.D. 1971). Wright brought an action against the State and the State Highway Department for injuries sustained in a collision with a North Dakota highway department vehicle. *Id.* at 676.

Cf. N.D. CENT. CODE §§ 32-12.1-05 and 32-12.1-15(1) (Supp. 1991). A State agency may insure "for its own protection or for the protection of any state employee." N.D. CENT. CODE § 32-12.1-15(1) (Supp. 1991). However, the purchase of insurance may not "be construed as a waiver of any existing immunity to suit." *Id.* Furthermore, an "insurer may not assert the defense of governmental immunity," and the insurer may not be sued directly by the claimant. N.D. CENT. CODE § 32-12.1-05 (Supp. 1991). Since North Dakota has provided for insurance, and in some instances actually obtained insurance coverage, there does not appear to be a valid reason for not allowing the State of North Dakota or its employees to be sued and held liable under circumstances in which a private tortfeasor would be liable.

73. *Wright*, 189 N.W.2d at 679.

74. *Id.*

75. *Id.* at 679-80.

76. 224 N.W.2d 795 (N.D. 1974).

the Minot Park District for the death of her son, who died as a result of his near-drowning in a park duck pond.[77] The court overruled previous decisions to the contrary and held "that governmental bodies, other than the state government, are subject to suit for damages to individuals injured by the negligent or wrongful acts or omissions of their agents and employees."[78] The holding of the *Kitto* court was a landmark decision because, for the first time since 1894, a North Dakota governmental agency was held liable for its wrongful acts.[79]

In addition to the *Kitto* holding, the case remains significant for several other reasons as well. The court acknowledged the injustice that immunity perpetuates and noted that immunity had "outlived its usefulness as a just instrument of governmental policy."[80] The court also specified that it recognized a distinction between governmental and sovereign immunity and that, since it viewed sovereign immunity as constitutionally mandated, sovereign immunity would not be revoked by the *Kitto* holding.[81] However, the court did state that the legislature should consider abolishing sovereign immunity.[82] This request seems to have fallen on deaf ears, because no legislative action aimed at abolishing sovereign immunity has been taken.[83]

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77. Kitto v. Minot Park Dist., 224 N.W.2d 795, 796-97 (N.D. 1974). The fence around the pond had been removed and Mrs. Kitto alleged that the unguarded pond was unsafe and constituted an attractive nuisance. *Id.* at 797. Her son was rescued from the pond, remained in a coma for 20 months, and later died. *Id.* at 796-97.

78. *Id.* at 797. The court noted that its holding was consistent with court decisions in 21 other states. *Id.* at 797 n.2.

79. The court had refused to allow recovery against a governmental agency since Vail v. Town of Amenia, 59 N.W. 1092 (N.D. 1894). *See supra* notes 50-52 and accompanying text.

80. *Kitto*, 224 N.W.2d at 798. The court adopted a critique from the New Mexico Supreme Court which found it incredible that in today's modern society " 'the entire burden of damage resulting from the wrongful acts of the government should be imposed upon the single individual who suffers the injury, rather than distributed among the entire community constituting the government, where it could be borne without hardship upon any individual, *and where it justly belongs.*' " *Id.* (quoting Barker v. City of Santa Fe, 136 P.2d 480, 482 (N.M. 1943) (emphasis added)).

81. *Id.* at 801, 804. For a discussion of the difference between governmental and sovereign immunity, see *supra* notes 43-46 and accompanying text.

82. *Kitto*, 224 N.W.2d at 803-04. "The matter of sovereign immunity of the state itself, which is untouched by this decision, is one on which we would solicit legislative action." *Id.* at 803. "Since the sovereign immunity of the state government is not affected by this decision, legislation to provide a remedy against the state would be an essential subject of consideration." *Id.* at 804.

83. See *infra* notes 135-36 and accompanying text for a discussion of the legislature's inaction in the area of sovereign immunity. The last reported case to touch on the issue of sovereign immunity in North Dakota was Olson v. University of North Dakota, 488 N.W.2d 386 (N.D. 1992). Olson invited the North Dakota Supreme Court to consider the question of sovereign immunity, but the court declined because the issue of sovereign immunity was not presented to the trial court. *Id.* at 388 n.1.

In Leadbetter v. Rose, 467 N.W.2d 431, 434 (N.D. 1991), the majority of the court was not persuaded that past sovereign immunity decisions should be revisited and reaffirmed

Since *Kitto*, the North Dakota Supreme Court has heard cases involving sovereign immunity on numerous occasions, but has consistently held that the state may not be sued without its consent and that the abrogation of sovereign immunity is a function of the legislature.[84]

III. TRADITIONAL REASONS FOR THE DOCTRINE OF SOVEREIGN IMMUNITY

Numerous justifications and public policy arguments have been advanced to support adherence to the doctrine of sovereign immunity. At first, it was believed that imposing liability on North Dakota would retard its growth.[85] The North Dakota Supreme Court expressed concern over the absence of funds with which to pay a judgment and worried about the possibility of diverting funds required for other governmental purposes.[86] The court feared that the entry of a judgment against a governmental agency would force the State to use funds raised for a particular purpose to pay the judgment, thereby restricting the administration of the government.[87] Indeed, it appears that the North Dakota Supreme Court upheld sovereign immunity on the belief that it was more prudent to make isolated individuals suffer than to inconvenience society.[88]

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their position that the abrogation of sovereign immunity was a matter for the legislature. *Id.*

84. *Olson*, 488 N.W.2d at 388 n.1 (declining to consider question of sovereign immunity because that issue was not presented to the trial court); *Leadbetter*, 467 N.W.2d at 434 (stating that article I, section 9 delegates the abrogation of sovereign immunity to the legislature); Schloesser v. Larson, 458 N.W.2d 257, 259 (N.D. 1990) (refusing to invade the legislature's domain and abrogate sovereign immunity); Dickinson Pub. Sch. Dist. v. Sanstead, 425 N.W.2d 906, 910 (N.D. 1988) (holding that since the action did not arise upon contract it was therefore barred by sovereign immunity); Patch v. Sebelius, 320 N.W.2d 511, 513-14 (N.D. 1982) (construing article I, section 9 as delegating to the legislature the State's amenability to suit); Senger v. Hulstrand Constr., Inc., 320 N.W.2d 507, 510 (N.D. 1982) (construing article I, section 9 as delegating to the legislature the State's amenability to suit).

85. *See* Vail v. Town of Amenia, 59 N.W. 1092, 1095-96 (N.D. 1894). For a discussion of *Vail* see *supra* notes 50-52 and accompanying text.

86. *See* State v. Lowe, 210 N.W. 501, 503 (N.D. 1926). The *Lowe* court surmised that subjecting North Dakota to suit by its citizens would essentially control " 'the use and disposition of the means required for the proper administration of the government,' " thus hampering public service and jeopardizing public safety. *Id.* (citations omitted).

87. Watland v. North Dakota Workmen's Compensation Bureau, 225 N.W. 812, 814 (N.D. 1929). The *Watland* court thought that one of the most obvious reasons for prohibiting suits against State agencies was that allowing such suits "might result in the dissipation of a fund raised for a particular purpose by requiring it to be applied in the liquidation of liabilities in favor of others than those for whose benefit the fund is created." *Id.*

88. Shermoen v. Lindsay, 163 N.W.2d 738, 742 (N.D. 1968). The *Shermoen* court found that governmental immunity had been preserved on three grounds: (1) "The sovereign is immune from suit . . . ;" (2) That it is more expedient to make individuals suffer

The North Dakota Supreme Court maintains that government functions more efficiently if it is not threatened with tort liability.[89] This theory is premised on the belief[90] that, since sovereign immunity removes much accident-producing activity from tort law by preventing an injured plaintiff from suing the state, the government will grow with the population and will be able to provide the increasing amount of governmental services demanded by the growing populace.[91] In other states, the government has claimed that its actions constitute a public service "in which it has no particular interest, and from which it derives no special benefit or advantage . . . but which it is bound to see performed in pursuance of a duty imposed by law for the general welfare" of its citizens.[92] Therefore, these states reason that they should not be financially responsible for private injuries or be subject to the burdens which accompany liability.[93]

IV. THE PURPORTED CONSTITUTIONAL BASIS FOR SOVEREIGN IMMUNITY IN NORTH DAKOTA

A. ARTICLE I, SECTION 9 OF THE NORTH DAKOTA CONSTITUTION

North Dakota Constitution article I, section 9 provides:

> All courts shall be open, and every man for any injury done him in his lands, goods, person or reputation shall have remedy by due process of law, and right and justice administered without sale, denial or delay. Suits may be brought against the state in such manner, in such courts, and in such cases, as the legislative assembly may, by law, direct.[94]

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than to inconvenience society; (3) That immunity will make government perform more efficiently. *Id.*

89. *Id.*

90. Although the North Dakota Supreme Court maintains that government functions more efficiently if not threatened with tort liability, *see supra* notes 88-89 and accompanying text, the court has never delineated a basis for this theory. Therefore, it is assumed that the North Dakota Supreme Court relies upon the justifications advanced by governments of other states in support of this theory.

91. Laughner v. County of Allegheny, 261 A.2d 607, 610 (Pa. 1970) (Pomeroy, J., dissenting). *Laughner* involved a wrongful death action for the death of a minor caused by the minor's setting herself afire while locked in her room at a county detention home. *Id.* at 608. Despite the minor's emotional instability and previous suicidal tendencies, an employee of the detention home provided the minor with matches. *Id.* The court affirmed the lower court's dismissal on the basis of sovereign immunity. A dissenting justice believed that the case was a "shocking, and harrowing, story of negligence." *Id.*

92. Holytz v. City of Milwaukee, 115 N.W.2d 618, 621 (Wis. 1962) (quoting Hayes v. City of Oshkosh, 33 Wis. 314, 318 (1873)), *cited in Shermoen*, 163 N.W.2d at 742.

93. *Laughner*, 261 A.2d at 610.

94. N.D. CONST. art. I, § 9.

B. THE HISTORY OF ARTICLE I, SECTION 9

Article I, section 9 was adopted in 1889 by the framers of the North Dakota Constitution from a Pennsylvania constitutional provision virtually identical in wording.[95] Pennsylvania drafted its constitutional provision in 1790, and studies suggest that the framers of the Pennsylvania Constitution did not intend that the entire Commonwealth would be immune from suit.[96] Rather, Pennsylvania courts have determined that this section is neutral and neither mandates nor forbids sovereign immunity.[97] In fact, the history of Pennsylvania's adoption of this section indicates that Pennsylvania's constitutional framers intended that the legislature could decide in which cases the Commonwealth *should be immune*, and not that the Commonwealth *would be immune*.[98] There is no indication that Pennsylvania intended to make sovereign immunity the rule. Since North Dakota adopted its proclaimed basis for sovereign immunity from Pennsylvania,[99] and since the written records of the debates of North Dakota's First Constitutional Convention contain no mention of the debate over the adoption of this section,[100] North Dakota should likewise con-

95. Schloesser v. Larson, 458 N.W.2d 257, 261 (N.D. 1990) (Meschke, J., dissenting). Pennsylvania's constitutional provision after which North Dakota Constitution article I, section 9 is modeled reads:

> All courts shall be open; and every man 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. Suits may be brought against the Commonwealth in such manner, in such courts and in such cases as the Legislature may by law direct.

PA. CONST. art. I, § 11. Pennsylvania article I, section 11 has remained virtually unchanged since its adoption in 1790. Sloan, *supra* note 29, at 232. *Cf.* A.E. DICK HOWARD, THE ROAD FROM RUNNYMEDE: MAGNA CARTA AND CONSTITUTIONALISM IN AMERICA 482-89 (1968). The "open courts" clause of both the North Dakota and Pennsylvania constitutional sections came from similar expressions in the Magna Charta. *Id. See also* THE MAGNA CHARTA, *supra* notes 6-14 and accompanying text.

96. Sloan, *supra* note 29, at 210, 219-20 (discussing the history surrounding Pennsylvania's adoption of article I, section 11 of the Pennsylvania Constitution).

97. Mayle v. Pennsylvania Dept. of Highways, 388 A.2d 709, 716-17 (Pa. 1978). "[W]e now believe that this constitutional provision does not forbid judicial abrogation of the doctrine [of sovereign immunity]." *Id.* at 716. The *Mayle* court then quoted *with approval* from an earlier dissenting opinion in which Justice Nix of the Pennsylvania Supreme Court said that the Pennsylvania Constitution did not contain an express grant of sovereign immunity. *Id.* at 716-17. Justice Nix had earlier pointed out that the Pennsylvania constitutional provision (from which North Dakota Constitution article I, section 9 was adopted) merely provided the manner by which Pennsylvania could waive sovereign immunity if it was ever implemented. *Id.*

98. *Mayle*, 388 A.2d at 717. *See also* Sloan, *supra* note 29, at 220 (stating that "absent such a legislative declaration, sovereign immunity or immunity of any kind simply does not exist.").

99. *See supra* note 95 and accompanying text.

100. Neither a search of the topics of debate nor an examination of the official report of the proceedings and debates of the first Constitutional Convention of North Dakota revealed any discussion surrounding the adoption of North Dakota Constitution article I, section 9.

sider the historical interpretation Pennsylvania places on this constitutional provision.

C. THE CURRENT INTERPRETATION OF ARTICLE I, SECTION 9

1. *Nine Rules of Constitutional Interpretation*

The interpretation of the North Dakota Constitution falls within the realm of the North Dakota Supreme Court.[101] When a constitutional provision is ambiguous, guidelines used to interpret statutory provisions may be applied to aid in the interpretation of the constitutional provision in question.[102] However, rules used to interpret statutory and constitutional provisions are often contradictory and a conscious effort should be made to apply rules consistently.[103] The following nine rules for constitutional interpretation have previously been used by the North Dakota Supreme Court and are particularly applicable to the interpretation of article I, section 9 of the North Dakota Constitution.

1. The entire document must be examined;[104]

2. If a constitutional provision is subject to two constructions, one which renders the provision constitutional and the other which does not, the former construction must be adopted;[105]

3. Courts should look at the history of the provision, and examine the state of the government when the provision was drafted and adopted so that the prior law, the mischief to be prevented, and the remedy proposed may be ascertained;[106]

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101. State *ex rel* Sanstead v. Freed, 251 N.W.2d 898, 904 (N.D.1977). *See also* Ford Motor Co. v. State, 231 N.W. 883 (N.D.1930). When statutory or constitutional language is doubtful or ambiguous, the construction placed on the language by the court is entitled to great weight, and should not be disregarded or overturned unless clearly erroneous. *Id.* at 888. For a discussion of the North Dakota Supreme Court's interpretation of North Dakota Constitution article I, section 9, see *infra* notes 113-26 and accompanying text.

102. *Freed*, 251 N.W.2d at 908. North Dakota Century Code § 1-02-39 sets forth seven factors to be considered when construing an ambiguous statute. These seven factors are:

1. The object sought to be attained.
2. The circumstances under which the statute was enacted.
3. The legislative history.
4. The common law or former statutory provisions, including laws upon the same or similar subjects.
5. The consequences of a particular construction.
6. The administrative construction of the statute.
7. The preamble.

N.D. CENT. CODE § 1-02-39 (1987 & Supp. 1991).

103. KARL N. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS 521 (1960). Appendix C lists 45 "Canons of Construction" and many contradict each other. *Id.*

104. State v. Robinson, 160 N.W. 514, 516 (N.D. 1916).

105. Hanson v. Williams County, 389 N.W.2d 319, 324 (N.D. 1986); Patch v. Sebelius, 320 N.W.2d 511, 513 (N.D. 1982).

106. Newman v. Hjelle, 133 N.W.2d 549, 556 (N.D. 1965); *Robinson*, 160 N.W. at 516.

4. The intent behind the adoption of the particular constitutional provision must be ascertained and effect given to interpreting the provision consistent with this intent;[107]

5. The provision must be interpreted from the language of the provision; if the language is ambiguous, the field of inquiry may be widened;[108]

6. If possible, effect must be given to each provision, section, and clause contained within the constitutional provision;[109]

7. Provisions which seem inconsistent must be reconciled if possible;[110]

8. Consult the decisions of other jurisdictions which have construed similar constitutional provisions;[111]

9. When in doubt over interpreting a provision on the basis of *stare decisis*, do not allow an interpretation to continue which is wrong or unsupported by modern considerations.[112]

2. *The Conflict Which Creates the Current Interpretation*

The current interpretation of article I, section 9 of the North Dakota Constitution reaches outside the written constitution for support. The North Dakota Constitution contains no unequivocal statement which provides that North Dakota shall be immune from suit; only an inference may be drawn from article I, section 9 in support of this theory.[113] Furthermore, construing article I, section 9 as prohibiting suits against the State requires that the two

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The previous state of government may furnish the true meaning of the ambiguous provision, "and it is especially important to look into [the prior state of law] if the Constitution is the successor to another," and if substantial changes have been made to the particular constitutional provision in question. *Id.* at 516. *See supra* notes 60-66 and accompanying text.

107. *Robinson*, 160 N.W. at 516. *See also Newman*, 133 N.W.2d at 555. The intent of the constitutional framers in adopting a constitutional provision should primarily be deduced from the provision's language. *Id.*

108. *Newman*, 133 N.W.2d at 556. *See* County of Stutsman v. State Historical Soc., 371 N.W.2d 321 (N.D. 1985). If strict adherence to the wording of the provision leads to an absurd or ludicrous result, the court may then consult extrinsic aids in an effort to properly construe the provision. *Id.* at 325.

109. *County of Stutsman*, 371 N.W.2d at 325. *See also* N.D. CENT. CODE § 31-11-05(23) (1976 & Supp. 1991). Every part of the constitutional provision, no matter how minuscule, must be considered because "[t]he law neither does nor requires idle acts." *Id.*

110. *Robinson*, 160 N.W. at 516. The court " 'must lean in favor of a construction which will render every word operative, rather than one which may make some words idle and nugatory.' " *Id.*

111. Bellemare v. Gateway Builders, Inc., 420 N.W.2d 733, 738 (N.D. 1988). *See, e.g.*, Schloesser v. Larson, 458 N.W.2d 257, 262 (N.D. 1990) (Meschke, J., dissenting). "The well reasoned construction of a like constitutional provision in another state from which ours is derived is highly persuasive." *Id.*

112. *Robinson*, 160 N.W. at 516-17.

113. N.D. CONST. art. I, § 9. *See generally* N.D. CONST.

sentences of section 9 be interpreted as conflicting with each other.[114] This conflict arises because the first sentence of article I, section 9 provides that *"every man for any injury . . . shall have remedy by due process of law, and right and justice administered without sale, denial or delay."*[115] This prime sentence, which declares that individual rights are above and beyond the power of the legislature and the State government, guarantees justice to an injured plaintiff.[116] However, the second sentence of article I, section 9 provides that *"[s]uits may be brought against the state . . . in such cases, as the legislative assembly may, by law, direct."*[117] Thus, when article I, section 9 is construed as prohibiting suits against the state absent legislative authorization, the second sentence prohibits the remedy guaranteed every person for any injury which is contained within the first sentence.

The controversy surrounding sovereign immunity stems from the construction of the second sentence of article I, section 9 of the North Dakota Constitution. This controversy arises because the first, primary clause of the second sentence acts as a grant, while

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114. *See infra* notes 115-26 and accompanying text.

115. N.D. CONST. art. I, § 9. (emphasis added).

116. Schloesser v. Larson, 458 N.W.2d 257, 261 (N.D. 1990) (Meschke, J., dissenting); Malin v. La Moure County, 145 N.W. 582, 586 (N.D. 1914). In interpreting article I, section 9, the *Malin* court was "quite satisfied" that this constitutional provision was intended to guarantee to everyone "reasonable access to the courts *and to the privileges accorded by the courts.*" *Malin*, 145 N.W. at 586 (emphasis added). *Contra* Andrews v. O'Hearn, 387 N.W.2d 716, 723 (N.D. 1986); KFGO Radio, Inc., v. Rothe, 298 N.W.2d 505, 510-11 (N.D. 1980). Even though the first sentence of article I, section 9 guarantees justice to an injured plaintiff and declares that an individual's rights are beyond the power of the legislature and the State government, the North Dakota Supreme Court has construed this *entire sentence* as *only* guaranteeing to the public the right to be *physically present* at court proceedings. *Andrews*, 387 N.W.2d at 723; *KFGO Radio, Inc.*, 298 N.W.2d at 510-11. The court's interpretation of the first sentence of article I, section 9 supports the clause which states "All courts shall be open," but ignores and renders ineffective the clause which guarantees that *"every man for any injury . . . shall have remedy by due process of law. . . ."* N.D. CONST. art. I, § 9.

In order to give effect to each provision and clause contained within the first sentence of article I, section 9, *see supra* notes 109-110 and accompanying text, the first sentence should be interpreted to *both* provide the public with physical access to court proceedings *and* grant the North Dakota Supreme Court power to render verdicts against the State in cases in which the State is guilty of tortious conduct.

117. N.D. CONST. art. I, § 9 (emphasis added). The second sentence of article I, section 9 allows the legislature to direct the course of and regulate the method and manner of claims brought against the State. *See* Dickinson Pub. Sch. Dist. v. Sanstead, 425 N.W.2d 906, 911 n.6 (N.D. 1988); *Schloesser*, 458 N.W.2d at 262 (Meschke, J., dissenting). The legislature may neither completely deny access to our State courts nor bar our State courts from rendering verdicts against North Dakota. *Id.* at 262-63. Rather, the second sentence allows the legislature to procedurally implement the substantive rights granted in the first sentence, Brown v. Commonwealth, 305 A.2d 868, 876 (Pa. 1973) (Manderino, J., dissenting), *overruled by* Mayle v. Pennsylvania Dep't of Highways, 388 A.2d 709 (Pa. 1978), by declaring cases in which North Dakota is immune from suit. Sloan, *supra* note 29, at 220. However, the power of the legislature to declare cases in which North Dakota is immune from suit *is subject to the North Dakota Supreme Court's later determination that such a legislative declaration was constitutionally proper. Id.*

the second, subordinate clause acts as a limitation.[118] The first, granting clause was intended to provide for suits against the state, while the second, limiting clause was intended to provide a method by which the legislature could limit suits against the state should it choose to do so.[119] The distinction is more comprehensible when one understands that the second sentence of section 9 was drafted into the 1790 Pennsylvania Constitution at the insistence of a known opponent of sovereign immunity.[120] Article I, section 9 of the North Dakota Constitution is virtually identical in wording to the Pennsylvania constitutional provision from which it was adopted.[121] Therefore, when it is understood that the grant/limitation conflict occurs *within* the second sentence and not *between* the first and the second sentences of article I, section 9, it becomes possible to construe both sentences of this section consistently with each other, thus giving effect to the whole section and every clause contained within it.[122] Thus, article I, section 9 should be interpreted: 1) to provide the public with access to court proceedings; 2) to grant the North Dakota Supreme Court power to render verdicts against the State in cases in which the State is guilty of tortious conduct; and, 3) to allow the legislature an opportunity to declare cases in which the State is immune from suit.

The North Dakota Supreme Court appears to misconstrue the proper grant/limitation conflict, and is thus forced to deal with a constitutional provision which seems to be in conflict with itself. The court interprets the second sentence of article I, section 9 as a specific limitation on the first sentence, and concludes that this limitation entrusts the legislature with the ability to regulate

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118. Sloan, *supra* note 29, at 213-14.

119. *Id.* at 220. The second "clause meant that the legislature must specifically and affirmatively declare the cases *in equity* in which the immunity of the governor or his officers exists, subject to the high court's determination that any such declared immunity is constitutionally proper." *Id.*

120. Mayle v. Pennsylvania Dep't of Highways, 388 A.2d 709, 717 (Pa. 1978). The first sentence was already proposed when James Wilson, an opponent of sovereign immunity, proposed this second sentence be added: " 'Suits may be brought against the Commonwealth as well as against other bodies corporate and individual.' " *Id.* (quoting Francis Shunk, *Minutes of the Convention that Formed the Present Constitution of Pennsylvania* 223, 282 (1825)). Wilson's proposed second sentence, which would have constitutionally abolished sovereign immunity, was already approved by Pennsylvania's constitutional framers when a motion was made to reconsider and the second sentence was adopted in its present form. *Id.* The revised second sentence was adopted over Wilson's original proposal in order to preserve for the legislature the ability to grant the state immunity should the legislature desire to do so in certain cases. *Id.*

121. *See supra* notes 94-95 and accompanying text for the texts of North Dakota Constitution article I, section 9 and Pennsylvania Constitution article I, section 11.

122. For a discussion of rules of constitutional interpretation that the North Dakota Supreme Court utilizes, see *supra* notes 104-12 and accompanying text.

North Dakota's amenability to suit.[123] In support of this construction, the court relies on the theory that the North Dakota Constitution is a document of limitations, not of grants.[124] Furthermore, the court suggests that even if article I, section 9 does not mandate sovereign immunity, the clear intent of this section is to invest the legislature with the ability to determine the manner, courts, and cases in which the state may be sued.[125] In taking this position, the court allows the subordinate sentence of article I, section 9 to dominate the declared rights contained within the entire section, thereby violating fundamental rules of constitutional interpretation which require inconsistent provisions to be reconciled, and effect given to each provision, section, and clause contained within the constitutional provision.[126]

D. THE CURRENT INTERPRETATION'S RELIANCE ON PRECEDENT

The continued adherence to the doctrine of sovereign immunity in North Dakota appears to be based upon precedent.[127] This precedent relies upon previous unintended restrictions that have been placed upon access to North Dakota's courts.[128] However, reliance on precedent should not prevent the North Dakota Supreme Court from abolishing sovereign immunity; rather, the

123. Leadbetter v. Rose, 467 N.W.2d 431, 435 (N.D. 1991). The court notes that the second sentence of North Dakota Constitution article I, section 9 specifically limits the first sentence by entrusting sovereign immunity to the legislature. *Id.* This appears to be a misconstruction because the second sentence does not limit the first sentence; rather, the second sentence of article I, section 9 supports the first sentence and the limitation occurs between the two clauses contained within the second sentence. *See supra* notes 118-22 and accompanying text.

124. Senger v. Hulstrand Constr., Inc., 320 N.W.2d 507, 510 (N.D. 1982) (Sand, J., concurring specially); State *ex rel* Agnew v. Schneider, 253 N.W.2d 184, 187 (N.D. 1977). It must be remembered that the North Dakota Constitution is designed to operate as a *limitation on the government* and not as a limitation upon the people. Schloesser v. Larson, 458 N.W.2d 257, 262 (N.D. 1990) (Meschke, J., dissenting). Furthermore, although the North Dakota Constitution is a document of limitations upon the government, the second sentence of article I, section 9 contains *both* a grant and a limitation. *See supra* notes 118-22 and accompanying text.

125. *Senger*, 320 N.W.2d at 509. This suggestion implies, and the court's refusal to grant relief against the State demonstrates, that even if sovereign immunity is not constitutionally mandated, the State is not subject to suit absent the express approval of the legislature.

126. *See supra* notes 109-10 and accompanying text.

127. *Leadbetter*, 467 N.W.2d at 438 (Meschke J., dissenting). *See Leadbetter*, 467 N.W.2d at 434. The *Leadbetter* court observed that article I, section 9 "had been consistently *construed* as giving the Legislature the power to modify or waive sovereign immunity." *Id.* (emphasis added). *Schloesser*, 458 N.W.2d at 258. "We have consistently *construed* [article I, section 9] . . . ." *Id.* (emphasis added). *Senger*, 320 N.W.2d at 508. "The *construction* consistently placed upon [article I, section 9] . . . ." *Id.* (emphasis added).

128. Dickinson Pub. Sch. Dist. v. Sanstead, 425 N.W.2d 906, 911 n.6 (N.D. 1988) (Meschke, J., concurring). *See supra* notes 60-66 and accompanying text.

court should "respond[] to the demands of justice" and allow the law to develop and grow with changing circumstances.[129] For the law to function properly, precedent must be examined in light of modern reality and outdated decisions must be abandoned when the reasons for them no longer exist.[130] As explained by Justice Cardozo:

> I think that when a rule, after it has been duly tested by experience, has been found to be inconsistent with the sense of justice or with the social welfare, there should be less hesitation in frank avowal and full abandonment . . . . If judges have wofully misinterpreted the *mores* of their day, or if the *mores* of their day are no longer those of ours, they ought not to tie, in helpless submission, the hands of their successors.[131]

The North Dakota Supreme Court has previously reconsidered and overruled other established precedents when justice so required; therefore, it should not hesitate to abolish sovereign immunity.

E. THE DISPUTE OVER THE POWER TO ABOLISH SOVEREIGN IMMUNITY

The North Dakota Supreme Court has consistently held that article I, section 9 vests the legislature with the power to abandon or modify sovereign immunity, and that absent action by the legislature, the State is not subject to suit.[132] In fact, the court has taken the view that this section vests the legislature with the *sole* power to abrogate sovereign immunity and that the court may not invade this domain.[133]

The court has opined that the North Dakota Legislature is fully aware of its (the legislature's) ability to abrogate sovereign immunity.[134] In fact, the court has referred to specific Legislative Reports which it suggests demonstrate the legislature's intent to

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129. Ayala v. Philadelphia Bd. of Pub. Educ., 305 A.2d 877, 888 (Pa. 1973). In *Ayala*, the Pennsylvania Supreme Court abolished governmental immunity and recognized that *stare decisis* responds to changing times by allowing changes in precedent. *Id.* at 888-89.

130. Smith v. State, 473 P.2d 937, 943 (Idaho 1970) (determining that because the reason for sovereign immunity was no longer in existence, the Idaho Supreme Court abolished sovereign immunity).

131. BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 150, 152 (1921).

132. Senger v. Hulstrand Constr., Inc., 320 N.W.2d 507, 510 (N.D. 1982); *See supra* note 84.

133. *Senger*, 320 N.W.2d at 510. The court construed article I, section 9 "as a delegation to the Legislature of the power to regulate the State's amendability to suit and not as an invitation to the court to invade that domain." *Id.*

134. *Id.*

retain sovereign immunity.[135] Nevertheless, a review of the Legislative Reports relied on by the court reveals that: (1) much of the content of the reports is needlessly devoted to tracing the history of immunity; and (2) that no study has been conducted which would indicate that the abrogation of sovereign immunity would result in large monetary verdicts against North Dakota.[136]

The abrogation of sovereign immunity is a function well within the power of the North Dakota Supreme Court and such action does not appear to violate the separation of powers doctrine.[137] While there may be economic consequences for North Dakota underlying the abolishment of sovereign immunity, the focus of the court should be on the rights of the individuals whose claims are barred by sovereign immunity rather than on the effect which abrogation might have upon the State.[138] The judiciary is the proper place for abolishing sovereign immunity while the legislature is the proper place for resolving any problems which may be created by the abrogation of this doctrine.[139]

V. A CONSTITUTIONAL REVIEW OF THE CURRENT INTERPRETATION OF ARTICLE I, SECTION 9

A. STANDARDS OF REVIEW USED TO DETERMINE THE CONSTITUTIONALITY OF SOVEREIGN IMMUNITY

The three standards of North Dakota constitutional review

135. *Id.* REPORT OF THE N.D. LEGISLATIVE COUNCIL, GOVERNMENT OFFICER AND EMPLOYEE LIABILITY STUDY, at 74 (1981); REPORT OF THE N.D. LEGISLATIVE COUNCIL, MISCELLANEOUS BUDGET SECTION ACTION, at 29 (1979); REPORT OF THE N.D. LEGISLATIVE COUNCIL, GOVERNMENTAL IMMUNITY, at 173 (1977); REPORT OF THE N.D. LEGISLATIVE COUNCIL, PAYMENT OF CLAIMS, at 83 (1971).

136. *See id.* The legislature's most in-depth analysis of the abrogation dilemma occurred in 1981 when it considered two bills related to the personal liability of state officials. REPORT OF THE N.D. LEGISLATIVE COUNCIL, at 75 (1981). The proposed bills were opposed by a group of attorneys general who believed the major problem was the cost of defending lawsuits brought against state officials. *Id.* However, no study or facts were presented to establish that the beliefs of the attorneys general were meritorious. *Id.*

137. *See* Haugland v. Meier, 335 N.W.2d 809, 811 (N.D. 1983). The North Dakota Supreme Court is not bound by the legislature's interpretation of the North Dakota Constitution and a question of law as to the constitutionality of sovereign immunity vests no discretion in the legislature. *Id.* The *Haugland* court reviewed the Secretary of State's interpretation of the North Dakota Constitution as it pertained to changing the name of a State college. *Id.* at 810-11. The court "concluded that [they] were not bound by the secretary of state's interpretation of the constitution and that a question of law as to the sufficiency of the petition vests no discretion in the secretary." *Id.* at 811.

138. Leadbetter v. Rose, 467 N.W.2d 431, 437-38 (N.D. 1991) (Meschke, J., dissenting); Hanson v. Williams County, 389 N.W.2d 319, 325 (N.D. 1986).

139. *See* Dickinson Pub. Sch. Dist. v. Sanstead, 425 N.W.2d 906, 911 n.6 (N.D. 1988) (Meschke, J., dissenting). Justice Meschke notes that "the legislature may 'direct' the course of claims against the State," but that citizens are entitled to their constitutional rights. *Id.* It is the court's responsibility to protect citizens constitutional rights; therefore, it is the court's responsibility to abolish sovereign immunity.

applicable when a plaintiff challenges a constitutional provision on equal protection grounds are strict scrutiny, rational basis scrutiny, and intermediate scrutiny.[140] Strict scrutiny is a heightened level of scrutiny applied to classifications of "fundamental interest" or to classes that are "inherently suspect."[141] A challenged classification will fail strict scrutiny unless it is narrowly tailored to further a compelling governmental interest.[142] The North Dakota Supreme Court has held "that the right to recover for personal injuries is not a fundamental right;"[143] thus, strict scrutiny may not be used to review the constitutionality of sovereign immunity because claims involving sovereign immunity challenge neither a fundamental interest nor an inherently suspect classification.[144]

At the other end of the spectrum is rational basis scrutiny. Rational basis scrutiny is the easiest standard of review to satisfy and is applied when nonsuspect classifications which do not interfere with fundamental or important substantive rights are involved.[145] A contested classification will survive review " 'unless it is patently arbitrary and bears no rational relationship to a legitimate governmental purpose.' "[146] Rational basis scrutiny is usually applied to classifications dealing with economic and social matters; however, the court does not consider human life and safety as

140. Hanson v. Williams County, 389 N.W.2d 319, 324 (N.D. 1986). The North Dakota Supreme Court's review of constitutional questions "is different from the review by the United States Supreme Court," particularly in the area of State legislation. Johnson v. Hassett, 217 N.W.2d 771, 775 (N.D. 1974).

141. Johnson v. Hassett, 217 N.W.2d 771, 775 (N.D. 1974). The *Johnson* court considered the constitutionality of the North Dakota Guest Law, which allowed a passenger riding in another's automobile to recover for injuries caused by the ordinary negligence of the operator if the passenger paid for the transportation, but not if they didn't pay. *Id.* at 777. The court applied the intermediate standard of review and found that the guest law did not operate uniformly because it provided "a special immunity from liability for ordinary negligence to a special category of persons," (the immunity given drivers of automobiles who negligently injured their nonpaying passengers) while it allowed a passenger to recover for the same ordinary negligence of the driver if the passenger paid for the transportation. *Id.* at 780. The court further found that the classification was "unreasonable for any proper purpose of legislation and [was] not based upon justifiable distinctions concerning any proper purpose of the law, and that it [was] arbitrary and overinclusive." *Id.*

142. Leadbetter v. Rose, 467 N.W.2d 431, 436 (N.D. 1991).

143. *Hanson*, 389 N.W.2d at 323 n.9. The right of a tort victim to recover for personal injuries is an important substantive right. *Id.* at 325. The *Hanson* court considered whether a 10-year statute of limitations for products liability claims violated the North Dakota Constitution. *Id.* at 320. The court noted its concern regarding "statutes which arbitrarily deny one class of persons important substantive rights to life and safety which are available to other persons," and concluded the 10-year statute of limitations violated article I, section 21 of the North Dakota Constitution. *Id.* at 328.

144. *See id.* at 323. "Inherently suspect classifications include classifications based upon race, sex, national origin, illegitimacy, or other immutable characteristics determined solely by accident of birth." *Id.* at 334 (Erickstad, C.J., dissenting).

145. *Leadbetter*, 467 N.W.2d at 436 (citing Kavadas v. Lorenzen, 448 N.W.2d 219 (N.D. 1989)).

146. *Id.* (quoting Kavadas v. Lorenzen, 448 N.W.2d 219 (N.D. 1989)).

merely a matter of economics.[147] Rather, the right to recover for personal injuries is viewed as an important substantive right.[148]

A third, intermediate level of review may be used by the court when neither strict scrutiny nor rational basis scrutiny apply. The North Dakota Supreme Court has determined that intermediate level review is appropriate when "an important substantive right" is at issue.[149] This intermediate level of constitutional review "requires 'a close correspondence between the [constitutional] classification and legislative goals.' "[150] Therefore, an arbitrary distinction between two classes of individuals must be justified by underlying legislative purposes or the classification is unconstitutional.[151]

The intermediate level of review should be used to determine the constitutionality of sovereign immunity. The North Dakota Supreme Court has determined that the right to recover for personal injuries is an important substantive right[152] and that the intermediate level of review should be applied when an important substantive right is at issue.[153] The court has applied the intermediate standard of review when considering tort claims brought by plaintiffs against private tortfeasors.[154] In addition, the court has determined that the intermediate level of review is the appropriate standard to apply when reviewing "the classification of tort victims of *insured state agencies and tort victims of non-insured state agencies.*"[155] Therefore, the court should apply the interme-

147. *Hanson*, 389 N.W.2d at 325.

148. *Id.* at 325. *See also Leadbetter*, 467 N.W.2d at 436. While there may be economic consequences for the State underlying the abolishment of North Dakota Constitution article I, section 9, the focus should be on the rights of the individuals whose claims are barred by sovereign immunity rather than on the effect upon the State. *Id.* at 438 (Meschke, J., dissenting); *Hanson*, 389 N.W.2d at 325.

149. *Hanson*, 389 N.W.2d at 325.

150. Arneson v. Olson, 270 N.W.2d 125, 133 (N.D.1978). For a discussion of the discriminatory classification created by the court's current interpretation of article I, section 9, see *infra* notes 157-85 and accompanying text.

151. *Hanson*, 389 N.W.2d at 324; Johnson v. Hassett, 217 N.W.2d 771, 780 (N.D. 1974). The traditional reasons for sovereign immunity suggest that the required close fit between the arbitrary distinction and constitutional framers' underlying legislative purpose is nonexistent. *See supra* notes 85-93 & *infra* notes 164-81 and accompanying text.

152. *Hanson*, 389 N.W.2d at 325. In *Hanson*, the court stated that it was "unwilling to view human life and safety as simply a matter of economics." *Id.* Furthermore, the court noted that its "focus must be on the individuals affected" by the legislation and not on the economic consequences which may result from the court's decision. *Id.*

153. *Id.*

154. Herman v. Magnuson, 277 N.W.2d 445, 451 (N.D. 1979). The intermediate level of scrutiny was applied in an action against a private tortfeasor and a municipality for injuries sustained as a result of the private tortfeasor's negligent driving. *Id.* at 446, 451. Johnson v. Hassett, 217 N.W.2d 771, 780 (N.D. 1974). The intermediate level of scrutiny was applied in an action against a private tortfeasor for injuries sustained as a result of the private tortfeasor's negligent driving. *Id.* at 772, 780.

155. Patch v. Sebelius, 320 N.W.2d 511, 513 (N.D. 1982) (emphasis added).

diate standard of review and determine that the classification[156] which sovereign immunity imposes upon the class of injured people is unconstitutional.

B. EQUAL PROTECTION: THE DISCRIMINATORY CLASSIFICATION CREATED BY THE CURRENT INTERPRETATION

As currently interpreted by the North Dakota Supreme Court, article I, section 9 creates an impermissible invidious classification among the class of injured people. The court's interpretation of article I, section 9 arbitrarily splits the class of people injured by the negligent acts of another into two disparate subclasses: (1) people injured by private tortfeasors who may recover for their injury; and (2) people injured by the State's tortious conduct or by the actions of State employees who may not recover for their injuries.[157] This classification violates North Dakota's constitutional provision which provides for equal protection[158] because the privilege of receiving compensation for a wrong inflicted upon a plaintiff depends on whether the tortfeasor is a private party or whether the tortfeasor is the State or a State agency or employee.[159] In other words, the immunity from suit granted the tortfeasor is dependent upon whether the tortfeasor is a private party or whether the tortfeasor is the State or a State agency or employee.[160] A plaintiff may maintain an action against a private tortfeasor and recover damages because a private tortfeasor is not

156. See *infra* note 157 and accompanying text for a discussion of the classification created by the current interpretation of article 1, section 9 of the North Dakota Constitution.

157. Herman v. Magnuson, 277 N.W.2d 445, 452 (N.D. 1979) (citing Reich v. State Highway Dept., 194 N.W.2d 700 (Mich. 1972)). *Reich* involved a consolidation of three personal injury claims brought against the Michigan State Highway Department. *Reich*, 194 N.W.2d at 701. *Reich* challenged a notice provision that served to bar claims against Michigan if notice of a claim was not given within 60 days of the injury. *Id.* The *Reich* court held that the notice provision "arbitrarily split the natural class, *i.e.*, all tortfeasors, into two differently treated subclasses: private tortfeasors to whom no notice of claim is owed and governmental tortfeasors to whom notice is owed," and declared that such arbitrary treatment violated equal protection guarantees. *Id.* at 702.

158. Dickinson Pub. Sch. Dist. v. Sanstead, 425 N.W.2d 906, 911 (N.D. 1988) (Meschke J., concurring). "Sovereign immunity . . . is contrary to our constitutions." *Id.* *See* Hanson v. Williams County, 389 N.W.2d 319, 332 & n.3, 333 (N.D. 1986). Article I, section 21 of the North Dakota Constitution guarantees equal protection, and provides in relevant part that no "citizen or class of citizens [shall] be granted privileges or immunities which upon the same terms shall not be granted to all citizens." *Id.* at 332 n.3; N.D. CONST. art. I, § 21.

The Fourteenth Amendment to the United States Constitution also guarantees equal protection and provides that "No State shall make or enforce any law which shall . . . deny any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

159. *See supra* note 157 and accompanying text.

160. *See supra* note 157 and accompanying text.

immune from suit.[161] However, because of sovereign immunity, the State and State agencies and employees are immune from suit and a plaintiff may not recover damages from these tortfeasors.[162] In a case involving a similar invidious classification, the North Dakota Supreme Court stated that such a classification was unreasonable, arbitrary and overinclusive, and unsupported by any proper legislative justification.[163]

The intermediate standard of review "requires 'a close correspondence between the [constitutional] classification and legislative goals.' "[164] However, the arbitrary and invidious classification[165] created by sovereign immunity is not justified by the purposes advanced in support of adherence to this doctrine. The North Dakota Supreme Court has expressed concern over the potential absence of funds with which to pay a judgment and over the possible fiscal inconvenience which might accompany the abolition of sovereign immunity.[166] The court has also asserted that State government functions more efficiently if it is not threatened with tort liability.[167] Other state agencies and employees have claimed that the abrogation of sovereign immunity would subject

161. *See generally* Johnson v. Hassett, 217 N.W.2d 771 (N.D. 1974) (allowing a plaintiff injured in an automobile accident to recover damages from the private tortfeasor driver).

162. *See generally* Leadbetter v. Rose, 467 N.W.2d 431 (N.D. 1991). "When an action is essentially against the state to recover money, the state is the real party in interest and is entitled to invoke sovereign immunity even though it is not a named defendant." *Id.* at 432. Furthermore, since a "[s]tate agency" is an "institution of state government," N.D. CENT. CODE § 32-12.1-02(6) (Supp. 1991), and since a suit against a State employee for acts done in their official capacity "is tantamount to suing the State itself," Kristensen v. Strinden, 343 N.W.2d 67, 72 (N.D. 1983), an injured plaintiff cannot circumvent the State's sovereign immunity by suing the state agency or the State employee that was involved in the tortious action. Thus, "[t]he injustices of state immunity remain for one who is injured by the wrongful act of the state government," Kitto v. Minot Park Dist., 224 N.W.2d 795, 803 (N.D. 1974) and the result is that the State saves a "fiscal inconvenience through injustice to individuals." *Leadbetter*, 467 N.W.2d at 438 (Meschke, J., dissenting).

163. Johnson v. Hassett, 217 N.W.2d 771, 780 (N.D. 1974). The *Johnson* court considered the constitutionality of the North Dakota Guest Law, which allowed a passenger riding in another's automobile to recover for injuries caused by the ordinary negligence of the operator if the passenger paid for the transportation, but not if they didn't pay. *Id.* at 777. The court applied the intermediate standard of review and found that the guest law did not operate uniformly because it provided "a special immunity from liability for ordinary negligence to a special category of persons," (the immunity given drivers of automobiles who negligently injured their nonpaying passengers) while it allowed a passenger to recover for the same ordinary negligence of the driver if the passenger paid for the transportation. *Id.* at 780. The court further found that the classification was "unreasonable for any proper purpose of legislation and [was] not based upon justifiable distinctions concerning any proper purpose of the law, and that it [was] arbitrary and overinclusive." *Id.*

164. Arneson v. Olson, 270 N.W.2d 125, 133 (N.D. 1978).

165. See *supra* note 157 and accompanying text for a discussion of the classification created by the current interpretation of article I, section 9 of the North Dakota Constitution.

166. See *supra* notes 86-87 and accompanying text for a discussion of the North Dakota Supreme Court's concern about subjecting North Dakota to a fiscal inconvenience.

167. See *supra* notes 89-93 and accompanying text.

North Dakota to a sudden influx of litigation and liability for large monetary verdicts.[168] Finally, the court has continuously relied upon *its* past interpretations of article I, section 9 and determined that this precedent mandates continued adherence to sovereign immunity absent legislative action.[169] However, these justifications are not valid reasons for continuing to adhere to sovereign immunity since there are alternative methods which both protect the State's interests and provide a remedy for people injured by the State's tortious conduct.

The North Dakota Supreme Court's concern over the lack of funds with which to pay a judgment and over the fiscal inconvenience which might accompany the abrogation of sovereign immunity are not legitimate concerns since the legislature has already provided a means by which state agencies may protect themselves against monetary judgments.[170] Furthermore, there is no evidence to suggest that North Dakota agencies and employees function more efficiently if not exposed to tort liability.[171] Rather, state agencies and employees would become *more efficient* if North Dakota could be held liable for the tortious acts of its agencies and employees.[172] There is also no evidence to suggest that North Dakota would be subjected to a sudden influx of litigation or that large monetary verdicts against the State would result if sovereign

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168. See *supra* note 136 and accompanying text.

169. *See* Leadbetter v. Rose, 467 N.W.2d 431, 434 (N.D. 1991). The *Leadbetter* court observed that article I, section 9 "had been consistently *construed* as giving the Legislature the power to modify or waive sovereign immunity." *Id.* (emphasis added). Schloesser v. Larson, 458 N.W.2d 257, 258 (N.D. 1990). "We have consistently *construed* [article I, section 9] . . . ." *Id.* (emphasis added). *See also* Senger v. Hulstrand Constr., Inc., 320 N.W.2d 507, 508 (N.D. 1982). "The *construction* consistently placed upon [article I, section 9] . . . ." *Id.* (emphasis added).

170. *See* N.D. CENT. CODE § 32-12.1-15(1) (Supp. 1991). North Dakota Century Code Section 32-12.1-15(1) allows state agencies to purchase insurance or to join an insurance pool. N.D. CENT. CODE § 32-12.1-15(1) (Supp. 1991). In addition, North Dakota Century Code Section 32-12.1-03(2) establishes an award ceiling and eliminates the award of punitive or exemplary damages against political subdivisions. N.D. CENT. CODE § 32-12.1-03(2) (Supp. 1991). A statute similar to North Dakota Century Code section 32-12.1-03(2) could be enacted by the Legislature for the protection of *state agencies.*

171. See *supra* note 90 and accompanying text.

172. *See* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 4, at 25 (5th ed. 1984). The North Dakota Supreme Court appears to maintain that since sovereign immunity prevents North Dakota from being sued for its tortious actions, the government will become more efficient because it will grow with the population and will be able to increase the amount of services which it provides to the public. *See supra* notes 89-91 and accompanying text. However, if North Dakota was liable for the tortious conduct of its agencies and employees, "there [would be] a strong incentive to prevent the occurrence of the harm." KEETON ET AL., *supra*, § 4, at 25. Thus, it would seem that if North Dakota were *liable* for the tortious conduct of its agencies and employees, North Dakota government could become more efficient and the tortious conduct of state agencies and employees would be lessened because the possibility of liability would provide an "incentive to prevent the occurrence of the harm." *Id.*

immunity were abolished.[173] The prospective abolition of sovereign immunity[174] would prevent North Dakota from being held liable for the tortious actions of State agencies or employees which occurred before the date of abolition and would also allow State agencies time to procure insurance coverage or time to join an insurance pool.[175] Finally, reliance upon precedent[176] does not constitute a legitimate reason for continuing to adhere to sovereign immunity because doing so may "threaten the stability and predictability of the law."[177] In fact, frank refusal "to abandon a rule of law which has not withstood critical scrutiny or which has been rendered anachronistic by the passage of time and events may itself breed uncertainty in the law" and give rise to "casuistic distinctions" which are "impossible to apply with any consistency."[178]

The above discussion demonstrates that the classification[179]

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173. See *supra* note 136 and accompanying text. Local governmental agencies such as counties, townships, park districts, school districts and cities have been subject to liability for the tortious actions of their agencies and employees since *Kitto v. Minot Park Dist.*, 224 N.W.2d 795 (N.D. 1974). For a discussion of *Kitto*, see *supra* notes 76-83 and accompanying text. If local government entities can withstand being liable for the tortious acts of local agencies and employees, North Dakota should also be able to withstand being liable for the tortious acts of State agencies and employees. See *infra* note 194 and accompanying text.

174. See *infra* notes 186-93 and accompanying text for a discussion of whether retrospective or prospective abrogation of sovereign immunity would best serve the needs of North Dakota while still providing an injured party with a means of redress against the State.

175. See *infra* notes 190-93 and accompanying text for a discussion of the benefits of prospectively abolishing sovereign immunity. North Dakota Century Code § 32-12.1-15(1) allows State agencies to purchase insurance or to join an insurance pool "for [their] own protection or for the protection of any state employee." N.D. CENT. CODE § 32-12.1-15(1) (Supp. 1991).

176. See *supra* notes 127-31 & *infra* note 213 and accompanying text for a discussion of how the North Dakota Supreme Court relies on precedent to perpetuate the continued adherence to the doctrine of sovereign immunity.

177. Laughner v. County of Allegheny, 261 A.2d 607, 611 (Pa. 1970) (Pomeroy, J., dissenting).

178. *Id.* As noted by Justice Cardozo:

> There should be greater readiness to abandon an untenable position when the rule to be discarded may not reasonably be supposed to have determined the conduct of the litigants, and particularly when in its origin it was the product of institutions or conditions which have gained a new significance or development with the progress of the years. In such circumstances, . . . [the] 'court best serves the law [when it] recognizes that rules of law which grew up in a remote generation may, in the fullness of experience, be found to serve another generation badly, and [when it] discards the old rule [upon a finding that a more modern] rule of law represents what should be according to the established and settled judgment of society . . . . Change of this character should not be left to the legislature.'

CARDOZO, *supra* note 131, at 151-52 (quoting Dwy v. Connecticut Co., 92 A. 883, 891 (Conn. 1915)).

179. See *supra* note 157 and accompanying text for a discussion of the invidious classification created by the current interpretation of article I, section 9 of the North Dakota Constitution.

created by sovereign immunity is not justified by the objectives[180] sought to be achieved through the continued adherence to this doctrine. Therefore, since the intermediate standard of review requires a *close* correspondence between the arbitrary classification and the government's objectives,[181] the unreasonable and arbitrary classification that article I, section 9 imposes upon the class of injured people is unconstitutional and in violation of the equal protection clause of the North Dakota Constitution if the intermediate standard of review is applied.

C. THE CURRENT INTERPRETATION OF ARTICLE I, SECTION 9 VIOLATES DUE PROCESS

The invidious classification created by the court's current interpretation of article I, section 9[182] also violates the due process provisions of the North Dakota and Federal Constitutions because a plaintiff who is injured by the State is deprived of property without the due process of law.[183] The North Dakota Supreme Court has acknowledged that the majority of authorities view a personal injury claim as a form of property.[184] However, a plaintiff who is injured by tortious state conduct is denied any chance of recovering for their injuries because of the status of the tortfeasor.[185] Therefore, since sovereign immunity prevents a plaintiff who is injured by tortious state conduct from pursuing a personal injury

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180. For a discussion of the purposes and goals sought to be achieved by adhering to the doctrine of sovereign immunity, see *supra* notes 165-69 and accompanying text.

181. *See supra* note 150 and accompanying text.

182. See *supra* note 157 and accompanying text for a discussion of the invidious classification created by the current interpretation of article I, section 9 of the North Dakota Constitution.

183. *See* Dickinson Pub. Sch. Dist. v. Sanstead, 425 N.W.2d 906, 911 (N.D. 1988) (Meschke, J., concurring). Due process guarantees are contained in article I, section 12 of the North Dakota Constitution which provides that "[n]o person shall . . . be deprived of life, liberty or property without due process of law." N.D. CONST. art. I, § 12. In addition, article I, section 9 of the North Dakota Constitution is interwoven with due process protections. *Hanson*, 389 N.W.2d at 333.

Due process guarantees are also contained in the Fourteenth Amendment to the United States Constitution which provides that no State shall "deprive any person of life, liberty, or property, without due process of law . . . ." U.S. CONST. amend. XIV, § 1.

184. Strankowski v. Strankowski, 447 N.W.2d 323, 326 (N.D. 1989). In *Strankowski*, the North Dakota Supreme Court upheld a lien on the contingent proceeds of a personal injury action as security for future child support payments and stated that "the majority of authorities conclude that a cause of action for a personal injury is a chose in action which is a form of property." *Id.* By imposing a lien on the contingent proceeds of the personal injury action, the court impliedly adopted the rule followed by the majority of authorities which treats a personal injury claim as a property right. *Id.*

185. *Leadbetter*, 467 N.W.2d at 432. When a plaintiff brings an action against the *State* to recover money, the State is entitled to invoke sovereign immunity. *Id.* Thus, *when the tortfeasor is the State*, the plaintiff is denied recovery for their injuries and the State saves a "fiscal inconvenience through injustice to individuals." *Id.* at 438 (Meschke, J., dissenting).

claim against the State, one could argue that the plaintiff is deprived of property without the due process of law.

VI. PROBLEMS AND SOLUTIONS RELATED TO THE ABOLITION OF SOVEREIGN IMMUNITY

A. RETROSPECTIVE OR PROSPECTIVE ABOLITION

Once the decision is made to abolish sovereign immunity, the problem of prospective or retrospective abolition surfaces. The prospective/retrospective decision must be made with care so that confusion and injustice is minimized for those who have relied on pre-abolition decisions.[186] On one side, prospective abrogation is unfair to a person injured before the date on which abrogation takes effect.[187] On the other side, retrospective abrogation is unfair because North Dakota would be denied a defense "which was in existence at the time the underlying cause of action arose."[188] Therefore, the best solution is the application of the *Sunburst* Doctrine,[189] which would allow the North Dakota Supreme Court to choose between prospective and retrospective abolition. If the court were to choose prospective abolition, sovereign immunity would be abolished with respect to the parties of the particular case then before the court, while providing for general abrogation to begin at some future date.

The prospective abolishment of sovereign immunity would parallel the judicial abolishment of governmental immunity by *Kitto v. Minot Park District*, while providing three valuable adjustment periods.[190] First, prospective abrogation provides the court with flexibility in dealing with future liability issues not presented by the parties to the abolishing action.[191] Second, prospective

186. Kitto v. Minot Park Dist., 224 N.W.2d 795, 803-04 (N.D. 1974). The *Kitto* court discussed the rationale behind the prospective abrogation of governmental immunity. *Id.* The same rationale would apply to the abolishment of sovereign immunity.

187. KEETON ET AL., *supra* note 172, § 131, at 1055 n.43 (5th ed. 1984).

188. Nieting v. Blondell, 235 N.W.2d 597, 603 (Minn. 1975). *Nieting* involved a personal injury action in which the plaintiff alleged that the Minnesota State Highway Department was negligent in its design, construction and maintenance of highway barriers. *Id.* at 599. The court prospectively abolished sovereign immunity so that the legislature would have time to work out the procedural details. *Id.* at 603.

189. Great Northern Ry. v. Sunburst Co., 287 U.S. 358 (1932). The Great Northern Railway had been transporting oil for Sunburst and charging Sunburst based on an estimated weight per pound. *Id.* at 359-60. Sunburst learned that it was being overcharged and brought suit to recover for past overcharges. *Id.* at 359. The court held that when deviating from precedent, a court may choose "for itself between the principle of forward operation and that of relation backward. It may say that decisions of its highest court, though later overruled, are law none the less for intermediate transactions." *Id.* at 364.

190. *See Kitto*, 224 N.W.2d at 804.

191. *Id.*

abrogation gives governmental entities which have relied on the immunity time to procure insurance coverage.[192] Finally, prospective abrogation gives the legislature an opportunity to declare in what instances the State is immune from suit—a power given the legislature in the second sentence of article I, section 9 of the North Dakota Constitution.[193]

B. OTHER PROBLEMS RELATED TO ABOLITION

There are other potential problems related to the abolition of sovereign immunity. Confusion and a sudden influx of litigation against North Dakota may accompany the abolition of this doctrine. However, if local government entities can withstand being subject to suit, the State should also be able to withstand the potential liability.[194] In addition, the ability of the State to obtain adequate insurance and excessive damage awards against the State are likely to be concerns that will surface immediately upon abrogation.[195] However, these problems are not without a solution, and legislative action after abrogation would effectively serve to protect the State's interest in guarding itself against frivolous litigation.

The legislature has numerous options available for dealing with these potential problems. Upon abrogation, the legislature could establish a special claims court for hearing suits against North Dakota, it could require prompt notice of a claim against the State when a cause of action has arisen, and/or it could shorten the statute of limitations for bringing an action against the State.[196] In addition, the legislature could establish damage ceilings, require State agencies to purchase insurance, and statutorily eliminate punitive or exemplary damage awards to an injured party.[197]

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192. *Id.*

193. For a discussion of the legislature's ability to declare the State immune from suit, see *supra* notes 117 & 119 and accompanying text.

194. Campbell v. State, 284 N.E.2d 733, 736 (Ind. 1972). The *Campbell* court abolished sovereign immunity and noted that "[i]f city and county governments can withstand the consequences of such liability, where the traffic hazards seemingly are greater, the state should be able to also bear such burden." *Id.*

195. *Id.*

196. *Kitto*, 224 N.W.2d at 803 n.18. *Cf.* N.D. CENT. CODE § 28-01-22.1 (1991). Currently, North Dakota Century Code § 28-01-22.1 provides a three-year statute of limitations for bringing claims against "the state or its employees and officials acting within the scope of their employment or office." *Id.*

197. *See* N.D. CENT. CODE § 32-12.1-15(1) (Supp. 1991). Currently, North Dakota Century Code § 32-12.1-15(1) allows state agencies to purchase insurance or to join an insurance pool. *Id.* In addition, North Dakota Century Code § 32-12.1-03(2) establishes an award ceiling and eliminates the award of punitive or exemplary damages against political subdivisions. *Id.* § 32-12.1-03(2). Similar statutes could be enacted by the Legislature for the protection of the State.

If the legislature followed these guidelines, North Dakota would not be jeopardized by excessive litigation or large damage awards, and an innocent victim of tortious state conduct would be provided a remedy for the wrong inflicted upon him or her.

VII. MOVING TOWARDS THE ABOLITION OF SOVEREIGN IMMUNITY

A. THE CHANGING STRUCTURE OF THE NORTH DAKOTA SUPREME COURT

The 1992 election may have changed the makeup of the North Dakota Supreme Court enough to provide for the abolition of sovereign immunity when the next case challenging the doctrine is presented to the court.[198] In previous cases in which a party challenged the doctrine of sovereign immunity, Justices Erickstad, Vande Walle, and Gierke voted as a majority of the court and upheld this doctrine.[199] Two other justices, Justices Meschke and Levine, consistently voted in favor of abolishing sovereign immunity.[200] However, the 1992 election replaced Justices Erickstad and Gierke and may have thus provided the impetus for the abolition of this outmoded doctrine. Justice Gierke's former position was filled by the election of Dale Sandstrom to a four year term,[201] and William Neumann was elected to fill the vacancy created by Chief Justice Erickstad's retirement.[202] Justice Vande

198. At the time this article was written, a case challenging the doctrine of sovereign immunity was on appeal to the North Dakota Supreme Court. Bulman v. Hulstrand Constr. Co., Civ. No. 930007 (on file with the Clerk of the North Dakota Supreme Court). *Bulman* involves a wrongful death action which results from a vehicle accident that occurred at the site of a road construction project. Brief for Appellants at 3, *Bulman*, Civ. No. 930007. The district court granted the State's Motion to Dismiss on the grounds that the plaintiff's claim was barred by the doctrine of sovereign immunity and the appeal now before the North Dakota Supreme Court followed. *Id.* The North Dakota Supreme Court heard arguments in this case on April 15, 1993 and it is anticipated that the court will render a decision within the following few months.

199. Leadbetter v. Rose, 467 N.W.2d 431 (N.D. 1991); Schloesser v. Larson, 458 N.W.2d 257 (N.D. 1990); Dickinson Pub. Sch. Dist. v. Sanstead, 425 N.W.2d 906 (N.D. 1988).

200. *Leadbetter*, 467 N.W.2d at 438 (Meschke and Levine, JJ., dissenting) "[S]overeign immunity is textually unfounded, lacks historical accuracy, and is judicially irrational." *Id.* *Schloesser*, 458 N.W.2d at 262 (Meschke and Levine, JJ., dissenting) "[The] sovereign immunity of the State and its officials should be discarded as unconstitutional." *Id.* In a third case involving sovereign immunity, *Sanstead*, 425 N.W.2d at 906, Justice Meschke voted with the majority for *substantive reasons, id.* at 912, but severely criticized sovereign immunity and called for its abrogation. *Id.* at 911.

201. *Decision 92: N.D. Supreme Court*, THE GRAND FORKS HERALD, Nov. 4, 1992, at C5. Supreme court justices serve for ten-year terms. N.D. CONST. art VI, § 7. Justice Gierke had resigned effective November 20, 1991 in order to accept an appointment to the United States Court of Military Appeals. Musich v. Yagow, 478 N.W.2d 15, 17 (N.D. 1991). There were four years remaining in Justice Gierke's term. Carter Wood, *Negative Politics Enters the Judicial Campaign*, THE GRAND FORKS HERALD, Oct. 26, 1992, at A1.

202. *Decision 92: N.D. Supreme Court*, *supra* note 207, at C5. William Neumann

Walle was chosen the new Chief Justice.[203] Since two former justices who voted in favor of upholding sovereign immunity are no longer on the bench, the tide of votes may turn.

B. THE NUMBER OF VOTES REQUIRED TO ABOLISH THE DOCTRINE OF SOVEREIGN IMMUNITY

The North Dakota Supreme Court is made up of five justices[204] and a majority vote of the court is necessary to pronounce a decision.[205] However, the court "shall not declare a legislative enactment unconstitutional unless at least four of the members of the court so decide."[206]

Article I, section 9 of the North Dakota Constitution was intended to provide a means by which the legislature could, if it desired, declare cases in which North Dakota would be immune from suit.[207] However, this legislative power *is subject to the North Dakota Supreme Court's determination that such a legislative declaration is constitutionally proper.*[208] Absent such a legislative declaration, sovereign immunity does not exist in North Dakota.

The North Dakota Constitution contains no unequivocal statement which provides that North Dakota shall be immune from suit.[209] Furthermore, the legislature has never established sovereign immunity in North Dakota. In fact, the closest the legislature has ever come to establishing sovereign immunity occurs in North Dakota Century Code section 32-12.1-03(4). Section 32-12.1-03(4) is part of a chapter which is entitled and pertains to the "*Liability of Political Subdivisions.*"[210] This section provides that "[t]he sovereign immunity of the state is not waived in any manner by this

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challenged Bob Wefald in the race for a ten-year term created by the retirement of Chief Justice Erickstad. *Negative Politics Enters the Judicial Campaign*, *supra* note 207, at A1.

203. Dale Wetzel, *VandeWalle Chosen Chief Justice of Supreme Court*, THE GRAND FORKS HERALD, Dec. 5, 1992, at A8. It is interesting to note that Justice Vande Walle was an assistant attorney general who wrote the *amicus curiae* brief on behalf of the State in Kitto v. Minot Park Dist., 224 N.W.2d 795, 796 (N.D. 1974). It is also interesting to note that in *Kitto*, Justice Meschke was the attorney for the plaintiff. *See* Amicus Curiae Brief of Attorney General (the brief's cover), Kitto v. Minot Park Dist., 224 N.W.2d 795 (N.D. 1974) (No. 9030) (on file in the Thormodsgard Law Library at the University of North Dakota). For a discussion of Kitto, see *supra* notes 76-83 and accompanying text.

204. N.D. CONST. art. VI, § 2.

205. N.D. CONST. art. VI, § 4.

206. *Id.*

207. Sloan, *supra* note 29, at 220. *See also supra* notes 117 & 119 and accompanying text.

208. Sloan, *supra* note 29, at 220. *See also supra* notes 116-120 and accompanying text.

209. N.D. CONST. art. I, § 9. *See generally* N.D. CONST. *See supra* notes 56-66 and accompanying text.

210. *See generally* N.D. CENT. CODE Ch. 32-12.1 (Supp. 1991).

chapter, and this chapter shall not be construed to abrogate the immunity of the state."[211] However, since the North Dakota Constitution does not establish sovereign immunity,[212] and since the legislature has never provided for sovereign immunity in North Dakota, the sovereign immunity to which section 32-12.1-03(4) refers results from *precedents* which have been applied as "an unexpressed and unintended limitation on access to the courts of this state."[213] Therefore, since the judicial abrogation of sovereign immunity would require the overruling of a precedent *rather* than a determination that a legislative enactment was unconstitutional, the votes of only three justices are needed to abolish this doctrine.[214]

VIII. CONCLUSION

Today, the doctrine of sovereign immunity is in disfavor, and "courts are disposed to hear an action against the state unless good reason stands in the way."[215] The legislature has already given state agencies permission to obtain insurance coverage[216] and has thus negated the possibility that a verdict against North Dakota would have a detrimental impact on State finances. Nevertheless, the North Dakota Supreme Court continues to uphold the doctrine, and in doing so reaches outside the written constitution and the laws of the State, thereby denying a wronged person's otherwise valid, legitimate claim against a State entity.[217]

Sovereign immunity places the burden resulting from the tortious acts of the State upon a single individual rather than on the entire community of North Dakota where it belongs.[218] This approach seems contrary to public policy because people injured

211. N.D. CENT. CODE § 32-12.1-03(4) (Supp. 1991).

212. N.D. CONST. art. I, § 9. *See generally* N.D. CONST. *See also supra* notes 56-66 & 117 and accompanying text.

213. Dickinson Pub. Sch. Dist. v. Sanstead, 425 N.W.2d 906, 911 n.6 (N.D. 1988) (Meschke, J., dissenting). *See* notes 53-66 and accompanying text. Article I, section 9 contains no unequivocal statement which grants North Dakota sovereign immunity. *See* N.D. CONST. art. I, § 9. Therefore, if the North Dakota Supreme Court were to abolish sovereign immunity, it would be overturning its *interpretation* of North Dakota Constitution article I, section 9. *See* Schloesser v. Larson, 458 N.W.2d 257, 258 (N.D. 1990). "We have consistently *construed* [article I, section 9] . . . ." *Id.* (emphasis added). Senger v. Hulstrand Constr., Inc., 320 N.W.2d 507, 508 (N.D. 1982). "The *construction* consistently placed upon [article I, section 9] . . . ." *Id.* (emphasis added).

214. *See* N.D. CONST. art. VI, § 4.

215. 72 AM. JUR. 2D *States, Etc.* § 101 (1974).

216. N.D. CENT. CODE § 32-12.1-15 (Supp. 1991).

217. *See* Brief for Third Party Defendants-Appellees at 11, Schloesser v. Larson, 458 N.W.2d 257 (N.D. 1990) (No. 890202) (on file in the Thormodsgard Law Library at the University of North Dakota).

218. *Kitto*, 224 N.W.2d at 798 (quoting Barker v. City of Santa Fe, 136 P.2d 480, 482 (N.M. 1943)).

by the State do not receive "a full measure of relief from wrongs inflicted upon them."[219] Furthermore, in a democracy that encourages the resolution of issues of broad public interest[220] and which protects individual rights, the court should not neglect the resolution of private injustices inflicted by State entities.[221] To properly serve the public interest, North Dakota must strive to protect its citizens and provide them with remedies for wrongs inflicted upon them. If the State fails in this task, it will be operating in conflict with public policy, public interest, and the public good.[222]

The North Dakota Supreme Court should not unduly regard potential problems associated with the abrogation of the doctrine of sovereign immunity. Rather, it should be remembered that the judiciary is the proper place for abolishing sovereign immunity, while the legislature is the proper place for resolving any problems created by the abrogation of this doctrine.[223] If the legislature acts promptly after sovereign immunity is abolished, and establishes safeguards to protect North Dakota against frivolous litigation and outrageous verdicts, wrongfully injured individuals will be provided a remedy and the interests of the State will remain protected.

The time has come for the North Dakota Supreme Court to declare liability the rule and immunity the exception when dealing with tortious claims against the State.[224] New causes of action should not be created, but existing causes of action should be allowed to be pursued. The time has come for the North Dakota Supreme Court to abolish the doctrine of sovereign immunity.

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219. Kristensen v. Strinden, 343 N.W.2d 67, 70 (N.D. 1983).
220. *Kitto*, 224 N.W.2d at 804.
221. Schloesser v. Larson, 458 N.W.2d 257, 263 (N.D. 1990) (Meschke, J., dissenting).
222. Nieting v. Blondell, 235 N.W.2d 597, 603 (Minn. 1975).
223. Dickinson Pub. Sch. Dist. v. Sanstead, 425 N.W.2d 906, 911 n.6 (N.D. 1988) (Meschke J., dissenting). Justice Meschke states that "the legislature may 'direct' the course of claims against the State," but that citizens are entitled to their constitutional rights. *Id.* It is the court's responsibility to protect citizens' constitutional rights; therefore, it is the court's responsibility to abolish sovereign immunity.
224. *See* Holytz v. City of Milwaukee, 115 N.W.2d 618, 625 (Wis. 1962).