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An Open Question in Utah's Open Courts Jurisprudence: The Utah Wrongful Life Act and *Wood v. University of Utah Medical Center*

I. INTRODUCTION

The sensitive issues and deeply held beliefs involved in this country's ongoing abortion debate have generated intense controversy. Although the U.S. Supreme Court[1] or Congress[2] have occasionally entered the fray, regulation of the specifics regarding abortion is often left to individual states. In particular, states have been able to determine whether parents can sue physicians for medical advice and procedures related to birth and abortion. In the wake of various state court decisions allowing such suits,[3] and a decade after the U.S. Supreme Court's controversial decision in *Roe v. Wade*, the Utah legislature passed the Utah Wrongful Life Act[4] (the "Wrongful Life Act" or the "Act"), prohibiting suits against physicians for such advice or procedures.[5] For twenty years, the Act garnered only passing mention in Utah Supreme Court cases.[6] But in 2002, the plaintiffs in *Wood v. University of Utah Medical Center*[7] challenged the Act as unconstitutional, thus ushering it into Utah's jurisprudential limelight.

This Note analyzes the *Wood* decision and the constitutionality of the Wrongful Life Act. In doing so, it is intended neither to add

1. *See, e.g.*, Planned Parenthood of S.E. Pa. v. Casey, 505 U.S. 833 (1992); Roe v. Wade, 410 U.S. 113 (1973).

2. Most recently, Congress passed the Partial-Birth Abortion Ban Act of 2003, 18 U.S.C. § 1531 (2003).

3. *See, e.g.*, Gildener v. Thomas Jefferson Univ. Hosp., 451 F. Supp. 692 (E.D. Pa. 1978); Berman v. Allan, 404 A.2d 8 (N.J. 1979); Jacobs v. Theimer, 519 S.W.2d 846 (Tex. 1975); Harbeson v. Parke-Davis, Inc., 656 P.2d 483 (Wash. 1983); Dumer v. St. Michael's Hosp., 233 N.W.2d 372 (Wis. 1975); *see also Utah Legislative Survey—1983*, 1984 UTAH L. REV. 115, 222–24 (1984) [hereinafter *Utah Legislative Survey*].

4. Act of Feb. 28, 1983, ch. 167, 1983 Utah Laws 687 (codified at UTAH CODE ANN. §§ 78-11-23 to -25 (2002)).

5. UTAH CODE ANN. § 78-11-24.

6. *See* C.S. v. Nielson, 767 P.2d 504, 507–08 (Utah 1988); Payne *ex rel.* Payne v. Myers, 743 P.2d 186, 188 n.4 (Utah 1987).

7. 67 P.3d 436 (Utah 2002), *cert. denied*, 124 S. Ct. 388 (2003).

to the extensive commentary on the constitutionality of abortion, nor to make normative arguments for or against the practice. Rather, it focuses both on the effect of the *Wood* decision and the constitutionality of the Act as challenged under the "open courts" clause of Utah's constitution. This Note first argues that the alignment of the Justices in *Wood* left at least part of the constitutional question unanswered. Next, it suggests an alternative to the conflicting standards of review used both in *Wood* and in past Utah decisions. Finally, it argues that, regardless of the standard of review used, the Act should be upheld as constitutional.

Part II of this Note gives background information on the Wrongful Life Act and the Utah Constitution's "open courts" clause. Part III describes the facts, procedural history, and holding of *Wood*. Part IV analyzes the *Wood* opinions: Part IV.A recommends a standard of review in open courts cases, and Part IV.B asserts that the Wrongful Life Act was properly upheld as constitutional. Part V offers a brief conclusion.

II. BACKGROUND

A. The Utah Wrongful Life Act

On February 28, 1983, the Utah Legislature passed the Wrongful Life Act.[8] It came in response to court decisions in other states allowing recovery for wrongful life[9] and wrongful birth[10] and was intended to prevent such suits.[11] Utah was one of the first states

8. Act of Feb. 28, 1983, ch. 167, 1983 Utah Laws 687 (codified at UTAH CODE ANN. §§ 78-11-23 to -25 (2002)).

9. "Wrongful life actions are those brought by or on behalf of an infant, usually physically or mentally impaired, and allege that the child was born into a disadvantaged form of life because of another's negligence." William Shane Topham, Note, *Wrongful Birth and Wrongful Life: Analysis of the Causes of Action and the Impact of Utah's Statutory Breakwater*, 1984 UTAH L. REV. 833, 834; *see also Payne*, 743 P.2d at 187 n.2.

10. "[W]rongful birth actions are brought by the parents in their own right, demanding compensation for costs related to the birth and rearing of the child." Topham, *supra* note 9, at 834 (footnote omitted); *see also Payne*, 743 P.2d at 187 n.1; Jennifer R. Granchi, Comment, *The Wrongful Birth Tort: A Policy Analysis and the Right to Sue for an Inconvenient Child*, 43 S. TEX. L. REV. 1261, 1265–66 (2002).

11. *See supra* note 3. *Utah Legislative Survey*, *supra* note 3, a law review article contemporary with the Act, indicated that at least one legislator thought the Act was intended to prevent abortions, *id.* at 224 & n.747, and that an author of the Act intended it to prevent routine genetic testing and thus abortions, *id.* at 224 & nn.749–52. The article determined, however, that the Act "fails to implement legislative intent." *Id.* at 224.

to enact a law prohibiting actions for wrongful birth, though several other states have enacted similar laws.[12]

The first section of Utah's statute declares that it is the public policy of Utah "to encourage all persons to respect the right to life of all other persons, regardless of age, development, condition or dependency, including all persons with a disability and all unborn persons."[13] Based on that policy, section 78-11-24 states that "[a] cause of action shall not arise, and damages shall not be awarded, on behalf of any person, based on the claim that but for the act or omission of another, a person would not have been permitted to have been born alive but would have been aborted."[14]

Although there was some speculation at the time of enactment that the Act may violate a woman's right to an abortion,[15] no such

12. *See* IDAHO CODE § 5-334(1) (Michie 1998) ("A cause of action shall not arise, and damages shall not be awarded, on behalf of any person, based on the claim that but for the act or omission of another, a person would not have been permitted to have been born alive but would have been aborted."); IND. CODE ANN. § 34-12-1-1 (West 1998) ("A person may not maintain a cause of action or receive an award of damages on the person's behalf based on the claim that but for the negligent conduct of another, the person would have been aborted."); MICH. COMP. LAWS ANN. § 600.2971 (West 2003) ("(1) A person shall not bring a civil action on a wrongful birth claim that, but for an act or omission of the defendant, a child or children would not or should not have been born. . . . (4) The prohibition . . . applies regardless of whether the child is born healthy or with a birth defect or other adverse medical condition."); MINN. STAT. ANN. § 145.424(2) (West 1998) ("No person shall maintain a cause of action or receive an award of damages on the claim that but for the negligent conduct of another, a child would have been aborted."); MO. ANN. STAT. § 188.130(2) (West 1996) ("No person shall maintain a cause of action or receive an award of damages based on the claim that but for the negligent conduct of another, a child would have been aborted."); 42 PA. CONS. STAT. ANN. § 8305(a) (West 1998) ("There shall be no cause of action or award of damages on behalf of any person based on a claim that, but for an act or omission of the defendant, a person once conceived would not or should not have been born."); S.D. CODIFIED LAWS § 21-55-1 (Michie 1987) ("There shall be no cause of action or award of damages on behalf of any person based on the claim of that person that, but for the conduct of another, he would not have been conceived or, once conceived, would not have been permitted to have been born alive."). *Cf.* CAL. CIV. CODE § 43.6(a) (West 1982) ("No cause of action arises against a parent of a child based upon the claim that the child should not have been conceived or, if conceived, should not have been allowed to have been born alive."); ME. REV. STAT. ANN. tit. 24, § 2931(3) (West 2000) ("Damages for the birth of an unhealthy child born as the result of professional negligence shall be limited to damages associated with the disease, defect or handicap suffered by the child."); N.D. CENT. CODE § 32-03-43 (1996) ("No person may maintain a claim for relief or receive an award for damages on that person's own behalf based on the claim that, but for the act or omission of another, that person would have been aborted.").

13. UTAH CODE ANN. § 78-11-23 (2002).

14. *Id.* § 78-11-24. The final section of the Act disallows use of "failure or refusal of any person to prevent the live birth of a person" as a defense in any action. *Id.* § 78-11-25.

15. *Utah Legislative Survey*, *supra* note 3, at 225–26.

claim made it to the Utah Supreme Court for twenty years. In the two cases that mentioned the statute, it either was found to not apply to the plaintiff's claim[16] or was not considered because the plaintiffs' claim was otherwise barred.[17] In *Wood v. University of Utah Medical Center*,[18] however, the court directly confronted a constitutional challenge to the Act.

B. The Open Courts Clause of the Utah Constitution

One ground for challenging the Act as unconstitutional was a provision of the Utah Constitution. Article I, section 11—the "open courts" clause[19]—provides the following:

> All courts shall be open, and every person, for an injury done to him in his person, property or reputation, shall have remedy by due course of law, which shall be administered without denial or unnecessary delay; and no person shall be barred from prosecuting or defending before any tribunal in this State, by himself or counsel, any civil cause to which he is a party.[20]

"Open courts" or "remedies" clauses such as Utah's have a strong common law background, dating from Sir Edward Coke's restatement of the Magna Carta.[21] Delaware was the first state to adopt such a clause into its constitution,[22] and at present forty states contain a similar guarantee.[23] These clauses were intended to serve two principal purposes: first, to establish an independent foundation

16. C.S. v. Nielson, 767 P.2d 504, 507–08 (Utah 1988).

17. Payne *ex rel.* Payne v. Myers, 743 P.2d 186, 189–90 (Utah 1987).

18. 67 P.3d 436 (Utah 2002).

19. *Id.* at 439.

20. UTAH CONST. art. I, § 11.

21. Jonathan M. Hoffman, *By the Course of the Law: The Origins of the Open Courts Clause of State Constitutions*, 74 OR. L. REV. 1279, 1284 (1995); *see also* Craftsman Builder's Supply, Inc. v. Butler Mfg. Co., 974 P.2d 1194, 1204 (Utah 1999) (Stewart, J., concurring).

22. Hoffman, *supra* note 21, at 1285.

23. Thomas R. Phillips, *The Constitutional Right to a Remedy*, 78 N.Y.U. L. REV. 1309, 1309 (2003). *But see* David Schuman, *The Right to a Remedy*, 65 TEMP. L. REV. 1197, 1201 n.25 (1992) (thirty-nine states). The discrepancy appears to arise from the latter author's omission of Georgia, *see* GA. CONST. art. I, § 1, ¶ 12 (1998), although Schuman (but not Phillips) concludes that New Mexico includes a common-law guarantee, *see* Richardson v. Carnegie Library Rest., Inc., 763 P.2d 1153, 1161 (N.M. 1988), and Phillips (but not Schuman) concludes that Washington's constitution implicitly recognizes a remedy guarantee, *see* WASH. CONST. art. I, § 10. *See also* John H. Bauman, *Remedies Provisions in State Constitutions and the Proper Role of the State Courts*, 26 WAKE FOREST L. REV. 237, 237 n.1 (1991). Regardless, the right to a remedy is widely recognized in a majority of states.

for the judiciary, and second, "to grant individuals rights to a judicial remedy for the protection of their person, property, or reputation from abrogation and unreasonable limitation by economic interests that could control state legislatures."[24]

The open courts clause in the Utah Constitution, according to an early Utah Supreme Court case, was specifically intended to place "a limitation upon the Legislature to prevent that branch of the state government from closing the doors of the courts against any person who has a legal right which is enforceable in accordance with some known remedy."[25] Later Utah Supreme Court cases have construed the clause to provide both procedural and substantive guarantees.[26] The procedural guarantees are somewhat akin to those of the due process clause: "access to the courts and a judicial procedure that is based on fairness and equality."[27] The substantive guarantee is that "an individual c[an]not be arbitrarily deprived of effective remedies designed to protect basic individual rights."[28]

There are, however, limitations on the reach of Utah's open courts clause. Construed too broadly, this clause might permanently prevent the legislature from enacting tort reform or caps on damages, exercising governmental immunity, or even passing statutes of limitations. The Utah Supreme Court, therefore, has indicated that "[article I,] section 11 rights are not always paramount . . . . They do not sweep all other constitutional rights and prerogatives before them. They . . . must be weighed against and harmonized with other constitutional provisions."[29]

In addition, the open courts clause is not intended to create new rights or give new remedies. "Where no right of action is given . . . or no remedy exists, under either the common law or some statute, [the open courts clause] create[s] none."[30] It is also not intended to "constitutionalize[] the common law or otherwise freeze[] the law governing private rights and remedies as of the time of statehood."[31] Finally, it is not meant to inhibit the legislature's "great latitude in

24. *Craftsman Builder's Supply*, 974 P.2d at 1205 (Stewart, J., concurring).

25. Brown v. Wightman, 151 P. 366, 366–67 (Utah 1915).

26. There has been substantial controversy in Utah over whether the open courts clause includes substantive guarantees. *See infra* notes 165–67 and accompanying text.

27. Berry *ex rel.* Berry v. Beech Aircraft Corp., 717 P.2d 670, 675 (Utah 1985).

28. *Id.*

29. *Id.* at 677.

30. *Brown*, 151 P. at 367.

31. *Berry*, 717 P.2d at 676.

defining, changing, and modernizing the law," or its ability to "create new rules of law and abrogate old ones."[32]

C. The Berry *Test*

The leading Utah case interpreting the open courts clause is *Berry ex rel. Berry v. Beech Aircraft Corp.*[33] In that case, the Utah Supreme Court developed a two-prong test for evaluating whether legislation challenged under the open courts clause is constitutional. Under the *Berry* test, a law that abrogates a common law remedy or cause of action withstands an open courts challenge only if it meets one of two requirements:

> [(1)] the law provides an injured person an effective and reasonable alternative remedy "by due course of law" for vindication of his constitutional interest[, or] . . .
>
> [(2)] there is [(i)] a clear social or economic evil to be eliminated and [(ii)] the elimination of an existing legal remedy is not an arbitrary or unreasonable means for achieving the objective.[34]

The *Berry* test is straightforward: if the legislature takes away a remedy, it either must have done so to eliminate a clear evil in a reasonable way, or it must provide a reasonable alternative. This test is designed to guide the courts in cases where the legislature has acted to limit or eliminate a judicially enforceable remedy. For example, in *Berry*, the court applied this test to invalidate a statute of repose for products liability.[35] As the lead opinion in *Wood* pointed out, "[i]nherent in [the *Berry* test] is whether the statute abrogated an existing remedy or cause of action."[36] If no remedy has been abrogated, the two prongs of the test are not even implicated.

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32. *Id.* Because "legal causes of action which provide remedies that protect section 11 interests may, in some cases, have to yield to the power of the Legislature to promote the public health, safety, morals, and welfare," *id.* at 677, legislatures can properly create statutory remedies—for example, worker's compensation acts—that replace the common law remedy.

33. 717 P.2d 670.

34. *Id.* at 680.

35. *Id.* at 681.

36. Wood v. Univ. of Utah Med. Ctr., 67 P.3d 436, 442 (Utah 2002). The *Wood* dissent agreed. *Id.* at 453 (Durham, C.J., dissenting) ("The first step in deciding whether the Act violates the constitutional guarantee of a remedy is to determine whether the Act abrogated an existing legal remedy."); *see also* Laney v. Fairview City, 57 P.3d 1007, 1021 (Utah 2002) ("[W]e must first determine whether a cause of action has been abrogated by the legislative enactment.").

Although there were no dissenters in *Berry*, the framework that it established has since been challenged. One Utah Supreme Court Justice said of the *Berry* test: "[i]t is subject to manipulation, . . . it leads to absurd results, and it distorts our relationship with the legislature."[37] Another added that "this test permits a majority of this court to substitute its judgment of what constitutes good public policy for the judgment of the legislature" and asserted that "the *Berry* test is a straw man analytical framework that permits one to justify a predetermined outcome."[38] One scholar described the *Berry* opinion as "typical of the activist use of the remedies provision,"[39] using "wishful thinking,"[40] and "almost casual[ly] invalidating" the law at issue in that case.[41] Finally, the historical analysis used in *Berry* has been criticized.[42] Nonetheless, despite these criticisms, majorities in the Utah Supreme Court continue to use the *Berry* test, most recently in the 2002 case *Laney v. Fairview City*.[43] *Berry* was therefore controlling precedent when the *Wood* case arose.

III. *WOOD V. UNIVERSITY OF UTAH MEDICAL CENTER*

A. Factual Background

Fifteen years after the legislature passed the Wrongful Life Act, Marie Wood discovered she was pregnant. She and her husband, Terry, sought treatment from the University of Utah Medical Center.[44] Specifically, they sought to learn whether, because of Marie's age,[45] there was a higher risk that the child would be born

37. Craftsman Builder's Supply, Inc. v. Butler Mfg. Co., 974 P.2d 1194, 1224 (Utah 1999) (Zimmerman, J., concurring).

38. *Laney*, 57 P.3d at 1029–30 (Wilkins, J., concurring and dissenting).

39. Bauman, *supra* note 23, at 270.

40. *Id*. at 271.

41. *Id*. at 271 n.205.

42. *See* Daniel W. Lewis, Note, *Utah's Emerging Constitutional Weapon—The Open Courts Provision:* Condemarin v. University Hospital, 1990 BYU L. REV. 1107, 1109 n.20 ("[T]he *Berry* court . . . ignore[d scholars who pointed out that] history suggests that open courts provisions were never intended to have any bearing on *legislative* power. Rather, these provisions represented a uniquely *judicial* guarantee aimed at remedying judicial favoritism, excessive filing fees, or other discriminatory procedural mechanisms . . . ." (emphasis added)).

43. 57 P.3d at 1021–27. It was there used to invalidate a governmental immunity statute. *Id*.

44. Wood v. Univ. of Utah Med. Ctr., 67 P.3d 436, 439 (Utah 2002).

45. Marie was 43 years old. Petition for Writ of Certiorari at 2, Wood v. Univ. of Utah Med. Ctr., 124 S. Ct. 388 (2003) (No. 03-82).

with a genetic disorder. Doctors at the Medical Center performed tests in early 1998, the results of which indicated that there was an eighty-five percent probability that the child would be born with Down syndrome.[46] The couple claimed they were not informed of the results of the tests until late March and that the doctors tempered the news by saying that, because the tests often resulted in false positives, the chances of Marie having a child with Down syndrome were actually quite small.[47] In August 1998, Marie gave birth to a baby girl, Mary Lorraine.[48] Although she was otherwise healthy, Mary Lorraine was diagnosed with Down syndrome.[49]

B. Procedural History

The parents filed suit against the Medical Center in Utah state court.[50] They alleged that employees of the Medical Center negligently performed and interpreted the prenatal tests, and failed to provide the couple sufficient information to make an informed decision about whether to abort their child.[51] The couple also included claims for negligent infliction of emotional distress and failure to obtain informed consent.[52] Finally, recognizing that the Act would bar their claim, the couple included a fourth "cause of action"—a challenge to the constitutionality of section 78-11-24 of the Act.[53]

In response, the Medical Center filed a motion for judgment on the pleadings, claiming that the Wrongful Life Act barred all of the couple's claims.[54] The district court granted the motion.[55] Plaintiffs appealed, attacking the constitutionality of section 78-11-24 on several grounds.[56] They claimed that it violated the open courts clause of the Utah Constitution, the due process clauses of both the

46. *Wood*, 67 P.3d at 439.
47. *Id.*
48. *Id.*
49. *Id.*
50. *Id.*
51. *Id.* at 439–40.
52. *Id.* at 440.
53. *Id.*
54. *Id.*
55. *Id.*
56. *Id.*

federal and Utah constitutions, and equal protection guarantees in both the federal and Utah constitutions.[57]

On the last day of 2002, the Utah Supreme Court affirmed the district court's decision.[58] The court was highly fractured, with only two of the five justices joining in a lead opinion.[59] The Chief Justice wrote a vigorous dissent, joined in full by another justice.[60] Finally, Justice Howe agreed with the first part of the Chief Justice's dissent[61] but concurred in the result of several major parts of the lead opinion[62]—thus providing what seemed to be a majority in favor of upholding the constitutionality of the Wrongful Life Act.

C. The Open Courts Holding in Wood

1. The lead and dissenting opinions

Despite the limited reach of Utah's open courts clause, the *Wood* plaintiffs claimed that because the Act eliminated their ability to recover for the Medical Center's alleged negligence, it violated the open courts clause.[63] In evaluating this claim, the lead opinion and the dissent disagreed on two "open courts questions."[64] They disagreed first as to the degree of deference afforded the legislature when *any* statute is challenged under the open courts clause (the standard of review) and second as to the constitutionality of the Wrongful Life Act.

The lead opinion, authored by Justice Wilkins and joined by Justice Durrant, answered both open courts questions in Part I of

57. *Id.* Although each of these challenges to the Act presents important constitutional issues, this Note deals solely with the open courts question. A majority of the court upheld the constitutionality of the Wrongful Life Act on each of the other challenges. *Id.* at 447–49.

58. *Id.* at 436.

59. *Id.* at 450. Because of ambiguity and potential confusion in the *Wood* opinions, discussed below, this Note refrains from referring to any one opinion as the "majority" opinion. For purpose of this Note, Justice Wilkins's opinion is termed the "lead opinion" and Chief Justice Durham's opinion is termed the "dissent" or "dissenting opinion" (although it commanded a majority on one issue).

60. *Id.* at 461 (Durham, C.J., dissenting). This other justice also filed a separate dissent. *Id.* (Russon, J., concurring in Chief Justice Durham's dissenting opinion).

61. *Id.* (Howe, J., concurring in Part I of Chief Justice Durham's dissenting opinion).

62. *Id.* at 450 (Howe, J., concurring in part). As Part III.C of this Note indicates, however, the opinions failed to conclusively resolve the open courts challenge.

63. *Id.* at 441.

64. Throughout this Note, reference is made to the two issues relating to the open courts clause—(1) standard of review and (2) constitutionality—as "open courts questions."

that opinion. In Part I.A, Justice Wilkins concluded that the proper standard of review for open courts cases is a presumption of constitutionality.[65] In Part I.B, he evaluated the constitutionality of the Act, concluding that "[t]he Utah Wrongful Life Act does not violate the Open Courts Clause."[66] However, since the Utah Supreme Court is currently composed of five justices,[67] and since only two of the justices joined in the lead opinion, that opinion did not command a majority on either of these conclusions.[68]

In contrast, Chief Justice Durham concluded in Part I of the dissenting opinion that open courts challenges should be analyzed using heightened scrutiny.[69] In Part II, she concluded that "the Act . . . violates article I, section 11 of the Utah Constitution," and would therefore have struck it down as unconstitutional.[70] Justices Russon and Howe joined in the dissenting opinion on the standard of review issue, but only Justice Russon joined the dissent in finding a violation of the open courts clause.[71]

2. The unusual result

The *Wood* holding on the two open courts questions is not immediately obvious. Clearly, there was a majority on the standard of review issue—three of the five justices held that the proper standard is one of heightened scrutiny.[72] However, on the second

65. *Wood*, 67 P.3d at 440–41.

66. *Id*. at 450.

67. UTAH CONST. art. 8, § 2; An Overview of the Utah Supreme Court, *at* http://www.utcourts.gov/courts/sup/overview.htm (last visited Apr. 1, 2004).

68. However, some phrases from the lead opinion indicate that its author assumed that it commanded a majority vote on both of the open courts questions. *Wood*, 67 P.3d at 441 n.1 ("[W]e apply the *Berry* test to the instant case to reach the decision of this court, that the challenged legislation is constitutional."); *id*. at 443 ("We therefore hold that the legislation in question was a constitutional exercise of legislative authority that did not violate the Open Courts Clause."); *id*. at 450 ("The Utah Wrongful Life Act does not violate the Open Courts Clause . . . and we therefore uphold the Act as constitutional."); *id*. ("[T]he decision of the district court is affirmed.").

69. *Id*. at 450–52 (Durham, C.J., dissenting).

70. *Id*. at 457 (Durham, C.J., dissenting).

71. *Id*. at 461 (Durham, C.J., dissenting).

72. Although Chief Justice Durham notes in dissent that "the majority of this court upholds a heightened standard of review" for open courts cases and asserts that this fact "undermines the legal analysis in this decision and the lead opinion's conclusion that the Act is constitutional," *id*. at 450 (Durham, C.J., dissenting), she later seems to treat the lead opinion as being supported by a majority, *id*. at 451–52 (Durham, C.J., dissenting) (stating that the lead opinion's standard "opens questions about the standards this court has applied to review

issue (the constitutionality of the Wrongful Life Act), two justices voted to uphold the statute as constitutional,[73] and two justices voted to find it unconstitutional.[74] Because Justice Howe expressed no opinion on the constitutionality of the Act,[75] neither position commanded a majority of the court.

Given this alignment, the statute was upheld as constitutional for two reasons. First, it was upheld because the Utah Constitution requires that for a statute to be found unconstitutional, a majority of the court must so vote.[76] The second, and more procedurally interesting, reason is that when an appellate court is equally divided on an issue, the ruling of the lower court is affirmed.[77] Because the lower court found the Wrongful Life Act to be constitutional,[78] the Act's constitutionality, as challenged under the open courts clause, was affirmed by an equally divided court. Though affirmance by an equally divided court is not without precedent in Utah[79] or other jurisdictions,[80] it is nonetheless the exceptional case where an equal

challenges to all article 1 rights. I believe this approach is incorrect and unwise."). *See also Marie Wood and Terry Borman v. University of Utah Medical Center*, 18 ISSUES L. & MED. 275 (2003) (omitting the dissenting opinion, apparently concluding that the lead opinion commanded a majority on all issues).

73. *Wood*, 67 P.3d at 443 ("We therefore hold that the legislation in question was a constitutional exercise of legislative authority that did not violate the Open Courts Clause.").

74. *Id*. at 457 (Durham, C.J., dissenting) ("The Act therefore violates article I, section 11 of the Utah Constitution.").

75. *See id*. at 450 ("Justice Howe concurs in the result in parts II and III of Justice Wilkins' opinion."); *id*. at 461 ("Justice Howe concurs in Part I of Chief Justice Durham's dissenting opinion.").

76. UTAH CONST. art. 8, § 2 ("The [Utah Supreme C]ourt shall not declare any law unconstitutional . . . except on the concurrence of a majority of all justices of the Supreme Court.").

77. *See* Brower v. Brown, 744 P.2d 1337, 1337 (Utah 1987) ("We are evenly divided [on one of the plaintiff's claims] . . . and we must affirm the summary judgment on that issue."); Stimpson v. Union Pac. Ry. Co., 31 P. 449, 450 (Utah Terr. 1892) ("The court being equally divided in opinion, this judgment is affirmed."); *see also* 5 AM. JUR. 2D *Appellate Review* § 832 (2003) ("Where an appellate court is equally divided on an appeal before it, the decision below is generally considered to be affirmed."). *See generally* William L. Reynolds & Gordon G. Young, *Equal Divisions in the Supreme Court: History, Problems, and Proposals*, 62 N.C. L. REV. 29 (1983) (describing the history of this rule and criticizing automatic affirmance by an equally divided court); Daniel Egger, Note, *Court of Appeals Review of Agency Action: The Problem of En Banc Ties*, 100 YALE L.J. 471 (1990).

78. *Wood*, 67 P.3d at 440.

79. *See supra* note 77.

80. *See* Dow Chem. Co. v. Stephenson, 123 S. Ct. 2161 (2003); Massachusetts v. White, 439 U.S. 280 (1978); Fri v. Sierra Club, 412 U.S. 541 (1973); Jean v. Collins, 221 F.3d 656 (4th Cir. 2000); Stupak-Thrall v. United States, 89 F.3d 1269 (6th Cir. 1996) (en banc); Anderson v. State *ex rel.* Cent. Bering Sea Fishermen's Ass'n, 78 P.3d 710 (Alaska

division is due to one justice's failure to express an opinion on an issue, rather than to, because of recusal or other reasons, there being an even number of justices participating in the decision. In *Wood*, the affirmance is somewhat ironic, given that the only two justices who voted to affirm used a deferential standard of review in their analysis, whereas a majority held that heightened scrutiny is the proper standard.

Nor was the equal divide the end of the complex *Wood* proceedings. Justice Howe, who had expressed no opinion on the constitutionality of the Act vis-à-vis the open courts clause,[81] retired on December 31, 2002.[82] *Wood* was one of the last two cases he participated in as a Utah Supreme Court Justice; the opinions were filed on the day he retired.[83] Two months later, on February 26, 2003, Justice Jill Parrish was confirmed by the Utah Senate as Justice Howe's replacement on the Utah Supreme Court.[84] Because "rehearings have been granted in situations where [a c]ourt had affirmed judgments by [an] equally divided court[], but soon thereafter a new justice was appointed, who could break the tie on rehearing,"[85] her appointment opened the possibility of a rehearing

2003); DeStefano v. Nichols *ex rel.* Nichols, 84 P.3d 496 (Colo. 2004); Benson v. First Trust & Sav. Bank, 145 So. 182 (Fla. 1932); Getschow v. Commonwealth Edison Co., 459 N.E.2d 1332 (Ill. 1984); State v. Henriksen, No. 02-1329, 2004 WL 345514 (Iowa Feb. 25, 2004); State v. Keopasaeuth, 645 N.W.2d 637, 641 (Iowa 2002); Pierce v. Pierce, 767 P.2d 292 (Kan. 1989); Anzalone v. Westech Gear Corp., 661 A.2d 796 (N.J. 1995); Tate v. Christy, 454 S.E.2d 242 (N.C. 1995); Felton v. Hosp. Guild of Thomasville, Inc., 296 S.E.2d 297 (N.C. 1982); State v. Cargill, 851 P.2d 1141 (Or. 1993); Christensen v. Epley, 601 P.2d 1216, 1218 (Or. 1979); State v. Pine, 45 P.3d 151 (Or. Ct. App. 2002); Commonwealth v. Stair, 699 A.2d 1250 (Pa. 1997); Hunt v. Commonwealth, 592 S.E.2d 789 (Va. App. 2004).

81. *See Wood*, 67 P.3d at 450, 461.

82. Elizabeth Neff, *Colleagues, Friends Honor Retired Justice Howe*, SALT LAKE TRIB., Jan. 16, 2003, http://www.sltrib.com/2003/Jan/01162003/Utah/20631.asp.

83. Supreme Court Opinions by Date—2002, *at* http://www.utcourts.gov/opinions/supopin/scbydate02.htm (last visited Jan. 21, 2004).

84. Elizabeth Neff, *Senate OKs Two Supreme Court Justices*, SALT LAKE TRIB., Feb. 27, 2003, http://www.sltrib.com/2003/Feb/02272003/utah/33295.asp.

85. 5 AM. JUR. 2D *Appellate Review* § 892 (2003); *see, e.g.*, Indian Towing Co. v. United States, 349 U.S. 902 (1955), *reh'g granted*, 349 U.S. 926 (1955), *different result reached on reh'g*, 350 U.S. 61 (1955). The Supreme Court granted certiorari in *Indian Towing Co.* on October 14, 1954—five days after the death of Justice Robert Jackson. Indian Towing Co. v. United States, 348 U.S. 810 (1955). Although Justice Harlan replaced Justice Jackson on March 16, 1955, he did not participate in *Indian Towing Co.*, which was decided on April 11 of that year. *Indian Towing Co.*, 349 U.S. at 902. After Justice Harlan's appointment, on May 16, the Court subsequently granted a rehearing. *Indian Towing Co.*, 349 U.S. at 926. On rehearing, the court reached a different result, entering a final judgment on November 21. *Indian Towing Co.*, 350 U.S. at 61.

of the *Wood* case. In fact, a petition for rehearing was made, but was denied on April 14, 2003.[86] The U.S. Supreme Court denied certiorari on October 14, 2003.[87]

3. Precedential value

As a result of the Utah Supreme Court's decision to not rehear the case and the U.S. Supreme Court's denial of certiorari, the constitutionality of the Wrongful Life Act was conclusively affirmed on all counts. However, because the affirmance of constitutionality under the open courts clause was by an equally divided court, its value as precedent may be considerably diminished or possibly even nonexistent.[88] At the very least, it is clear that the Utah Supreme Court has yet to conclusively decide the constitutionality of the Act

86. *Wood*, 67 P.3d at 436. The denial of the request for rehearing is not very surprising. Utah does not allow judges who join the Supreme Court after the court has rendered its decision in a case (in *Wood*, that date was December 31, 2002) to participate in the consideration of a petition for rehearing. Cordner v. Cordner, 64 P.2d 828, 828–29 (Utah 1937). Therefore, Justice Parrish did not participate in the vote. Also, Justice Russon retired in early 2003—possibly before the vote on the petition for rehearing—and his replacement, Justice Nehring, would have been unable to vote on the petition due to the *Cordner* rule. Therefore, the only Justices who considered the petition for rehearing were Justices Wilkins and Durrant (who, respectively, wrote and concurred in the lead opinion), Chief Justice Durham (who authored the main dissent), and possibly Justice Russon (who joined in the dissent). It seems probable, then, that the vote for rehearing ended in either a 2–1 vote, against, or a 2–2 deadlock.

87. Wood v. Univ. of Utah Med. Ctr., 124 S. Ct. 388 (2003) (No. 03-82). The denial of certiorari was of minor importance on the open courts questions because the U.S. Supreme Court almost certainly would not have interfered with the Utah Supreme Court's interpretation of a state constitutional provision, since the U.S. Supreme Court does not have jurisdiction over such interpretations. *See* 28 U.S.C. 1257 (1993) (defining the U.S. Supreme Court's appellate jurisdiction over state courts).

88. *See* Rutledge v. United States, 517 U.S. 292, 293 (1996) ("[T]he judgment is not entitled to precedential weight because it amounts at best to an *unexplained* affirmance by an equally divided court." (emphasis added)); Neil v. Biggers, 409 U.S. 188, 192 (1972) ("Nor is an affirmance by an equally divided Court entitled to precedential weight."); Stupak-Thrall v. United States, 89 F.3d 1269, 1269 (6th Cir. 1996) (en banc) (Moore, C.J., concurring) (stating that since the court was equally divided, "this case has resulted in no law of the circuit"); Hudgins Moving & Storage Co., Inc. v. Am. Exp. Co., 292 F. Supp. 2d 991 (M.D. Tenn. 2003); Anderson v. State *ex. rel.* Cent. Bering Sea Fishermen's Ass'n, 78 P.3d 710, 713 (Alaska 2003) ("An affirmance by an evenly divided court is not binding precedent."). *But see* Harper v. Harper, 491 So. 2d 189, 202 (Miss. 1986) ("Prior decisions of this Court have said that an affirmance by an equally divided court is binding precedent unless and until the same is overruled."); Egger, *supra* note 77, at 473 n.7 ("Potential litigants will of course be able to predict how the same court will dispose of the same issue in the future, which means that affirmance by an equally divided court can in fact both change the law and influence future decision making.").

under the open courts clause. The two current Utah Supreme Court justices who did not participate in the *Wood* decision have yet to rule on the issue, and in a subsequent challenge to the Act their votes could bridge the equal divide in *Wood* for one side or the other.[89]

In any event, there is room for a subsequent plaintiff to make the argument, at the very least without fear of sanctions,[90] and with what would seem to be at least even odds of success,[91] that the Act violates the open courts clause. In fact, such a plaintiff's case would be strengthened by the holding of a majority of the justices in *Wood* that heightened scrutiny is the appropriate standard of review in open courts cases.[92] Unless a majority of the current court is willing to overrule the *Wood* holding on the standard of review question, a subsequent open courts attack would require analyzing the Act using heightened scrutiny. Part IV.A of this Note discusses in more detail the conflict over the appropriate standard of review, and Part IV.B analyzes whether the court *should* overrule the *Wood* court's standard of review holding.

89. As explained *supra* note 86, the court's refusal to rehear the *Wood* case does not indicate acquiescence in the decision by the new justices, as they were not allowed to participate in the consideration of the petition for rehearing. *See Cordner*, 64 P.2d at 828; *see also* 46 AM. JUR. 2D *Judges* § 31 (2003) ("Although there is authority for the view that where an appellate court is reconstituted after the decision of the case but before the time for filing a petition for rehearing has run or before the decision on such a petition has been made, the new judges may participate in the decision on the petition for rehearing, there is also authority to the contrary." (footnotes omitted)); 5 C.J.S. *Appeal & Error* § 677 (2003) ("Where there has been a change in the membership of the court since the original hearing, a petition for rehearing should be heard and acted on only by the members of the court participating in the original decision.").

90. Challenging the essentially undecided question of the Wrongful Life Act's constitutionality vis-à-vis the open courts clause would not trigger sanctions since it would not violate the Utah rule requiring that "the claims, defenses, and other legal contentions [in a pleading] are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law." UTAH R. CIV. P. 11(b)(2).

91. Of the four justices who have considered the question, two have come down on each side. Based solely on this statistic, a plaintiff would appear to have a 50/50 chance of success in a subsequent claim.

92. *See supra* text accompanying note 72.

IV. ANALYSIS

A. The Standard of Review in Open Courts Cases

The standard of review conflict between the lead and dissenting *Wood* opinions is but one instance of an ongoing debate in the Utah Supreme Court regarding article I, section 11.[93] Although a presumption of constitutionality is undeniably proper "where no significant constitutional right is claimed to have been abrogated"[94] and the presumption clearly must give way when certain constitutional rights are at issue, there is substantial disagreement as to whether the open courts clause guarantees significant rights that implicate heightened scrutiny. As indicated above in Part III.C, the dissent in *Wood* actually garnered a majority vote on this issue, which held that heightened scrutiny is required in open courts cases.[95] This section analyzes the standard of review analysis in both the lead and dissenting opinions and ultimately recommends following a different approach, derived in part from the Utah Court of Appeals decision in *Currier v. Holden*.[96]

1. The dissent's open courts standard of review

Although a majority of the court agreed with the standard of review advocated in the dissenting opinion, the dissent's argument was nonetheless written as a reaction to the lead opinion.[97] The dissent asserted that the lead opinion's "brief, two-paragraph [standard of review] analysis . . . abandoned [the] carefully crafted and long relied-on analytic model" in open courts cases, choosing instead to use a "blunt instrument"—presumption of constitutionality.[98] Such a presumption, the dissent emphasized, should not apply when a significant constitutional right is claimed to

93. The debate is evident in the conflicts between the majority and dissenting opinions in various Utah cases. *See, e.g.*, Laney v. Fairview City, 57 P.3d 1007 (Utah 2002); Craftsman Builder's Supply, Inc. v. Butler Mfg. Co., 974 P.2d 1194 (Utah 1999); Condemarin v. Univ. Hosp., 775 P.2d 348 (Utah 1989); and Berry *ex rel.* Berry v. Beech Aircraft Corp., 717 P.2d 670 (Utah 1985).

94. Wood v. Univ. of Utah Med. Ctr., 67 P.3d 436, 450 (Utah 2002).

95. *See supra* notes 69–71 and accompanying text.

96. 862 P.2d 1357 (Utah Ct. App. 1993).

97. This further compounded the confusion as to the *Wood* holding. *See supra* note 68.

98. *Wood*, 67 P.3d at 450 (Durham, C.J., dissenting).

have been violated.[99] The dissent focused on three reasons for using heightened scrutiny in analyzing open courts cases: the open courts clause's location in article I next to other important rights, the importance of the rights protected by the open courts clause, and past Utah Supreme Court precedent using heightened scrutiny in open courts cases.[100] For these reasons, according to the dissent, legislation challenged using that section must be analyzed using heightened scrutiny.

The Chief Justice first relied on the open courts clause's location in article I to support a heightened scrutiny standard. She disputed what she characterized as the lead opinion's claim that "article I, section 11 rights are 'no more important and [have] no greater weight as a constitutional provision than other constitutional provisions.'"[101] She argued instead that a constitutional provision that protects significant individual rights *is* more important than provisions that do not protect such rights and should therefore trigger a heightened scrutiny standard.[102] To support this claim, she stated that

> article I of the Utah Constitution, known as the "Declaration of Rights," contains affirmative guarantees of specific individual rights that are indeed fundamental. Article I, section 11 rights are no more important than other article I rights, but . . . most, if not all, of these rights have generated some form of heightened judicial scrutiny.[103]

99. *Id.* (Durham, C.J., dissenting).

100. *Id.* at 450–51 (Durham, C.J., dissenting).

101. *Id.* (Durham, C.J., dissenting) (alteration in original). Confusingly, the text she included in quotation marks does not appear anywhere within the lead opinion. Perhaps it is a reference to an earlier draft of that opinion.

102. The dissent quoted from a 1941 concurring opinion to that effect: "[A] court will exercise stricter scrutiny in evaluating measures that encroach upon civil liberties than it will with respect to statutes that impact . . . only economic interests." *Id.* at 451 (Durham, C.J., dissenting) (quoting Allen v. Trueman, 110 P.2d 355, 365 (Utah 1941) (Wolfe, J., concurring)).

103. *Id.* at 450 (Durham, C.J., dissenting). Although this language avoids explicitly calling article I, section 11 rights "fundamental," it does (1) indicate that at least *some* (perhaps all) article I rights are fundamental, and (2) imply that section 11 rights are as important as other (perhaps *all* other) article I rights. At the very least, Chief Justice Durham is asserting that section 11 rights are closely related to fundamental rights, and she may be implicitly asserting that they *are* fundamental. *But see id.* at 452 (Durham, C.J., dissenting) ("Although this court has not recognized the guarantee included in article I, section 11 as 'fundamental,' as Justice Zimmerman has noted, 'I do not think we intended to denigrate the importance of the rights protected from legislative abridgement by article I, section 11. . . .' This court has

She then listed eight article I rights[104] and, for each,[105] cited at least one Utah case where the court used heightened scrutiny in analyzing legislation that was challenged based on the article I right.[106] The Chief Justice concluded that "this court has consistently applied various forms of heightened review when article I rights are at issue."[107]

The dissent then asserted that rights guaranteed in the open courts clause are likewise important rights. She asserted that the open courts clause is meant to "protect injured persons who are isolated in society and lack political influence by guaranteeing them access to the courts."[108] That clause guarantees "'the availability of legal remedies for vindicating the great interest that individuals . . . have in the integrity of their persons, property, and reputations.'"[109] The drafters of the Utah Constitution included the open courts clause, the Chief Justice asserted, because they "understood that the 'normal political processes would not always protect the common law rights of all citizens to obtain remedies for injuries.'"[110] Therefore, the rights protected by the open courts clause are important rights that must be analyzed using heightened scrutiny.

The Chief Justice also relied on past Utah Supreme Court cases in which the court "consistently rejected the presumption of constitutionality of statutes challenged under the remedies clause of article I, section 11."[111] She cited only one such case, *Condemarin v.*

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wisely avoided the 'analytical straitjacket' of federal equal protection analysis by avoiding a rigid test that dictates that some rights are fundamental and others are not." (quoting Condemarin v. Univ. Hosp., 775 P.2d 348, 367 (Utah 1989) (Zimmerman, J., concurring))). Ultimately, it is unclear whether the Chief Justice thinks that article I, section 11 rights are "fundamental," or what that would even mean in the context of Utah's standard of review analysis.

104. The eight rights (nine, if freedom of speech and the press are separated) are: "religious liberty, habeas corpus, the right to bear arms, due process of law, the rights of accused persons, [protection against] unreasonable searches and seizures, freedom of speech and of the press, [and] the protection against taking private property for public use without compensation." *Id.* at 450–51 (Durham, C.J., dissenting) (footnote and citations omitted).

105. No case was cited for the right to bear arms. *Id.* at 450 (Durham, C.J., dissenting).

106. *Id.* at 450–51 (Durham, C.J., dissenting).

107. *Id.* at 451 (Durham, C.J., dissenting).

108. *Id.* (Durham, C.J., dissenting) (citing Berry *ex rel.* Berry v. Beech Aircraft Corp., 717 P.2d 670, 676 (Utah 1985)).

109. *Id.* (Durham, C.J., dissenting) (quoting *Berry*, 717 P.2d at 677 n.4).

110. *Id.* (Durham, C.J., dissenting) (quoting Laney v. Fairvew City, 57 P.3d 1007, 1007 (Utah 2002)).

111. *Id.* (Durham, C.J., dissenting).

University Hospital,[112] and included quotations from two of that case's concurring opinions in support of heightened scrutiny.[113] The first concurrence in *Condemarin* argued that to presume constitutionality in open courts cases "is to fail to give any greater weight to a constitutional right than to a nonconstitutional interest, such as a general social or economic interest."[114] The second concurrence stated that "the presumption of validity . . . must be reversed once it is shown that [a statute] . . . does, in fact, infringe upon the interests enumerated in article I, section 11."[115]

Although the lead opinion had cited conflicting precedent—three Utah Supreme Court cases in support of a presumption of constitutionality standard[116]—the Chief Justice found those cases to be irrelevant.[117] First, she discounted presumption language in *Zamora v. Draper*,[118] arguing that the court used article I, section 11 "to interject a 'higher principle[] of justice' that provided the plaintiff a remedy that he would not have had under the statute alone. . . . In essence, the court found the statute unconstitutional as applied . . . ."[119] She next dismissed the lead opinion's second case, *Society of Separationists, Inc. v. Whitehead*,[120] as a case that "did not deal with article I, section 11."[121] Finally, she noted that in *Lindon City v. Engineers Construction Co.*,[122] the court did not rely on a

112. 775 P.2d 348 (Utah 1989). However, she presumably also referred to *Berry*, *Allen*, and *Laney*, all previously cited in her opinion. *Wood*, 67 P.3d at 450, 451 (Durham, C.J., dissenting).

113. *Wood*, 67 P.3d at 451 (Durham, C.J., dissenting).

114. Condemarin v. Univ. Hosp., 775 P.2d 348, 370 (Utah 1989) (Stewart, J., separate opinion).

115. *Id.* at 368 (Zimmerman, J., concurring in part). Justice Zimmerman later abandoned his support for this line of analysis. *See* Craftsman Builder's Supply, Inc. v. Butler Mfg. Co., 974 P.2d 1194, 1224 (Utah 1999) (Zimmerman, J., concurring). In her own *Condemarin* opinion (not quoted in *Wood*), Chief Justice Durham stated that "we [have] committed ourselves to something more than a 'rational basis' deference [for open courts cases]." 775 P.2d at 360.

116. *Wood*, 67 P.3d at 440 (citing Soc'y of Separationists, Inc. v. Whitehead, 870 P.2d 916, 920 (Utah 1993); Lindon City v. Eng'rs Constr. Co., 636 P.2d 1070, 1073 (Utah 1981); Zamora v. Draper, 635 P.2d 78, 80 (Utah 1981)).

117. *Id.* at 452 (Durham, C.J., dissenting).

118. 635 P.2d 78.

119. *Wood*, 67 P.3d at 452 (Durham, C.J., dissenting) (quoting *Zamora*, 635 P.2d at 81).

120. 870 P.2d 916.

121. *Wood*, 67 P.3d at 452 (Durham, C.J., dissenting).

122. 636 P.2d 1070.

presumption of constitutionality, but "actually undertook a review of the constitutionality of the [challenged statute]," despite observing that the "plaintiff does not support the point [on constitutionality] by any substantial meritorious argument."[123] The presumption language in *Lindon*, she asserted, merely indicated "that the burden of convincing the court of unconstitutionality lies with the challenger;" it did not indicate "that the legislature needs no more than a minimal reason for overriding a constitutional guarantee."[124]

2. Problems with the dissent's analysis

As indicated above, the dissent's analysis in *Wood* commanded a majority of the participating justices, thus holding heightened scrutiny to be the appropriate standard of review in open courts cases.[125] Nonetheless, there were three important problems with the dissent's analysis: it overemphasized the significance of the location of the open courts clause in article I, too quickly disregarded the cases cited by the lead opinion, and misconstrued Utah precedent.

a. Overemphasis on the open courts clause's location. The dissent first argued that heightened scrutiny is required in open courts cases because of that clause's location in article I.[126] The Chief Justice stated that "most, if not all" article I rights have "generated some form of heightened scrutiny."[127] However, one of the cases, *Whitehead*, which she cited to show that challenges based on the religious freedom guarantee of article I have generated heightened scrutiny, does not support that proposition. In fact, the court in *Whitehead* unhesitatingly stated that when a legislative enactment is challenged as unconstitutional, "[t]he act is presumed valid, and we resolve any reasonable doubts in favor of constitutionality."[128] The Chief Justice recognized this but essentially argued in *Wood* that the presumption language, in which she joined,[129] is a facade, since "the

123. *Wood*, 67 P.3d at 452 (Durham, C.J., dissenting) (second alteration in original) (quoting *Lindon*, 636 P.2d at 1073).

124. *Id.* (Durham, C.J., dissenting).

125. *See supra* notes 69–71 and accompanying text.

126. *See supra* notes 101–07 and accompanying text.

127. *Wood*, 67 P.3d at 450 (Durham, C.J., dissenting).

128. Soc'y of Separationists, Inc. v. Whitehead, 870 P.2d 916, 920 (Utah 1993).

129. *Id.* at 941.

actual analysis undertaken by the court in that case cannot be characterized as anything but heightened scrutiny."[130]

While it is true that the *Whitehead* court engaged in extensive analysis to determine whether the enactment at issue "survives constitutional scrutiny,"[131] it is far from clear that it applied heightened scrutiny. In that case, the Utah Supreme Court reversed the district court's ruling that a city council's practice of having prayer before meetings violated the religious freedom guarantee of the Utah Constitution.[132] The city council had argued that the practice should be upheld unless it was found to be "unconstitutional 'beyond a reasonable doubt.'"[133] Although the *Whitehead* court rejected this extremely deferential standard, it also unequivocally stated that "the burden of showing the unconstitutionality of the practice is on the [party challenging it]."[134] In addition, the court upheld the constitutionality of the enactment because the party challenging it could not show either that "the City Council favored particular religions or religion in general in scheduling participants," or that "the City Council's policy denied any group or individual a realistically equal opportunity to participate in favor of . . . religious groups or speakers."[135] Requiring this kind of proof by the party challenging the enactment indicates deference to the enactment, not heightened scrutiny.

There is a second weakness with the dissent's defense of heightened scrutiny based on the open courts clause's location in article I. Although the exact number may be debatable, there are dozens of enumerated rights within article I of the Utah Constitution—many more than the few listed in the dissent.[136] It is

130. *Wood*, 67 P.3d at 450 n.1 (Durham, C.J., dissenting).

131. *Whitehead*, 870 P.2d at 938.

132. *Id.* at 917–18.

133. *Id.* at 920.

134. *Id.*

135. *Id.* at 939.

136. There are over fifty independent rights listed in article I: The right to (1–2) enjoy and defend one's life and liberty; (3–5) acquire, possess, and protect property; (6) worship according to the dictates of one's conscience; (7) assemble peaceably; (8) protest against wrongs; (9) petition for redress of grievances; (10) communicate freely one's thoughts and opinions; (11) alter or reform the government as the public welfare may require; (12) freedom of conscience and religious liberty; (13) habeas corpus; (14) bear arms; (15) due process of law; (16) bail for qualifying offenses; (17) avoid excessive bail or fines; (18) not be subject to cruel and unusual punishments; (19) trial by jury; (20) open courts; (21) appear and defend in person and by counsel; (22) demand the nature and cause of the accusation against one; (23)

therefore certainly not true that "most, if not all" article I rights have generated heightened scrutiny—only a small minority have done so, and most article I rights have not even been used to challenge legislation in the Utah courts. Although it is possible that heightened scrutiny would be used for many of these rights, this "guilt by association" argument for heightened scrutiny in open courts cases cannot be definitive. This is particularly true since the court in *Whitehead* did not use heightened scrutiny in examining a challenge based on an article I right.[137] Nonetheless, with the exception of *Whitehead*, Chief Justice Durham correctly points out that using heightened scrutiny in article I, section 11 cases is "entirely consistent" with that used in other article I cases.[138] This does carry some weight, although less than the Chief Justice would attribute to it.

b. Improper rejection of the lead opinion's cited cases. The dissent also inappropriately rejected the lead opinion's cited cases. It first argued that the *Zamora* court could not have used a deferential standard of review.[139] In *Zamora*, a plaintiff challenged as unconstitutional a state statute requiring the posting of a bond in suits against police officers.[140] The court in *Zamora*, professing

have a copy of the accusation; (24) testify in one's own behalf; (25) be confronted by the witnesses against one; (26) have compulsory process to compel the attendance of witnesses in one's behalf; (27) have a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed; (28) appeal in all cases; (29) not be compelled to advance money or fees to secure other rights of the accused; (30–31) not be compelled to give evidence against oneself or one's spouse; (32) not be twice put in jeopardy for the same offense; (33–35) be secure in one's person, house, papers, and effects against unreasonable searches and seizures; (36) warrants based on probable cause; (37) freedom of speech; (38) freedom of the press; (39) not be imprisoned for debt; (40) free elections; (41–43) not be subject to bills of attainder, ex post facto laws, or laws impairing the obligation of contracts; (44) not be not be convicted of treason except on the testimony of two witnesses; (45) no quartering of soldiers without consent; (46) no slavery or involuntary servitude; (47) no taking of private property for public use without compensation; (48) uniform operation of general laws; and if one is a crime victim, the right to (49) be treated with fairness, respect, and dignity; (50) be free from harassment and abuse throughout the criminal justice process; (51–53) be informed of, present at, and heard at important criminal justice hearings; and (54) have a sentencing judge receive and consider reliable information concerning the background, character, and conduct of a person convicted of an offense. UTAH CONST. art I, §§ 1–28.

137. *See supra* notes 126–35 and accompanying text.

138. Wood v. Univ. of Utah Med. Ctr., 67 P.3d 436, 451 (Utah 2002) (Durham, C.J., dissenting).

139. *Id.* at 452 (Durham, C.J., dissenting).

140. Zamora v. Draper, 635 P.2d 78, 79 (Utah 1981).

deference to the legislature, upheld the constitutionality of the statute.[141] It concluded, however, that a pure facial application of the statute could conflict both with other statutes[142] and the open courts clause in that it could prevent the indigent from gaining access to the courts.[143] Concluding that the statute requiring the bond "should be so interpreted and applied as to avoid conflict [with other statutes], and to harmonize with . . . the Constitution," the court thus held that the statute contained an implicit exception in the case of impecuniosity.[144] In *Wood*, the dissent dismissed the deferential language of *Zamora*, arguing that since the *Zamora* court "actually used article I, section 11 to avoid a statute," it could not have used a deferential standard of review.[145] However, a court's recognition of a potential constitutional conflict and interpretation of a statute to avoid that conflict do not mean that the court used heightened scrutiny. Rather, it is a further indication that the court was willing to defer to the legislature: the court properly presumed that the legislature intended to enact a constitutional statute and properly interpreted it as such. The *Wood* dissent seems to argue that a court may only engage in such statutory interpretation when using heightened scrutiny. If that were true, then a court analyzing a statute using heightened scrutiny could uphold the statute as constitutional, whereas a court using a more deferential standard of review would find it unconstitutional. This topsy-turvy result would turn the normal understanding of standards of review on its head and is untenable. The dissent's rejection of *Zamora* is therefore out of hand—there is no indication in *Zamora* of anything other than deference to the legislature.

Second, the dissent improperly dismissed *Whitehead* as a case that "did not deal with article I, section 11," assuming that it was therefore irrelevant.[146] However, as shown above,[147] the case is relevant first because it is an example of an article I right not generating heightened scrutiny. Second, *Whitehead* also supports the lead opinion's assertion that deference is proper when analyzing

141. *Id*. at 80.

142. This factor was not present in *Wood*.

143. *Zamora*, 635 P.2d at 80.

144. *Id*. at 81.

145. Wood v. Univ. of Utah Med. Ctr., 67 P.3d 436, 452 (Utah 2002) (Durham, C.J., dissenting).

146. *Id*. (Durham, C.J., dissenting).

147. *See supra* notes 126–35 and accompanying text.

challenged legislation generally; the lead opinion simply refused to find an exception to this rule for section 11. Finally, that *Whitehead* did not deal specifically with section 11 does not make it irrelevant—the dissent itself discussed multiple article I rights together, in showing that "[t]he standard of review we have developed in section 11 cases is entirely consistent" with other article I standards.[148] It is inconsistent for the dissent to later criticize and dismiss the lead opinion's inclusion of a case involving another article I right in a discussion of section 11.

c. Misinterpretation of Utah precedent. Finally, the dissent improperly found that since the court in *Lindon* "actually undertook a review of the constitutionality of the [challenged statute]," despite observing that the "plaintiff does not support the point [on constitutionality] by any substantial meritorious argument," it must have been using heightened scrutiny.[149] That a court does not find the plaintiff's arguments "substantial" or persuasive does not prevent the court from reviewing the constitutionality of the statute while still using a deferential standard of review. Because the plaintiff in *Lindon* argued that the challenged statute violated the constitution[150] and because "[a]n appellate court may . . . properly review the constitutionality of a statute [even if] the constitutional issue was not suggested, briefed, or argued in the court below,"[151] the *Lindon* court's decision to undertake a constitutional analysis does not indicate that it used heightened scrutiny. In fact, the presumption language in *Lindon* indicates otherwise.[152] The dissent dismissed this language as merely indicating that the challenger has the burden of proving the unconstitutionality of the statute, not that only a minimal reason is necessary for the legislature to override a constitutional guarantee.[153] However, this is a straw man—the lead

148. *Wood*, 67 P.3d at 451 (Durham, C.J., dissenting).

149. *Id.* at 452 (Durham, C.J., dissenting) (second alteration in original) (quoting Lindon City v. Eng'rs Constr. Co., 636 P.2d 1070, 1073 (Utah 1981)).

150. 636 P.2d at 1074.

151. 5 AM. JUR. 2D *Appellate Review* § 703 (2003).

152. 636 P.2d at 1073 ("Without satisfactory proof otherwise, constitutionality is generally presumed. . . . 'The first legal principle to be observed is that there is a presumption that a statute is valid and constitutional; and one who questions it has the burden of convincing [the] court of its unconstitutionality.'" (quoting Branch v. Salt Lake County Serv. Area No. 2—Cottonwood Heights, 460 P.2d 814, 815 (Utah 1969)).

153. *Wood*, 67 P.3d at 452 (Durham, C.J., dissenting).

opinion makes no claim that the legislature needed only a "minimal reason" to override a constitutional guarantee; nor does that follow from use of a deferential standard. Ultimately, *Whitehead* is a relevant case, and *Lindon* and *Zamora* are valid cases that conflict with those cited by the *Wood* dissent.

Despite the dissent's analytical problems, the standard it advocates does have some merit. Applying heightened scrutiny in open courts cases would help protect the rights of citizens to appeal to the courts and help prevent overreaching by the legislature. However, heightened scrutiny is an "extremely strict" standard that "look[s] no further than . . . stated legislative objectives" and "[does] not consider additional plausible or even possible justifications."[154] It also "puts the burden on the statute to be a rational means of correcting clear social or economic evil."[155] Under this standard, "the plaintiff needs only to discredit the defendant's argument in favor of constitutionality" to prevail.[156] This has the potential of unduly hampering the legislature while expanding the court's role in defining policy.[157] Nonetheless, since a majority in *Wood* upheld this standard, it is still the law in Utah.

3. The lead opinion's open courts standard of review

In evaluating the open courts challenge, Justice Wilkins' lead opinion took the approach that legislation is presumed constitutional, even when challenged based on the open courts clause.[158] In support of this claim, the opinion cited *Zamora*, *Whitehead*, and *Lindon*. From *Zamora*, the lead opinion quoted:

> [T]he prerogative of the legislature as the creators of the law is to be respected. Consequently, its enactments are accorded a presumption of validity; and the courts do not strike down a legislative act unless the interests of justice in the particular case

154. Bauman, *supra* note 23, at 270.

155. *Id*; *see also* Lewis, *supra* note 42, at 1116 ("The practical significance of the court's application of the open courts provision . . . is that the burden of demonstrating the constitutionality of the challenged statute rests upon the party seeking to uphold the statute." (footnotes omitted)).

156. Lewis, *supra* note 42, at 1117.

157. *See* Bauman, *supra* note 23, at 271 ("It is not clear why the court's powers and abilities [would be] superior to the legislature's.").

158. *Wood*, 67 P.3d at 440 (stating that this deference requires "resolv[ing] any reasonable doubts in favor of constitutionality")

> before it require doing so because the act is clearly in conflict with the higher law as set forth in the Constitution.[159]

Based on that yardstick, the lead opinion asserted that the proper standard of review in *Wood* should be a presumption of constitutionality.[160] As explained above,[161] only Justices Wilkins and Durrant urged the use of this analysis.

The lead opinion recognized that past decisions used a less deferential standard in analyzing open courts cases but concluded that those cases were in error.[162] Because the court "has 'not hesitated . . . to reverse case law when [it is] firmly convinced that [it has] erred,'" Justice Wilkins was willing to overrule those cases as far as standard of review was concerned.[163] He concluded that "[a]ny heightened level of scrutiny simply because the constitutional challenge is based on the Open Courts Clause is improper" and that challenged legislation should be reviewed for correctness, "resolving any reasonable doubts in favor of constitutionality."[164]

In her dissent, Chief Justice Durham claimed that Justice Wilkins' standard of review stance stemmed from the fact, apparent in his *Laney* dissent, that "he does not regard article I, section 11 as having any substantive content."[165] If that is a true characterization of the lead author's view,[166] it follows that he would see no substantive rights in article I, section 11 requiring the protection of heightened scrutiny.[167] Even if Justice Wilkins had no such underlying reason, he at least felt that in open courts cases there is

159. *Id.* (quoting Zamora v. Draper, 635 P.2d 78, 80 (Utah 1981)).

160. *Id.* at 441.

161. *See supra* Part III.C.

162. *Wood*, 67 P.3d at 440.

163. *Id.* at 441 (quoting Clark v. Clark, 27 P.3d 538, 544 n.3 (Utah 2001) (quoting Staker v. Ainsworth, 785 P.2d 417, 424 n.5 (Utah 1990))).

164. *Id.* at 440–41.

165. *Id.* at 451 (Durham, C.J., dissenting).

166. Although this characterization is undercut by the lead opinion's decision to adhere to *Laney*, *see id.* at 441 n.1 ("*Laney* is controlling precedent from this court, and we are cognizant of and respect the principle of stare decisis . . . ."), the lead opinion does state that Justices Wilkins and Durrant "are still firmly convinced that the decision in *Laney* to adhere to the *Berry* interpretation and test was erroneous." *Id.*

167. Whether Justice Wilkins really believed that article I, section 11 has no substantive content is unclear, since he does not address the issue in his opinion. It should be noted, however, that there is considerable debate as to the substantive content of such clauses in Utah and in other states. *See* Patrick E. Sullivan, Note, *Medical Malpractice Statute of Repose: An Unconstitutional Denial of Access to the Courts*, 63 NEB. L. REV. 150, 170–78 (1983) (describing different states' characterizations of open courts clauses).

no reason to look beyond the standard presumption of constitutionality that is used in, as he said, "all other such cases."[168]

Unfortunately, it is not clear what "such cases" includes, and there is little in the opinion to indicate what it encompasses. It is possible that the lead opinion was intimating that *every* case where legislation is challenged as unconstitutional requires "resolving any reasonable doubts in favor of constitutionality."[169] This seems unlikely, given the large body of state and federal law upholding heightened scrutiny as the appropriate standard of review with various constitutional challenges.[170] "Such cases," then, must have a limited meaning. One possibility is that it means "all cases that do not implicate[] a 'fundamental or critical right' or [the] creat[ion of impermissible classifications]."[171] If this is the correct interpretation, the justices concurring in the lead opinion must not consider article I, section 11 rights to be "fundamental," "critical," or "important" enough to trigger additional scrutiny. While it is true that the Utah Supreme Court "has not recognized the guarantee included in article I, section 11 as 'fundamental,'"[172] this is in part because Utah does not use a framework, analogous to that of federal equal protection, of classifying different rights as "fundamental."[173] However, that does not indicate that article I, section 11 rights are unimportant.[174] In fact, the history of Utah's open courts clause indicates that the rights are important.[175] The problem with the lead opinion's

168. *Wood*, 67 P.3d at 441.

169. *Id.*

170. *See, e.g.*, State v. Mohi, 901 P.2d 991 (Utah 1995) (discussing equal protection and uniform operation of laws provisions); West Jordan v. Utah State Ret. Bd., 767 P.2d 530, 537 (Utah 1988) (analyzing uniform operation of the laws); Mountain Fuel Supply Co. v. Salt Lake City Corp., 752 P.2d 884, 888 (Utah 1988) (same); *see also* Gallivan v. Walker, 54 P.3d 1069, 1085 (Utah 2002) ("Where a legislative enactment implicates a 'fundamental or critical right' or creates classifications which are 'considered impermissible or suspect in the abstract,' we apply a heightened degree of scrutiny." (quoting Ryan v. Gold Cross Servs., 903 P.2d 423, 426 (Utah 1995))).

171. *See Gallivan*, 54 P.3d at 1085.

172. *Wood*, 67 P.3d at 452 (Durham, C.J., dissenting).

173. *See* Condemarin v. Univ. Hosp., 775 P.2d 348, 366–67 (Utah 1989) (Zimmerman, J., concurring in part).

174. *See id.* at 366 (Zimmerman, J., concurring in part) ("[I]n declining to . . . characterize the guarantee of a remedy of injuries [as fundamental], I do not think we intended to denigrate the importance of th[os]e rights . . . . Instead, we simply avoided being bound into the analytical straitjacket that has been fashioned out of the federal equal protection clause . . . .").

175. *See supra* text accompanying notes 21–28.

standard is that it does not give much weight to the protections of article I, section 11. There seem to be some situations where presuming constitutionality in the face of an open courts challenge does not appropriately protect the rights of individuals.

4. An alternative standard of review

Both the lead opinion and the dissent supported their positions with Utah precedent. In the end, it must be admitted that there are Utah cases supporting each side of the debate as to the appropriate standard of review. This debate ultimately seems to hinge on conflict over whether the rights guaranteed in the open courts clause are important, substantial, or fundamental rights that must be protected by heightened constitutional scrutiny. There is no clear answer to this question, and Utah case law is hopelessly confused.

There is, however, an alternative to both of these standards—one which could potentially resolve the conflict and properly balance the competing interests of individual rights and legislative prerogative. This third option is presented in part in the Utah Court of Appeals case *Currier v. Holden*,[176] and is in part advocated by other states.[177] This approach involves analyzing the two types of Utah open courts protections, procedural and substantive,[178] differently. First, when acts—legislative or judicial—affect the *procedures* for gaining access to the courts, special protection is required. According to the alternative standard, heightened scrutiny is always proper in such cases. Thus, statutes that allow a party to create extensive delays in jury trials,[179] limit or eliminate the jurisdiction of the courts, require payment of large fees to enter the courthouse, mandate arbitration or referral to a review board,[180] or retroactively change the law[181] would be subject to heightened scrutiny. This would help prevent the legislature from improperly limiting the jurisdiction of the

176. 862 P.2d 1357 (Utah Ct. App. 1993).

177. Commonwealth v. Werner, 280 S.W.2d 214, 215–16 (Ky. 1955); Murphy v. Edmonds, 601 A.2d 102, 113–14 (Md. 1992); Pinnick v. Cleary, 271 N.E.2d 592, 599–601 (Mass. 1971); State *ex rel.* Cardinal Glennon Mem'l Hosp. for Children v. Gaertner, 583 S.W.2d 107, 110–11 (Mo. 1979).

178. *See supra* text accompanying notes 26–28. Although there is debate as to whether the open courts clause *should* provide substantive protections, Utah cases have consistently held that it does. *See supra* notes 165–67 and accompanying text.

179. *See Werner*, 280 S.W.2d at 214.

180. *See Gaertner*, 583 S.W.2d at 109.

181. *See* Pickett v. Matthews, 192 So. 261 (Ala. 1939).

courts. Those joining *Wood*'s lead opinion would presumably disagree with this standard, but it properly advances one of the main purposes of Utah's open courts clause—"prevent[ing the legislature] from *closing the doors of the courts* against any person who has a legal right which is enforceable in accordance with some known remedy."[182]

According to this alternative standard, the substantive protections of the open courts clause are accorded a different treatment. In *Currier*, the court determined that the standard of review used in open courts cases may change depending on the right asserted.[183] The court implicitly recognized that there are no fundamental rights necessarily found in the substantive protections of article I, section 11. Rather, the nature of the rights protected by the open courts clause depends on the remedy at issue. For a remedy to be needed, there must have been a violation of a person's rights. It is the *violated* rights, not the right to a remedy, that this alternative view would evaluate in determining the appropriate standard of review.

The *Currier* court indicated that "the nature of the individual right impacted by a statute influences the level of scrutiny which a court should employ in examining that legislation."[184] If a statute interferes with "civil liberties,"[185] "individual liberties,"[186] or "right[s] established by . . . the state constitution,"[187] it would trigger heightened scrutiny. The alternative view would also hold that when the need for a remedy arises due to violation of a fundamental or important constitutional right,[188] heightened scrutiny would be proper in evaluating legislative abrogation of that remedy. For example, legislation eliminating a cause of action for regulatory

182. Brown v. Wightman, 151 P. 366, 366–67 (Utah 1915) (emphasis added).

183. Currier v. Holden, 862 P.2d 1357, 1365 (Utah Ct. App. 1993) ("Having determined that the statute at issue . . . creates a significant impairment of an important constitutionally based personal right, we conclude the challenge[] require[s] h[eightened] scrutiny.").

184. *Id.* at 1364.

185. *Id.* (quoting *In re* Criminal Investigation, 754 P.2d 633, 640 (Utah 1988) (citing Allen v. Trueman, 110 P.2d 355, 365 (Utah 1941))).

186. *Id.*

187. *Id.* (alternation in original) (quoting Condemarin v. Univ. Hosp., 775 P.2d 348, 370 (Utah 1989)).

188. The article I rights that Chief Justice Durham lists are good examples of important rights that trigger heightened scrutiny. *See* Wood v. Univ. of Utah Med. Ctr., 67 P.3d 436, 450–51 (Utah 2002) (Durham, C.J., dissenting).

takings would be subject to heightened scrutiny since it involves a constitutional right,[189] whereas a shortening of a particular statute of limitations, assuming it did not implicate any fundamental rights, would be analyzed under a deferential standard of review.[190]

This alternative view provides a way out of the dilemma of the lead opinion's "always deferential" standard and the dissent's "always heightened scrutiny" standard. The Court of Appeals of Maryland—that state's highest tribunal—has advocated a form of this approach.[191] In *Murphy v. Edmonds*,[192] the plaintiffs challenged a statutory cap on noneconomic damages in personal injury cases under the Maryland open courts clause.[193] In analyzing this claim, the court stated that a higher standard is implicated "with regard to causes of action to recover for violations of certain fundamental rights" where a statute would cause "an abrogation of access to the courts which would leave the plaintiff totally remediless."[194] However, "the abolition of some common law causes of action, without providing an alternate remedy," would not be held to the higher standard.[195] Thus, where fundamental rights are abrogated by statute, the courts will examine the statute more strictly than where such rights are not at issue.

This alternative approach would both permit the legislature to act and properly protect individual rights. Where a cause of action arises due to a violation of important individual rights, abrogation of that cause of action would be carefully scrutinized.[196] Otherwise, the legislature would be afforded deference.[197] This approach has the added benefit of eliminating the debate over whether the rights guaranteed by the open courts clause are "important" or

189. *See* UTAH CONST. art. 1, § 22 ("Private property shall not be taken or damaged for public use without just compensation.").

190. Such a statute could still be invalidated under a more deferential standard of review if it were shown to unreasonably limit access to the courts. It would, however, be presumed valid absent such a showing.

191. *See* Murphy v. Edmonds, 601 A.2d 102 (Md. 1992); *see also* Phillips, *supra* note 23, at 1336 ("[S]ome opinions use different standards of scrutiny based on the nature of the right being infringed." (citing *Murphy*, 601 A.2d at 113–14)).

192. 601 A.2d 102.

193. *Id*. at 104 n.1; *see* MD. DECLARATION OF RIGHTS, art. 19.

194. *Murphy*, 601 A.2d at 113.

195. *Id*. at 114.

196. This would avoid the weakness of the lead opinion's standard of review—too little protection of individual rights against legislative abuse.

197. Thus, this approach avoids the dissent's weakness—limitation of legislative prerogative.

"fundamental."[198] Rather, it allows the court to individually examine the rights asserted and determine their importance—a plaintiff could not bootstrap his claim into triggering heightened scrutiny merely by claiming a violation of the open courts clause. Although neither *Wood* opinion considers or adopts this approach, such an approach avoids the weaknesses of each opinion's standard of review.

B. Constitutionality Under the Open Courts Challenge

Although there was a majority decision as to the proper standard of review in open courts cases, there was an even divide on the issue of constitutionality. Whether the Wrongful Life Act is constitutional under Utah's open courts clause is thus still an open question. This section explores the lead and dissenting opinions, and suggests that, although the lead opinion did not use heightened scrutiny, which a majority of the court held was the proper standard, that failure did not affect the analysis; the lead opinion still came to the correct conclusion—that the Act is constitutional.

1. The lead opinion's application of the Berry *test*

Justice Wilkins, the author of the lead opinion, dissented in *Laney*, where he called for the overruling of *Berry*.[199] Although he stated in *Wood* that he was "still firmly convinced that the decision in *Laney* to adhere to the *Berry* interpretation and test was erroneous," he applied the *Berry* test because "*Laney* is controlling precedent from this court, and we are cognizant of and respect the principle of stare decisis which gives stability and predictability to our legal system."[200]

198. *See supra* note 103 and accompanying text.

199. Laney v. Fairview City, 57 P.3d 1007, 1028 (Utah 2002) (Wilkins, J., dissenting) ("In my view the current interpretation of the Open Courts Clause originating with *Berry* . . . , and the accompanying *Berry* test, places this court outside of its constitutional role and creates separation of powers problems. I would overturn *Berry* in favor of the more procedural interpretation of the Open Courts Clause advanced in our jurisprudence prior to, and since, *Berry*.").

200. Wood v. Univ. of Utah Med. Ctr., 67 P.3d 436, 441 n.1 (Utah 2002). This respect for precedent may initially seem odd, given his decision in the immediately preceding paragraph of his opinion to disregard recent standard of review cases. However, although no post-*Berry* majority has ever rejected that case, Part IV.A of this Note shows the substantial disagreement as to appropriate open courts standard of review. In rejecting some standard of review conclusions, Justice Wilkins was simply selecting from two competing interpretations that had each garnered a majority. Notably, Justice Wilkins does not indicate that he would not overrule *Berry*, given the right case and the right composition of the court. He noted only

The lead opinion's application of *Berry* is relatively straightforward and simple. The opinion observes that to answer the first prong of the test, whether an alternative remedy is provided,[201] the court must first answer the implicit question of "whether the statute abrogated an existing remedy or cause of action" at all.[202] According to *Day v. State*,[203] this is a question of whether the remedy existed at the time of the enactment of the statute[204]—for the Wrongful Life Act, the year 1983[205]—and was abrogated by the statute.[206] The *Wood* plaintiffs claimed that the Wrongful Life Act abrogated remedies for both "professional negligence" and "medical malpractice," which they claimed existed in 1983 when the statute was enacted.[207] "In other words, according to plaintiffs, their claim is simply a negligence claim, and because of the [Wrongful Life Act], their claim that would have been valid prior to the statute is now no longer available."[208] However, the lead opinion refused to evaluate the claim as a general professional malpractice claim.[209] Instead, it asked whether wrongful birth was recognized as a cognizable claim in Utah when the statute was enacted.

In answering this question, the lead opinion first noted that "[a]t common law, no cause of action existed for . . . wrongful birth."[210] More importantly, it continued, "this court has never recognized the tort of wrongful birth in Utah."[211] To support this latter assertion, the opinion cited two prior Utah Supreme Court cases that dealt with the tort of wrongful birth. Although the decision in *Payne ex rel. Payne v. Myers*[212] was issued after 1983, because the plaintiffs'

that "we apply the *Berry* test *to the instant case* to reach the decision of this court." *Id.* (emphasis added).

201. *See supra* text accompanying note 34.

202. *Wood*, 67 P.3d at 442.

203. 980 P.2d 1171 (Utah 1999).

204. *Id.* at 1184. *Day* clearly rejects the alternative—asking whether the remedy existed at the time of statehood. *Id.*

205. Act of Feb. 28, 1983, ch. 167, 1983 Utah Laws 687.

206. *Day*, 980 P.2d at 1183–85.

207. *Wood*, 67 P.3d at 441.

208. *Id.*

209. *Id.* at 442.

210. *Id.* (quoting Hickman v. Group Health Plan, Inc., 396 N.W.2d 10, 13 (Minn. 1986) (citing Baker v. Bolton, 170 Eng. Rep. 1033 (N.P. 1808); W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS §§ 55, 125A (5th ed. 1984))).

211. *Id.*

212. 743 P.2d 186 (Utah 1987).

claims arose before the Act was passed,[213] recognition of the tort of wrongful birth would have established it as existing before the Act was passed. On this issue, the *Payne* court stated that "[a]ssuming, but not deciding, that Utah jurisprudence should recognize an action for wrongful birth, it is necessary to determine precisely when the parents' cause of action accrued."[214] The court ultimately had no need to decide whether such a cause of action existed, because it would have been barred anyway by governmental immunity.[215]

The second case, *C.S. v. Nielson*[216] also involved a claim for wrongful birth. However, in that case, the court distinguished claims for wrongful life, wrongful pregnancy, and wrongful birth.[217] It defined wrongful birth as a "cause of action whereby parents claim they would have avoided conception or terminated an existing pregnancy by abortion but for the negligence of those charged with . . . prenatal testing or counseling."[218] Nevertheless, the *Nielson* court determined that the "instant case is correctly viewed as involving a wrongful pregnancy cause of action," not a wrongful birth action.[219]

According to the lead opinion in *Wood*, although both *Payne* and *Nielson* "noted that other states were almost unanimous in their recognition of a [wrongful birth] cause of action," neither case recognized a cause of action for wrongful birth in Utah.[220] "At best, it was unclear whether such a cause of action might have been recognized by th[e] court prior to 1983, if it had decided the issue. The fact remains, though, that no such decision was made . . . ."[221] Because *Payne* and *Nielson* are the only Utah cases relevant to the issue, "the tort of wrongful birth did not exist in Utah in 1983."[222] Therefore, because the Wrongful Life Act did not abrogate an

213. *See id.* at 188 n.4.

214. *Id.* at 188–89 (footnote omitted).

215. *Id.* at 188.

216. 767 P.2d 504 (Utah 1988).

217. *Id.* at 506.

218. *Id.*

219. *Id.*

220. Wood v. Univ. of Utah Med. Ctr., 67 P.3d 436, 443 (Utah 2002).

221. *Id.* The opinion further stated that "[i]n the absence of a declaration by this court either recognizing, or refusing to recognize, a cause of action for wrongful birth, *the legislature set forth the law*, declaring that claims for wrongful birth would not be recognized in Utah . . . ." *Id.* (emphasis added).

222. *Id.*

existing legal remedy when it was passed in 1983, the first prong of the *Berry* test was not even implicated. There was thus no need to analyze the second prong, which assumes abrogation of a remedy.[223] The lead opinion concluded that "the legislation in question was a constitutional exercise of legislative authority that did not violate the Open Courts Clause."[224]

2. The dissent's application of the Berry *test*

The dissent, applying the *Berry* test, came to a different conclusion. The basis for the difference was that the dissent found the lead opinion's evaluation of the claim too narrow. In essence, the dissent agreed with the plaintiffs that "wrongful birth" should not be viewed as a separate cause of action, but merely as a form of medical malpractice.[225] It quoted from a *Berry* footnote stating that "[w]hat section 11 is primarily concerned with is not particular, identifiable causes of action as such, but with the availability of legal remedies for vindicating the great interest that individuals . . . have in the integrity of their persons, property, and reputations."[226] The dissent argued that the inquiry should not be just "whether or not, on the day the Act was passed, there was a specific cause of action entitled 'wrongful birth.' The inquiry must focus on the nature of the harm and the recognition that it . . . [is] cognizable at law."[227]

The dissent then answered the implicit question of whether a remedy was actually abrogated in the affirmative. The *Wood* plaintiffs, the dissent asserted, were injured in person[228] and in property[229] by the alleged malpractice of the Medical Center. According to the dissent, they would have had a remedy available at the time the Wrongful Life Act was enacted—"[t]here is no question

223. *Id.*

224. *Id.*

225. *Id.* at 454 (Durham, C.J., dissenting) ("The 'wrongful birth' cause of action is nothing more than a legal remedy for medical malpractice based on negligence.").

226. *Id.* at 451 (Durham, C.J., dissenting) (quoting Berry *ex rel.* Berry v. Beech Aircraft Corp., 717 P.2d 670, 677 n.4 (Utah 1985) (quoting Currier v. Holden, 862 P.2d 1357, 1360–61 (Utah Ct. App. 1993))).

227. *Id.* at 453 (Durham, C.J., dissenting).

228. "[T]heir personal right to make informed, lawful decisions regarding medical treatments and procedures [w]as subverted by the admitted negligence of the defendant." *Id.* (Durham, C.J., dissenting). Apart from this assertion, the facts as given in the opinions do not otherwise indicate that the Medical Center admitted negligence.

229. "The right to be compensated for a personal injury is a property right . . . ." *Id.* (Durham, C.J., dissenting).

that a claim for medical malpractice [based on negligence] existed in 1983."[230] Therefore, the dissent concluded, there was an available remedy for those in the plaintiffs' position that was abrogated by the Wrongful Life Act.[231]

The dissent also relied on other court decisions to show that there was a recognition of wrongful birth claims in Utah. Of *Payne* and *Nielson*, the dissent said: "*five years after* the Act was passed in 1983, this court assumed, albeit without specifically deciding, that a wrongful birth cause of action already existed in Utah."[232] The dissent also quoted the *Payne* court's holding that the plaintiffs in that case were not denied their open courts rights "because [when their wrongful birth claim arose] they *still had an opportunity to seek redress in the courts.*"[233] The Utah Court of Appeals,[234] the Kansas Supreme Court,[235] and even the Utah Supreme Court in *Nielson*,[236] according to the dissent, also concluded that Utah recognizes a wrongful birth cause of action.[237] Finally, since Utah has joined a majority of states in recognizing a "wrongful pregnancy" cause of action "based upon a 'negligently performed or counseled sterilization procedure or abortion,'" the dissent concluded that Utah must also recognize a similar negligence cause of action in wrongful birth situations.[238]

Having concluded that a remedy was abrogated, the dissent examined the first prong of the *Berry* test—whether the Act provided "an effective and reasonable alternative remedy"—and concluded

230. *Id.* at 455 (Durham, C.J., dissenting).

231. *Id.* at 453 (Durham, C.J., dissenting) ("[T]he Act has precluded them from pursuing any remedy . . . .").

232. *Id.* at 454 (Durham, C.J., dissenting).

233. *Id.* (Durham, C.J., dissenting) (alterations in original) (citing Payne *ex rel.* Payne v. Myers, 743 P.2d 186, 190 (Utah 1987)).

234. State v. Shipler, 869 P.2d 968 (Utah Ct. App. 1994).

235. Arche v. U.S. Dept. of Army, 798 P.2d 477 (Kan. 1990).

236. The dissent observed that "the [*Nielson*] court . . . noted that courts 'have been almost unanimous in their recognition of a [wrongful birth] cause of action . . . .' *Nielson* did not except Utah from that list." *Wood*, 67 P.3d at 455 (Durham, C.J., dissenting) (quoting C.S. v. Nielson, 767 P.2d 504, 506 n.4 (Utah 1988)).

237. *Id.* at 454–55 (Durham, C.J., dissenting).

238. *Id.* at 455 (Durham, C.J., dissenting) (citing *Nielson*, 767 P.2d at 506).

that it did not.[239] Since the Act does not even purport to provide an alternative, this was an easy analysis.[240]

The dissent then analyzed the second *Berry* prong—whether "there is a clear social or economic evil to be eliminated and the elimination of an existing legal remedy is not an arbitrary or unreasonable means for achieving the objective."[241] The dissent argued that since the Act, on its face, "does not identify a social or economic evil to be eliminated," deeper analysis is necessary.[242] Looking at "the language of the Act and . . . its history," the dissent concluded that "it is clear that its purpose was to eliminate or reduce opportunities for the exercise of the lawful choice to abort a fetus with a prenatally diagnosed defect."[243] Because "the right to choose whether or not to abort is . . . protected in Utah, . . . as well as part of a fundamental right to privacy[,] . . . it cannot be considered a 'social evil' for the purposes of article I, section 11."[244] The dissent concluded that since this was the only purpose identified in the history and language of the Act, there was no evil to be eliminated, and the Act also fails the second prong of the *Berry* analysis.[245]

3. The lead opinion came to the proper conclusion

Neither opinion in *Wood* provided an analysis compelling to a majority of the court, leaving the question open. The lead opinion even purported to use a standard of review contrary to that upheld by the majority of the court.[246] Nonetheless, this section argues that the lead opinion came to the correct determination—that the Act is constitutional under the Utah open courts clause.

239. *Id*. (Durham, C.J., dissenting).

240. The dissent indicated that the Act's abrogation of a remedy without providing an alternative created an unfair distinction—plaintiffs are allowed or denied a remedy based solely on the kind of medical advice provided. The *Nielson* plaintiff was allowed to recover based on "negligen[t] . . . provision of information about sterilization." *Id*. at 456 (Durham, C.J., dissenting). However, due to the Act, plaintiffs are denied recovery for negligent "provision of genetic counseling." *Id*. (Durham, C.J., dissenting). The *Wood* dissent argued that it would be "unfair [if] some victims of medical malpractice have remedies and others do not, even when the nature of the malpractice and of the injuries is identical." *Id*. (Durham, C.J., dissenting).

241. Berry *ex rel.* Berry v. Beech Aircraft Corp., 717 P.2d 670, 680 (Utah 1985).

242. *Wood*, 67 P.3d at 456 (Durham, C.J., dissenting).

243. *Id*. (Durham, C.J., dissenting).

244. *Id*. at 456–57 (Durham, C.J., dissenting).

245. *Id*. (Durham, C.J., dissenting).

246. *See supra* text accompanying notes 65–71.

Ultimately, the heated debate about the appropriate standard of review was essentially irrelevant to the lead opinion's analysis. The standard of review question would affect the degree of scrutiny applied to the Act and perhaps the burden of proof or degree of proof required.[247] However, Justice Wilkins based his conclusion on the determination that the tort of wrongful birth never existed in Utah.[248] This decision surely would have been the same regardless of the standard used—the existence or nonexistence of a cause of action does not depend on the standard of review used.[249] It was therefore immaterial that the lead opinion used a standard other than that upheld by a majority for open courts cases.

The dissent's attempts to show that Utah *did* recognize wrongful birth prior to 1983 are unavailing. The dissent asserted that the *Payne* court "assumed, albeit without specifically deciding, that a wrongful birth cause of action already existed in Utah."[250] Despite the dissent's attempt to downplay the significance of the "[a]ssuming, but not deciding"[251] language, it is a foundational principle that "ordinarily, a decision is not a precedent on matters assumed therein, but not decided."[252] Even if that language is disregarded, the dissent is mistaken—the *Payne* court did not assume that a wrongful birth cause of action "already existed," but rather that "Utah jurisprudence *should* recognize an action for wrongful birth."[253] The difference is significant because, at most, the *Payne* court was expressing an opinion, in dictum, that a wrongful birth cause of action *should be* recognized in Utah, not that such a cause of action *was* recognized. The dissent further asserts that the Utah Court of Appeals and the Kansas Supreme Court read *Payne* as recognizing a wrongful birth cause of action in Utah.[254] However,

247. *See supra* text accompanying notes 154–57.

248. *See Wood*, 67 P.3d at 442.

249. Recognizing or prohibiting causes of action depending on the standard of review used would lend an air of uncertainty and unpredictability to the law, and would almost certainly prove unworkable.

250. *Wood*, 67 P.3d at 454 (Durham, C.J., dissenting).

251. Payne *ex rel.* Payne v. Myers, 743 P.2d 186, 188 (Utah 1987).

252. 21 C.J.S. *Courts* § 162 (2003). Note also that "[b]ecause the question of whether a cause of action exists is not a question of jurisdiction, it may be assumed without being decided." 35A C.J.S. *Federal Civil Procedure* § 308 (2003).

253. *Payne*, 743 P.2d at 188 (emphasis added).

254. *See* Arche v. U.S. Dep't of Army, 798 P.2d 477, 479 (Kan. 1990); State v. Shipler, 869 P.2d 968, 970 (Utah Ct. App. 1994) ("[I]n an action for wrongful birth and wrongful

the Utah case was an action to reduce a conviction for felony theft to a misdemeanor and the court cited *Payne* merely for the proposition that "rights accrue only when the prerequisites for filing an action are fulfilled."[255] The Kansas court noted only that "Arizona, California, and Utah have sometimes been cited as states recognizing the action [of wrongful birth], but the issue has not been clearly presented and determined in those states"[256]—hardly a persuasive recognition.

Although not offered by the dissent, it could be argued that wrongful birth should be recognized because if it had been considered prior to 1983, the courts would have recognized it. This claim is not only speculative but is also irrelevant. As the *Wood* dissent noted, "[t]he first step in [the *Berry* test] is to determine whether the Act abrogated an *existing legal remedy*."[257] That the justices on the Utah Supreme Court prior to 1983 would have been willing to create a cause of action for wrongful birth does not mean that such a remedy existed. As the lead opinion stated, "[i]n the absence of a declaration by this court either recognizing, or refusing to recognize, a cause of action for wrongful birth, the legislature set forth the law, declaring that claims for wrongful birth would not be recognized in Utah."[258]

The dissent's strongest contention is that wrongful birth is merely a subcategory of medical malpractice. Indeed, several states have followed this line of reasoning in evaluating wrongful birth claims.[259] Although those states may distinguish "wrongful birth" as a separate kind of malpractice claim, they use an analysis identical to

life, the Utah Supreme Court held that the causes of action did not accrue until the birth of the gravely ill child.").

255. *Shipler*, 869 P.2d at 970.

256. *Arche*, 798 P.2d at 479.

257. Wood v. Univ. of Utah Med. Ctr., 67 P.3d 436, 453 (Utah 2002) (Durham, C.J., dissenting) (emphasis added).

258. *Id.* at 443. Note also that "the statute in question did not operate either to extinguish a cause of action after it had accrued or to limit the remedies available; it simply prevented one from ever arising." Cruz v. Wright, 765 P.2d 869, 871 (Utah 1988) (referring to the repudiation of loss-of-consortium actions by the Married Women's Act of 1898).

259. *See, e.g.*, *Wood*, 67 P.3d at 454 (Durham, C.J., dissenting) (citing supreme court decisions from Indiana, Delaware, Kansas, and Washington); *see also* Greco v. United States, 893 P.2d 345, 348 (Nev. 1995) (finding that there is "no reason for compounding or complicating our medical malpractice jurisprudence by according this particular form of professional negligence action some special status apart from presently recognized medical malpractice or by giving it the new name of 'wrongful birth'").

that used in "garden-variety medical malpractice claim[s]."[260] Nonetheless, this claim fails when applied to Utah. Wrongful birth has not been viewed as subsumed in medical malpractice in Utah, even if wrongful pregnancy has.[261] The dissent does not challenge the assertion that wrongful birth did not exist at common law,[262] and no statute or decision in Utah ever recognized it. For it to exist at the time of *Wood*, this cause of action would have had to spring into existence from a vacuum. In fact, the dissent's statement that because Utah has chosen to recognize a "wrongful pregnancy" cause of action, it must therefore also recognize wrongful birth, proves too much. The court in *Nielson* took great pains to distinguish "wrongful pregnancy" and "wrongful birth" actions,[263] recognizing the former but not the latter. If, as the *Wood* dissent claimed, both of these are merely "garden-variety medical malpractice claim[s],"[264] then why go to the trouble of distinguishing them at all? The *Nielson* court obviously felt that there was an important difference. That these two claims are separated and analyzed distinctly in Utah indicates that recognition of one does not imply recognition of the other.

In addition, many states do not accept wrongful birth causes of action or view them as subsumed in medical malpractice claims. The Minnesota Supreme Court determined that "the establishment of wrongful birth . . . [is] best within the exclusive jurisdiction of the legislature."[265] The Supreme Court of Georgia declared that "our current malpractice statute does not encompass a wrongful birth claim."[266] The Supreme Court of North Carolina indicated that "claims for relief for wrongful birth of defective children shall not be recognized in this jurisdiction absent a clear mandate by the legislature."[267] Although the majority of states have chosen to recognize such claims, Utah is certainly not alone in not having done so.[268] Even some of the states that *have* recognized wrongful birth

260. *Wood*, 67 P.3d at 455 (Durham, C.J., dissenting).

261. *See* C.S. v. Nielsen, 767 P.2d 504, 509 (Utah 1988).

262. *See Wood*, 67 P.3d at 452–57 (Durham, C.J., dissenting).

263. 767 P.2d at 506.

264. *Wood*, 67 P.3d at 455 (Durham, C.J., dissenting).

265. Hickman v. Group Health Plan, Inc., 396 N.W.2d 10, 13 (Minn. 1986).

266. Etkind v. Suarez, 519 S.E.2d 210, 215 (Ga. 1999).

267. Azzolino v. Dingfelder, 337 S.E.2d 528, 533 (N.C. 1985).

268. It should be noted that the Act does not prohibit eventual recognition of any and all "wrongful birth" claims. Although it prohibits a cause of action for those who argue that they

claims have established it as a separate tort, not as part of medical malpractice. Ultimately, "[b]ecause no right existed at common law to recover . . . , the legislature is free to limit . . . liability in that area without implicating the open courts clause . . . ."[269]

Because the tort of wrongful birth was never recognized in Utah prior to its enactment, the Wrongful Life Act did not abrogate an existing cause of action and is therefore constitutional under *Berry*. But, even if the Act is deemed to have abrogated an existing cause of action, it should still be held constitutional. The second prong of *Berry*[270] is whether "there is a clear social or economic evil to be eliminated and the elimination of an existing legal remedy is not an arbitrary or unreasonable means for achieving the objective."[271] The dissent looked past the plain language of the Act to the history of its adoption, asserting that on its face, the Act "does not identify a social or economic evil to be eliminated."[272] The Utah standard, however, is that "[w]hen examining a statute, we look first to its plain language as the best indicator of the legislature's intent and purpose in passing the statute."[273] The first section of the Act states that it is the public policy of Utah "to encourage all persons to respect the right to life of all other persons, regardless of age, development, condition or dependency, including all persons with a disability and all unborn persons."[274] This language indicates that the legislature was trying to eliminate two "clear social evils"—discrimination against the developmentally disabled and emotional damage to children whose parents bring wrongful birth claims.[275]

First, the Utah legislature was trying to promote respect for the lives of all citizens—even the disabled. By allowing parents to recover for the unwanted birth of a disabled child, it sends a message to the

would otherwise have chosen to abort, it does not provide a similar bar in the case where a parent would have avoided pregnancy altogether but for negligent advice from physicians. This latter type of wrongful birth claim, unavailable to the already-pregnant couple in *Wood*, could potentially yet be recognized in Utah.

269. *See* McCorvey v. Utah State Dep't of Transp., 868 P.2d 41, 48 (Utah 1993).

270. Because the Act did not provide an alternative remedy, the first *Berry* prong is inapplicable.

271. Berry *ex rel.* Berry v. Beech Aircraft Corp., 717 P.2d 670, 680 (Utah 1985).

272. Wood v. Univ. of Utah Med. Ctr., 67 P.3d 436, 456 (Utah 2002) (Durham, C.J., dissenting).

273. *Id.* at 445 (quoting Wilson v. Valley Mental Health, 969 P.2d 416, 418 (Utah 1998)).

274. UTAH CODE ANN. § 78-11-23 (2002).

275. *Cf.* Americans with Disabilities Act of 1990, 42 U.S.C. § 12101 (1990).

disabled that they are of less value.[276] As an early wrongful birth case stated, "[o]ne of the most deeply held beliefs of our society is that life—whether experienced with or without a major physical handicap—is more precious than non-life."[277] Respect for that life was one reason, obvious from the language of the Act, for prohibiting wrongful birth claims. As another court stated, proscribing wrongful birth claims "reflect[s] the state's view that a handicapped child should not be deemed better off dead and of less value than a 'normal' child."[278] Second, prohibiting wrongful birth claims out of respect for life, even of the disabled, indicates that the Utah legislature was trying to prevent emotional harm to disabled children. As one court stated, if claims of this type are allowed, "[w]e are . . . convinced that the damage to the child will be significant; that being an unwanted [child] . . . who will someday learn that its parents did not want it and, in fact, went to court to force someone else to pay for its raising, will be harmful to that child."[279] One commentator persuasively noted that if wrongful birth actions are allowed, "even though a child will have independent evidence of his or her parent's love, there will always be contradictory evidence (and a court transcript) to prove that the child's parents convinced a jury that the child was unwanted and would have been aborted if the opportunity had presented itself."[280] These concerns vindicate the stated purpose of the legislature, and there is nothing arbitrary or unreasonable about the method selected—the legislature properly sought to eliminate a clear social evil.[281]

Ignoring section 78-11-23, however, the dissent concluded that "it is clear that [the Act's] purpose was to eliminate or reduce

276. Paula Bernstein, Comment, *Fitting a Square Peg in a Round Hole: Why Traditional Tort Principles Do Not Apply to Wrongful Birth Actions*, 18 J. CONTEMP. HEALTH L. & POL'Y 297, 321 (2001) ("When a state allows wrongful birth actions, . . . it sends a pernicious message to its citizens with disabilities; that the state places a higher value on its 'normal' citizens.").

277. Berman v. Allan, 404 A.2d 8, 12 (N.J. 1979).

278. Dansby v. Thomas Jefferson Univ. Hosp., 623 A.2d 816, 820 (Pa. Super. Ct. 1993).

279. Wilbur v. Kerr, 628 S.W.2d 568, 571 (Ark. 1982).

280. Bernstein, *supra* note 276, at 320.

281. Allowing wrongful birth actions also implicates the problem of "eugenics as a birth policy whereby doctors are sued for not weeding out the unfit." Monique Ann-Marie Croon, Note, Taylor v. Kurapati*, the Court of Appeals of Michigan's Decision of Refusing to Recognize the Tort of Wrongful Birth*, 5 DEPAUL J. HEALTH CARE L. 317, 339 (2002) (quoting Matthew Rarely, *Sliding into Eugenics?*, INSIGHT ON NEWS, Nov. 22, 1999, at 31).

opportunities for the exercise of the lawful choice to abort a fetus with a prenatally diagnosed defect."[282] This is a logical leap that finds no basis in the language of the Act.[283] As stated in the lead opinion, "where the legislative purpose is expressly stated and agreed to as part of the legislation, we do not look to the [legislative history] in determining the intent of the statute."[284] The dissent improperly found that the sole purpose of the Act was to burden abortion and that "there is no . . . evil identified."[285] In looking past the language of the Act, and its implications, the dissent ignores the factors that would satisfy the second prong of the *Berry* test.[286]

V. CONCLUSION

After the dust from *Wood* had settled, the Utah Wrongful Life Act was still standing, although barely. A unique combination of concurrences and dissents produced a confusing decision, particularly with relation to the open courts clause of the Utah constitution. This Note demonstrates that, although a majority in *Wood* upheld heightened scrutiny as the proper standard of review in open courts cases, there was no majority opinion as to the constitutionality of the Act under that analysis. Because the court was equally divided on this issue, the decision of the lower court that the Act is constitutional was affirmed.

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282. Wood v. Univ. of Utah Med. Ctr., 67 P.3d 436, 456 (Utah 2002) (Durham, C.J., dissenting).

283. Despite the evidence of individual legislator's intent, *see supra* note 11, the *Wood* lead opinion properly noted that "[l]egislators may decide that a statute should be passed for myriad, often even different, reasons . . . ." *Id.* at 445.

284. *Id.*

285. *Id.* at 457 (Durham, C.J., dissenting).

286. Because it found no abrogation of an existing legal remedy, the lead opinion did not expressly evaluate the second *Berry* prong. However, in a footnote, Justice Wilkins indicated that "this case reveals an inherent problem with the *Berry* test, that it 'simply sets forth a framework for justifying the policy position of a majority of the members of this court.'" *Id.* at 443 n.3 (quoting Laney v. Fairview City, 57 P.3d 1007, 1031 (Utah 2002)). His argument is that because both the plaintiffs and the defendants may have reasonable positions as to the existence of an evil, the court simply must choose which "evil" it prefers. However, this mischaracterizes the *Berry* test. The balancing of evils, even under *Berry*, is left to the legislature. As long as the statute remedies a "clear social or economic evil [and is] non-arbitrary or reasonable," Berry *ex rel.* Berry v. Beech Aircraft Corp., 717 P.2d 670, 680 (Utah 1985), it should be upheld—regardless of whether there are competing evils that are not eliminated. Because the legislature did identify and intend to remedy a clear social evil, the Act passes even this second part of the *Berry* test.

This Note illustrates that between the two extremes of the lead and dissenting opinions on the appropriate standard of review lies a middle ground, used in part by both the Utah Court of Appeals in *Currier* and the courts of other states. This Note also recommends that standard for future analyses because it appropriately balances the concerns of individual rights and legislative prerogative in open courts cases. Finally, this Note evinces that, regardless of the standard of review used, the Utah Wrongful Life Act should be upheld under the controlling *Berry* test. The Wrongful Life Act did not abrogate an existing legal remedy, and even if it had, the Act is supported by a strong public policy: eliminating the clear social evils of discrimination against and emotional harm to the disabled.

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