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WACHOCKI V. BERNALILLO COUNTY SHERIFF'S DEPARTMENT: RENEWED CHALLENGES TO THE NEW MEXICO TORT CLAIMS ACT CAP

Alexandra Wilson*

I. INTRODUCTION

On November 24, 2009, the New Mexico Court of Appeals decided *Wachocki v. Bernalillo County Sheriff's Department*.¹ That case involved the estate of a motorist who was killed in an accident caused by a speeding vehicle driven by a corrections officer.² The estate brought a wrongful death action against the corrections officer and the Bernalillo County Sheriff's Department.³ The trial court found the sheriff's department thirty percent liable, but the award was capped at \$400,000 pursuant to the New Mexico Tort Claims Act's (TCA) cap on damages against government tortfeasors.⁴ The sheriff's department appealed and the Wachocki estate cross-appealed, challenging the constitutionality of the cap.⁵ The Wachockis argued that the cap on damages violated their equal protection and due process rights guaranteed by both the New Mexico and Federal Constitutions.⁶ The court first dismissed the Wachocki's New Mexico constitutional claims due to the requirements of the state's inter-

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1. *Wachocki v. Bernalillo County Sheriff's Department*, 2010-NMCA-021, 228 P.3d 504.

2. *Id.*

3. *Id.*

4. *Id.* ¶ 2, 228 P.3d at 508; NMSA 1978, § 41-4-19 (A)(3) (1991) (amended 2007).

5. The sheriff's department appealed the judgment of the district court holding it thirty percent liable, and the Wachockis also cross-appealed on the trial court's decision to deny the brother's loss of consortium claim. *Wachocki*, 2010-NMCA-021, ¶¶ 1-2, 228 P.3d at 507-508.

6. *Wachocki*, 2010-NMCA-021, ¶¶ 35-45, 228 P.3d at 514-16. The Wachockis also argued that the cap violated the Separation of Powers clause; the court also rejected this claim, which will not be discussed in this note. For a full analysis of these claims, see *id.* ¶¶ 46-49, 228 P.3d at 516-17.

stitial approach.⁷ The court then rejected the federal constitutional arguments and upheld the constitutionality of the cap.⁸ This case note will discuss the implications of the New Mexico interstitial approach, which allows state courts to dismiss a plaintiff's state constitutional claims if such claims are not properly preserved. This note will proffer that the use of that approach may be causing New Mexico courts to side-step their duties to interpret the New Mexico Constitution. Further, this note demonstrates that New Mexico courts should consider extending protection under state constitutional provisions versus their federal counterparts, particularly with respect to due process and equal protection. Such an expansion could result in favorable outcomes for tort victims challenging the TCA cap.

This note will begin in Part II by discussing how and why the TCA cap was enacted in New Mexico. This section will discuss the genesis of sovereign immunity in New Mexico and how sovereign immunity was abolished in 1975. Then, the discussion will shift to the legislature's response to that abolition through the TCA. Part II will conclude with a brief introduction of the TCA cap on damages, and the challenges it presents for victims of government torts.

Part III will discuss the constitutional challenges that have been made to the cap since its enactment. First, the background law behind New Mexico's adoption of the interstitial approach will be provided. The consequences of the adoption for New Mexico jurisprudence will then be discussed. The section will then discuss the equal protection and due process challenges to the constitutionality of the cap. The background law on equal protection in the New Mexico and Federal Constitutions, as well as how the analyses of equal protection have been applied to the TCA cap, will be provided. Next, the background law for due process analyses in both the New Mexico and Federal Constitutions will be provided. That background law includes challenges to both substantive due process and right of access to courts.

Part IV will provide the law in other states regarding limitations on damages for tort claims against the government. This section will discuss how other states limit damages, if at all, and will discuss the constitutional challenges that have been made against other state laws.

Part V will be a statement of the *Wachocki v. Bernalillo County Sheriff's Dept.* case.⁹ The first part will discuss the facts of the case, followed by the constitutional arguments made by the Wachockis on appeal.

7. *Id.* ¶ 34, 228 P.3d at 514.

8. *Id.* ¶¶ 35–45, 228 P.3d at 514–16.

9. *Wachocki*, 2010-NMCA-021.

This section will conclude with how the court of appeals dealt with the Wachockis' arguments and the reasoning behind the court's decisions.

Part VI will analyze the constitutional arguments made in the *Wachocki* decision, with a heavy emphasis on equal protection analysis. The analysis will begin with a discussion on the interstitial approach in New Mexico and how it may have affected the outcome in the court's holdings. Part VI will then discuss reasons for why greater protection under the New Mexico Constitution is warranted for equal protection and due process claims. This section will then demonstrate that greater protection under the New Mexico Constitution could result in more equitable outcomes for government tort victims. Finally, this note offers practical considerations for future challenges to the TCA cap, and will anticipate the legislature's response if the courts began to strike down the constitutionality of the TCA cap.

II. HISTORY OF THE NEW MEXICO TORT CLAIMS ACT

The New Mexico TCA was created by the legislature to abolish a series of judicially created doctrines that had been developed over time since statehood. The following sections will discuss the history of those doctrines and the evolution and provisions of the TCA in response to such doctrines.

A. Sovereign Immunity in New Mexico

Until 1975, New Mexico recognized the common law principle of sovereign immunity.¹⁰ This doctrine provided that "no sovereign state can be sued in its own courts or in any other without its consent and permission."¹¹ Thus, any state or municipal tortfeasor acting in his or her official capacity was protected under this doctrine. Sovereign immunity was upheld tenaciously by courts from statehood, and not until 1941 did the legislature enact laws directly addressing the doctrine.¹² Those laws required the state to purchase liability insurance for negligent operation of a motor vehicle.¹³ Further, such laws allowed a plaintiff to file suit against the operator of the vehicle in his individual capacity, but not against the state¹⁴ and, consequently, lessened the rigid effects of sovereign immunity while remaining in harmony with the doctrine.

10. See *Hicks v. State*, 88 N.M. 588, 544 P.2d 1153 (1975).

11. *Dougherty v. Vidal*, 37 N.M. 256, 257-58, 21 P.2d 90, 91 (1933).

12. *Hicks*, 88 N.M. at 589, 544 P.2d at 1154.

13. *Id.*

14. *Id.*

The courts also began to shape state sovereign immunity by distinguishing cases in which the doctrine would apply.¹⁵ In 1943, the court in *Barker v. City of Santa Fe* held that a government could be held liable for proprietary actions; namely, those torts arising "from a nuisance created or maintained by a municipality" or "corporate functions."¹⁶ However, the court recognized that when a government performs governmental functions and duties, sovereign immunity principles establish that it cannot be held liable for tortious conduct.¹⁷ The court in *Barker* thus adopted a doctrine that attempted to ameliorate the harshness of sovereign immunity, by distinguishing cases in which it applies, without infringing upon the larger principles of sovereign immunity.

Eventually, the courts and the legislature determined that the sovereign immunity doctrine too often led to harsh results for tort victims and could no longer be justified by public policy.¹⁸ The doctrine was abolished by the New Mexico Supreme Court in *Hicks v. State*.¹⁹ *Hicks* involved a wrongful death action against the State Highway Department for the negligent construction and maintenance of a narrow bridge.²⁰ The state argued that sovereign immunity could only be changed through legislative action and the plaintiff was barred from recovery.²¹ The court rejected that argument, holding that the doctrine was judicially created, and thus could be judicially amended or abolished.²² The court further held that sovereign immunity had lost its foundation due to changing circumstances, and that social philosophy no longer accepted that a government should be free of liability for its wrongdoing.²³ Thus, the *Hicks* court held that sovereign immunity no longer served a valid purpose, and the doctrine was abolished entirely.²⁴

B. The New Mexico Tort Claims Act

The TCA was the New Mexico Legislature's response to *Hicks*' abolition of sovereign immunity and its attendant common law doctrines.²⁵

15. *Barker v. City of Santa Fe*, 47 N.M. 85, 136 P.2d 480 (1943).

16. *Id.* at 85, 136 P.2d at 485.

17. *Id.*

18. *See Hicks*, 88 N.M. at 589-91, 544 P.2d at 1154-56.

19. *Id.*

20. *Id.* at 588-589, 544 P.2d at 1153-54.

21. *Id.* at 589, 544 P.2d at 1154.

22. *Id.* at 590, 544 P.2d at 1155.

23. *See id.* at 591, 544 P.2d at 1156.

24. *Id.* at 592, 544 P.2d at 1157.

25. NMSA 1978, §§ 41-4-1 to -29 (amended 1991); *see Barker*, 47 N.M. at 85, 136 P.2d at 485 (defining a doctrine that distinguished between proprietary and governmental functions).

The TCA was enacted the year after *Hicks*, in 1976.²⁶ The legislature recognized the “inherently unfair and inequitable results which occur in the strict application of the doctrine of sovereign immunity,” but also acknowledged that it could not leave the state subject to unlimited liability.²⁷ The legislature reasoned that “the area within which the government has the power to act for the public good is almost without limit, and therefore government should not have the duty to do everything that might be done.”²⁸ The legislature thus reinstated sovereign immunity in tort claims for those governmental entities and public employees acting within the scope of duty, and abolished all common law doctrines addressing sovereign immunity.²⁹

However, in an effort to prevent a rigid application of sovereign immunity, the legislature listed eight exceptions with which a government entity or individual waived its immunity.³⁰ The first of these eight exceptions included the claim of wrongful death caused by a public employee acting within the scope of duty while operating a motor vehicle.³¹ The other exceptions included negligent operation and maintenance of any building, public park, machinery, equipment or furnishings; negligent operation by public employees of airports, public utilities, medical facilities; negligence by public health providers; negligent operation and maintenance of public highways and streets; and torts arising out of wrongful acts (e.g. assault, battery, wrongful arrest, false imprisonment) committed by law enforcement officers.³² The TCA provided additional limitations that put greater restrictions on government tort victims than private tort victims. Two of these limitations included were the statute of limitations period of two years and notice of claims to be provided within ninety (90) days for injuries and six months for deaths.³³ Another major limitation

26. *Supra* note 25.

27. See NMSA 1978, § 41-4-2 (1953).

28. *Id.*

29. NMSA 1978, § 41-4-4 (amended 1977).

30. NMSA 1978, § 41-4-4 (amended 1977); see also NMSA 1978, §§ 41-4-5 to -12 (1977).

31. NMSA 1978, § 41-4-5 (1977) (providing that “immunity . . . does not apply liability for damages resulting from bodily injury, wrongful death or property damage caused by the negligence of public employees while acting within the scope of their duties in the operation or maintenance of any motor vehicle, aircraft or watercraft.”).

32. For a full list of these exceptions, see NMSA 1978, §§ 41-4-5 to -12 (1977).

33. NMSA 1978, §§ 41-4-15, 41-4-16 (1977); see e.g. NMSA 1978, § 37-1-8 (1976) (providing a three year statute of limitations for personal injuries caused by private entities).

was the limit on recoverable damages that could be awarded to government tort victims, namely, the TCA cap.³⁴

C. TCA Cap

Originally, the TCA created a cap, which provided maximum liability of \$300,000 "to any person for any number of claims arising out of a single occurrence for all damage other than property damage" or \$500,000 "for all claims arising out of a single occurrence."³⁵ In 1991, the cap was amended and maximum liability was increased to \$400,000 and \$750,000, respectively.³⁶

Many government tort victims have been concerned with the constitutionality of the TCA cap. Such plaintiffs have challenged the cap under both the New Mexico and Federal Constitutions. Most of those constitutional arguments have been premised on violations of equal protection rights, substantive due process rights, and a right of access to courts.

III. CONSTITUTIONAL CHALLENGES AND THE TCA CAP

New Mexico has adopted what is named the "interstitial approach" when parties assert constitutional challenges under the State and Federal Constitutions. The interstitial approach, as further explained below, is a tool used by courts to dismiss state constitutional claims and continue its analysis using federal mechanisms. Most constitutional challenges made to the TCA cap have been equal protection and due process claims. The following sections will discuss the evolution of the interstitial approach and the history of the constitutional challenges against the TCA cap.

A. Interstitial Approach

The New Mexico Constitution and the U.S. Constitution both provide parallel provisions for equal protection rights and due process.³⁷ The due process clause protects the right of access to courts, as well as substantive due process rights.³⁸ The language in both provisions is almost

34. NMSA 1978, § 41-4-19 (amended 1991).

35. *Id.*

36. NMSA 1978, § 41-4-19 (amended 2007).

37. Compare N.M. CONST. art. II, § 18 ("nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.") with U.S. CONST. amend. XIV ("No person shall be deprived of life, liberty or property without due process of law; nor shall any person be denied equal protection of the laws.").

38. *Jiron v. Mahlab*, 99 N.M. 425, 425, 659 P.2d 311, 312 (1983); *Madrid v. St. Joseph Hosp.*, 1996-NMSC-064, ¶ 25, 928 P.2d 250.

identical.³⁹ However, even when the language is identical, state courts may nonetheless interpret state provisions to afford greater protection to their federal counterparts.⁴⁰

In *State v. Gomez*, the court adopted the interstitial approach for circumstances when both state and federal constitutional challenges are raised to address the same right.⁴¹ This approach requires the court to first determine whether the right being asserted is protected under the Federal Constitution.⁴² If so, the state constitutional claim need not be reached.⁴³ “A state court . . . may diverge from federal for three reasons: a flawed federal analysis, structural differences between state and federal government, or distinctive state characteristics.”⁴⁴ When a litigant asserts a claim under a provision in the New Mexico Constitution that is parallel or analogous to the U.S. Constitution, the requirements for preserving that claim on appeal depend on current state precedent which analyzes that state constitutional provision.⁴⁵ If current precedent construes the state provision as providing greater protection than its federal equivalent, the New Mexico constitutional claim may be preserved.⁴⁶ However, if no such precedent exists, the party must assert greater protection under the state constitution and reasons to diverge from federal precedent at the trial court level.⁴⁷

The *Gomez* court adopted the interstitial approach in rejection of the primacy and lock-step approaches. Under the primacy approach, if the rights are protected under the state Constitution, the court will not look to federal law.⁴⁸ The court rejected this approach because “[w]hen federal protections are extensive and well-articulated, state court decision-making that eschews consideration of . . . federal doctrine not only will often be an inefficient route, but also will lack the cogency”⁴⁹ Under the lock-step method, the New Mexico courts followed only federal precedent when there were parallel provisions involved, and did not interpret the state provision independently.⁵⁰ That approach was rejected

39. See *supra* note 37.

40. *City of Farmington v. Fawcett*, 114 N.M. 537, 544–45, 843 P.2d 839, 846–47 (Ct. App. 1992).

41. *State v. Gomez*, 1997-NMSC-006, ¶ 20, 932 P.2d 1.

42. *Id.* ¶ 19, 932 P.2d at 7.

43. *Id.* ¶ 20, 932 P.2d at 7.

44. *Id.* ¶ 19, 932 P.2d at 7.

45. *Id.* ¶ 22, 932 P.2d at 8.

46. *Id.*

47. *Id.* ¶ 23, 932 P.2d at 8.

48. *Id.* ¶ 18, 932 P.2d at 7.

49. *Id.* ¶ 21, 932 P.2d at 7.

50. *Id.* ¶¶ 16–17, 932 P.2d at 6.

because the court recognized the state constitution has the power to offer greater protection than its federal counterpart, and cited recent New Mexico decisions that had extended protection under the New Mexico Constitution.⁵¹ Thus, the court determined that the interstitial approach would allow for independent constitutional interpretation, but also allowing the federal precedent to provide well-developed guidance in areas where the state constitution does not afford greater protection.⁵²

Since *Gomez*, New Mexico courts have used the interstitial approach to afford greater protection to individuals under state constitutional provisions than the federal counterparts. Some areas in which the courts have extended state protection in criminal cases include habeas corpus relief, double jeopardy, and unreasonable search and seizures.⁵³ A civil case in which protection was extended was *New Mexico Right to Choose/NARAL v. Johnson*.⁵⁴ *NARAL* was an equal protection challenge to a law that limited funding of abortions for Medicaid-eligible women.⁵⁵ The court used the interstitial approach, and held that the New Mexico Constitution contained an Equal Rights Amendment that the Federal Constitution had not adopted.⁵⁶ The court also determined that New Mexico's values included a desire to equalize gender, which allowed the court to diverge from federal precedent under the interstitial approach.⁵⁷ Thus, the court applied a higher level of scrutiny than its federal counterpart, and struck down the law.⁵⁸

In another civil case, *Breen v. Carlsbad Municipal Schools*, the New Mexico Supreme Court did not use the interstitial approach, but nonetheless held that the Equal Protection Clause of the New Mexico Constitution affords rights and protections independent of its federal analog.⁵⁹ Although the court analyzed the issue under the New Mexico Constitution, it looked to federal precedent as persuasive and applied federal modes of equal protection analysis.⁶⁰ *Breen* involved an equal protection challenge to a statute that limited worker's compensation to 100 weeks of

51. *Id.* ¶ 17, 932 P.2d at 6–7.

52. *Id.* ¶¶ 17–21, 932 P.2d at 7.

53. *See, e.g.,* *Montoya v. Ulibarri*, 2007-NMSC-035, 163 P.3d 476; *State v. Nunez*, 2000-NMSC-013, 2 P.3d 264; *State v. Granville*, 2006-NMCA-098, 142 P.3d 933.

54. *New Mexico Right to Choose/NARAL v. Johnson*, 1999-NMSC-005, ¶¶ 29–30, 975 P.2d 841, 851.

55. *Id.* ¶ 1, 975 P.2d at 844.

56. *Id.* ¶¶ 28–30, 975 P.2d at 851.

57. *Id.* ¶ 31, 975 P.2d at 852.

58. *Id.* ¶ 37, 975 P.2d at 854.

59. *Breen v. Carlsbad Municipal Schools*, 2005-NMSC-028, ¶ 14, 120 P.3d 413, 418.

60. *Id.*

payment to employees that developed mental disabilities caused by work-related injuries, but awarded up to 700 weeks to those with physical disabilities.⁶¹ Justice Maes determined that mentally disabled people constituted a sensitive class, which deserved greater protection and a heightened level of scrutiny under New Mexico's Equal Protection Clause.⁶² The statute was struck down as unconstitutional for the state's failure to demonstrate that it was substantially related to an important state interest.⁶³

Conversely, other courts have been reluctant to diverge from federal precedent under the interstitial approach. The court in *ACLU of NM v. City of Albuquerque* held that the mere possibility that a state provision may be independent of a federal provision is not sufficient to diverge from federal precedent.⁶⁴ *ACLU* involved a claim against the constitutionality of the city's sex offender alert program.⁶⁵ The court stated that the burden to provide reasons for divergence is on the party asserting state constitutional claims, absent established precedent that provides whether or not the New Mexico Constitution affords greater protection in a given area.⁶⁶ The party asserting state constitutional claims on a city ordinance in that case had not met this burden.⁶⁷ Thus, the court held that its analysis of substantive due process and equal protection would be limited to federal constitutional provisions.⁶⁸

New Mexico courts since *State v. Gomez* have not yet indicated that the New Mexico Constitution affords greater protection than does the Federal Constitution in TCA cap cases. Some New Mexico cases that discuss the TCA cap have merged the state and federal analyses, implying that one does not afford greater protection than the other.⁶⁹ Others have used the interstitial approach to apply the U.S. Constitution alone.⁷⁰ Nonetheless, New Mexico precedent indicates that the mode of analysis of the TCA cap under New Mexico Equal Protection and Due Process Clause remains identical to the analysis applied to federal equal protection and due process challenges.

61. *Id.* ¶ 1, 120 P.3d at 415.

62. *Id.* ¶ 28, 120 P.3d at 422–23.

63. *Id.* ¶ 50, 120 P.3d at 427.

64. *ACLU of NM v. City of Albuquerque*, 2006-NMCA-078, ¶ 18, 137 P.3d 1215, 1223–24.

65. *ACLU of NM*, 2006-NMCA-078.

66. *Id.* ¶ 18, 137 P.3d at 1223–24.

67. *Id.*

68. *Id.*

69. *See, e.g., Trujillo v. City of Albuquerque (Trujillo II)*, 1998-NMSC-031, 965 P.2d 305.

70. *See, e.g., ACLU of NM*, 2006-NMCA-078, ¶ 18, 137 P.3d at 1223–24.

B. Equal Protection Challenges

Both the State and Federal Constitutions guarantee equal protection of the law.⁷¹ The Equal Protection Clauses guarantee that individuals in similar situations will be treated the same, and “prohibit the government from creating statutory classifications that are unreasonable, unrelated to a legitimate statutory purpose, or are not based on real differences.”⁷²

The first step in an equal protection analysis is to determine whether a statute requires a group of people be treated differently than others who are similarly situated.⁷³ If this type of discrimination exists, the next step is to determine the level of scrutiny that should be applied.⁷⁴ Different levels of scrutiny are applied depending on the right being asserted or status of the group of people affected by legislation.⁷⁵ The level of scrutiny will also affect which party has the burden of proof.⁷⁶

The first level of scrutiny is rational basis.⁷⁷ “Rational basis review applies to general social and economic legislation that does not affect a fundamental or important constitutional right or a suspect or sensitive class.”⁷⁸ This standard of review is most deferential to the legislature and shifts the burden of proof on the party challenging the law.⁷⁹

Strict scrutiny, conversely, shifts the burden on the person defending the constitutionality of a law.⁸⁰ This level of scrutiny is applied when there is a fundamental right involved or a suspect classification, such as race.⁸¹ The burden is to prove that the discrimination or classification is narrowly tailored to achieve a compelling state interest.⁸²

The final level of scrutiny is between strict scrutiny and rational basis.⁸³ Intermediate scrutiny requires the party defending the legislation to prove the law is substantially related to a state interest.⁸⁴ “The existence of less restrictive alternatives is material to the determination of whether

71. See U.S. CONST. amend. XIV; N.M. CONST. art. II, § 18.

72. *Breen*, 2005-NMSC-028, ¶ 7, 120 P.3d at 416–17 (citation omitted).

73. *Id.* ¶ 8, 120 P.3d at 8.

74. *Id.*

75. *Id.* ¶ 8, 120 P.3d at 417.

76. *Id.*

77. *Id.* ¶ 11, 120 P.3d at 418.

78. *Id.*

79. *Id.*

80. *Id.* ¶ 12, 120 P.3d at 418.

81. *Breen*, 2005-NMSC-028; see also *Trujillo II*, 1998-NMSC-031, ¶ 16, 965 P.2d at 310.

82. *ACLU of N.M.*, 2006-NMCA-078, ¶ 19, 137 P.3d at 1223–24.

83. *Breen*, 2005-NMSC-028, ¶ 13, 120 P.3d at 418.

84. *Id.*

the classification substantially furthers an important governmental interest.”⁸⁵ This level should be applied when there is an important right involved, or when the interest involves a sensitive class.⁸⁶

The constitutionality of the TCA cap was challenged in *Trujillo v. City of Albuquerque (Trujillo I)* on equal protection and the right of access to courts grounds.⁸⁷ The plaintiff in *Trujillo I* obtained a personal injury judgment against the city for \$547,905, but his damages were capped at \$300,000 in accordance with the TCA provisions.⁸⁸ The New Mexico Supreme Court first determined which level of scrutiny should apply under the equal protection claim, finding that previous cases had not determined the appropriate level of scrutiny for damage caps for future cases.⁸⁹ The court based much of its reasoning on *Richardson v. Carnegie Library Restaurant*. Interestingly, *Richardson* involved a dram shop damage cap that applied to *private* business entities, while the TCA cap applied to all *governmental* entities in New Mexico.⁹⁰ *Richardson* held the cap invalid under heightened scrutiny.⁹¹ The court in *Trujillo I* followed the same reasoning, despite the extraordinary difference between public and private caps, when it held that the level of scrutiny for the TCA cap required more than rational basis review.⁹² It reasoned that heightened scrutiny rested on the importance of the right to recovery for tortious injury and on the importance of the “possibility that the rights of particular classes of tort victims will be sacrificed to social expediency in the legislative process.”⁹³ The legislature would need to consider the substantial individual interest in the right to recovery in its decision to limit such recoveries for tort claims against the government.⁹⁴ Thus, rational basis was not appropriate given the importance of the rights asserted.

85. *Trujillo v. City of Albuquerque* (“*Trujillo I*”), 110 N.M. 621, 630, 798 P.2d 571, 580 (1990), *overruled on other grounds by Trujillo II*, 1998-NMSC-031.

86. *ACLU of N.M.*, 2006-NMCA-078, ¶ 19.

87. *Trujillo I*, 110 N.M. 621, 798 P.2d 571.

88. *Id.* at 622, 798 P.2d at 572.

89. *Id.* at 622–23, 798 P.2d at 572–73; *see also Richardson v. Carnegie Library Restaurant*, 107 N.M. 688, 692–98, 763 P.2d 1153, 1157–63 (1988) (declining to decide whether strict scrutiny or intermediate scrutiny should be applied in the future because the damage cap in the dram shop act was constitutionally invalid under the intermediate standard, and thus also under the strict scrutiny standard).

90. *Trujillo I*, 110 N.M. at 622–26, 798 P.2d at 572–76 (emphasis added); *Richardson*, 107 N.M. at 692–98, 763 P.2d at 1157–63 (emphasis added).

91. *Trujillo I*, 110 N.M. at 622–26, 798 P.2d at 572–76; *Richardson*, 107 N.M. at 692–99, 763 P.2d at 1157–64.

92. *Trujillo I*, 110 N.M. at 625, 798 P.2d at 574.

93. *Id.*

94. *Id.*

The court determined the level of scrutiny based solely on the nature of the individual interest and the legislative classification, excluding the importance of preserving the governmental treasury from its analysis.⁹⁵ Tort victims were not defined as a "suspect class," as required by strict scrutiny review, and thus the court determined strict scrutiny was not appropriate.⁹⁶ "A tort victim's interest in full recovery of damages calls instead for a form of scrutiny somewhere between the largely toothless invocation of minimum rationality and the nearly fatal invocation of strict scrutiny."⁹⁷ Thus, the court held an intermediate level of scrutiny was appropriate, and the TCA cap must be substantially related to the governmental interest with the least restrictive means.⁹⁸ However, the court did not reach the question of whether or not the cap was constitutional under this level, due to a lack of factual development.⁹⁹ Consequently, the court remanded to the trial court for development of factual findings consistent with the intermediate scrutiny test.¹⁰⁰

Trujillo I returned to the supreme court in 1994, consolidated with another TCA case, the *Rogers v. City of Albuquerque* case.¹⁰¹ *Rogers* involved a six-year-old girl who was paralyzed in a car accident caused by an off-duty Albuquerque police officer driving a patrol car.¹⁰² The girl sustained permanent and irreversible injuries that caused her to lose the capacity to control virtually every physiological function, and rendered her unable to move herself, unable to control bowel functions, and unable to communicate.¹⁰³ Although the girl later died, had she survived she would have remained in constant custodial care for the remainder of her life.¹⁰⁴ The court entered a judgment against the City and awarded the girl's conservator \$6,017,500. The TCA cap limited the recoverable

95. *Id.* at 628, 798 P.2d at 578.

96. *Id.*

97. *Id.*; see also *Richardson*, 107 N.M. at 697, 763 P.2d at 1162.

98. *Trujillo I*, 110 N.M. at 628-29, 798 P.2d at 578-79.

99. *Id.* at 630, 798 P.2d at 580.

100. *Id.* at 631-32, 798 P.2d at 581-82.

101. *Trujillo v. City of Albuquerque*, 119 N.M. 602, 893 P.2d 1006 (1995).

102. *Trujillo v. City of Albuquerque*, No. 18-296 & 19-118, slip op. at 4 (N.M. Sept. 6, 1994).

103. Appellee's Answer Brief at 2-3, *Rogers v. City of Albuquerque*, No. 10-437 (Ct. App.). The girl died on the first day of the evidentiary hearing, in September 1991. *Rogers v. City of Albuquerque*, No. 19-118 at 4, n.7.

104. Appellee's Answer Brief at 3, *Rogers v. City of Albuquerque*, No. 10-437 (Ct. App.).

amount to \$300,000, a difference of more than \$5,700,000.¹⁰⁵ Rogers appealed, attacking the constitutionality of the TCA cap.¹⁰⁶

The court issued an opinion on the consolidated appeals in September, 1994, but later withdrew that opinion and remanded the case for further review.¹⁰⁷ The withdrawn opinion stated that, under the intermediate standard, the TCA cap served a substantially related purpose to the governmental interest of protecting the public treasury.¹⁰⁸ The court, however, found that the trial court had improperly excluded evidence, thus withdrawing the initial opinion, and again remanded for further evidentiary hearing.¹⁰⁹ The *Trujillo I* case reached the New Mexico Supreme Court again in 1998, and became "*Trujillo II*".¹¹⁰

In *Trujillo II*, the parties presented evidence consistent with the intermediate standard articulated in *Trujillo I*.¹¹¹ Based on those circumstances and principles of fairness, the court decided that it would conduct its constitutional analysis under intermediate scrutiny.¹¹² However, the court did not agree with the standard after all, and held that all future equal protection challenges to the TCA cap would require rational basis review.¹¹³

The court held that rational basis review was appropriate under both State and Federal Constitutions.¹¹⁴ First, the individual interests at stake were economic or financial in nature, and it was not persuaded that the interests were so great as to require a heightened level of scrutiny.¹¹⁵ Additionally, the court reasoned that "the mere existence of classification does not justify . . . overturning the action of the elected legislature on equal protection grounds."¹¹⁶ Third, federal caselaw and a majority of the sister states at that time used rational basis standards for constitutional

105. *Trujillo*, No. 18-296 & 19-118, slip op. at 4.

106. *Id.*

107. *Trujillo*, 119 N.M. at 603, 893 P.2d at 1007.

108. *Trujillo*, No. 18-296 & 19-118, slip op. at 31.

109. *Trujillo*, 119 N.M. at 603, 893 P.2d at 1007.

110. *Trujillo v. City of Albuquerque (Trujillo II)*, 1998-NMSC-031, 965 P.2d 305. Although *Trujillo II* should realistically be named "*Trujillo III*," the Wachocki court refers to the final *Trujillo* appeal as "*Trujillo II*," and so will this note to avoid confusion.

111. *Trujillo II*, 1998-NMSC-031, ¶ 3, 965 P.2d at 308.

112. *Id.*

113. Justice Baca was the only Supreme Court Justice that heard both *Trujillo* cases and, in fact, wrote the opinion in *Trujillo II*. Interestingly, he concurred in *Trujillo I*, but then overruled his own concurrence in his opinion in *Trujillo II*. *Id.*

114. *Id.* ¶ 26, 965 P.2d at 313.

115. *Id.*

116. *Id.* ¶ 28, 965 P.2d at 313.

challenges to caps on damages.¹¹⁷ Finally, the court reasoned that the rational basis inquiry was not “largely toothless,” citing U.S. Supreme Court cases that had struck down legislation on the rational basis standard.¹¹⁸ Thus, the rational basis standard was adopted for equal protection challenges to the TCA cap and *Trujillo I* was overturned.¹¹⁹

The court, however, continued its analysis in that specific case under intermediate scrutiny for the equitable reasons previously mentioned.¹²⁰ Under this standard, the court upheld the district court’s analysis under intermediate scrutiny, and found that the defendant failed to meet its burden in showing the cap was substantially related to an important governmental interest.¹²¹

Consequently, the rational basis standard has been applied to all subsequent equal protection challenges to the TCA cap. *Trujillo II*, however, did not provide guidance as to whether or not the cap would be constitutionally valid under the appropriate rational basis review. Nevertheless, *Trujillo II* has been the only decision in New Mexico that has reviewed a full, factually developed record under intermediate review, and indicated that the TCA cap failed under that standard, given those set of facts.¹²² The city was required to pay the full judgment.¹²³

C. Substantive Due Process Challenges

The Due Process Clause states that “[n]o person shall be deprived of life, liberty or property without due process of law.”¹²⁴ The clause involves substantive due process, which “protects individuals from arbitrary and discriminatory laws, requiring that every law further a proper legislative purpose.”¹²⁵ The rights asserted under substantive due process must be so fundamental that “neither liberty nor justice would exist if they were sacrificed.”¹²⁶ This analysis is slightly different than that for equal protection. Equal protection issues arise when some individuals are statu-

117. *Id.* ¶ 29, 965 P.2d at 313.

118. *Id.* ¶¶ 30–39, 965 P.2d at 314–15. The court also determined that the procedural realities warrant an overruling of intermediate scrutiny standard, when it caused many inefficiencies in the court system since the case had been remanded to many evidentiary hearings, and created a substantial financial burden on the parties and the courts. *Id.*

119. *Id.* ¶ 30, 965 P.2d at 314.

120. *Id.* ¶ 42–43, 965 P.2d at 316–17.

121. *Id.* ¶ 43, 965 P.2d at 317.

122. *Id.*

123. *Id.*

124. See U.S. CONST. amend. XIV; N.M. CONST. art. II, § 18.

125. *Madrid v. St. Joseph Hosp.*, 1996-NMSC-064, ¶ 25, 928 P.2d 250, 260.

126. *ACLU of NM*, 2006-NMCA-078, ¶ 16, 137 P.3d 1215, 1223.

torily entitled to a right while others are not, whereas substantive due process violations deny an asserted right to all individuals.¹²⁷ Despite the differences between equal protection and substantive due process rights, “substantive due process attacks implicitly and necessarily includes an equal protection attack.”¹²⁸ Thus, the determination of the level of protection required for the right asserted in an equal protection analysis will implicitly determine whether or not the right is protected under substantive due process.

New Mexico precedent has not held that the right to full recovery against a government tortfeasor is “fundamental.” In *Trujillo I*, the court described the right as “important” and a “substantial individual interest,” but not fundamental, or else strict scrutiny would have applied in place of intermediate for the equal protection analysis.¹²⁹ However, in *Marrujo v. New Mexico State Highway Transp. Dept.*, the court implied that, since the right to full recovery fell under intermediate scrutiny at the time, the right was protected by substantive due process.¹³⁰ The constitutional challenge in that case was over a notice of claim statute under the TCA, and the court determined that rational basis review was appropriate.¹³¹ The TCA cap was distinguished in that case, since it barred full recovery for all victims of government torts, whereas the notice of claim did not bar full recovery, but provided the circumstances in which a person could seek recovery.¹³² The notice of claim was not considered a substantive due process right and was subject to rational basis review, and was held distinct from the right found under the TCA cap.¹³³

Regardless of whether or not the New Mexico Supreme Court intended to represent that the right to full recovery is protected by substantive due process, the ruling in *Trujillo II* indicated that it was not a fundamental or constitutional right.¹³⁴ Since rational basis review did not apply to fundamental or constitutional rights, the right to full recovery did not rise to the level of importance to warrant protection from substantive due process.¹³⁵ Additionally, the U.S. Supreme Court’s opinion in *Washington v. Glucksberg* has extended protection to a very narrow set

127. *Id.*

128. *Id.* (citations omitted).

129. *Trujillo I*, 110 N.M. at 627–28, 798 P.2d at 577–578.

130. *Marrujo v. New Mexico State Highway Transp. Dept.*, 118 N.M. 753, 758, 887 P.2d 747, 752 (1994).

131. *Id.* at 758, 887 P.2d at 752.

132. *Id.*

133. *Id.*

134. *Trujillo II*, 1998-NMSC-031, ¶ 26, 956 P.2d at 313.

135. *Id.* ¶ 26. *See also* N.M. Const. art. II, § 18.

of rights under substantive due process,¹³⁶ and New Mexico precedent has never asserted that the right to full recovery falls within one of those rights.¹³⁷

Thus, the law is not clear on whether intermediate scrutiny implicitly creates a substantive due process right under the TCA cap. However, caselaw provides that as long as the rational basis standard is applied to equal protection claims, the right to full recovery will not receive substantive due process protection.

D. Challenges Under the Right of Access to Courts

The New Mexico Supreme Court has held that the right of access to courts is implied in the general principle of equal protection and the due process clauses.¹³⁸ In *Richardson*, the court addressed the constitutional claims against a cap on damages in dram shop liability.¹³⁹ The court held that a tort victim's interest in full recovery was protected through implication under the right of access to courts.¹⁴⁰ *Trujillo I* adopted *Richardson's* holding, despite the private nature of the cap, in its decision to raise the level of scrutiny for the TCA cap.¹⁴¹

However, *Trujillo II* overruled *Trujillo I*, holding that the right of access to courts was not violated by the TCA cap.¹⁴² The court in *Trujillo II* addressed *Richardson's* reasoning that the right of access to courts was synonymous with right to full recovery.¹⁴³ *Trujillo II* rejected *Trujillo I's* adoption of that reasoning, stating *Trujillo I* had failed to demonstrate how the reasoning for a private cap was the same for a public cap.¹⁴⁴ *Trujillo II* held the right of access to courts did not include the right to unlimited liability from the state.¹⁴⁵ The court reasoned that the plaintiffs were not denied the ability to have access to resolve legal claims.¹⁴⁶ "The fact that a plaintiff is denied an adequate remedy when suing the state does not constitute a violation of one's right to court access."¹⁴⁷ Consequently,

136. *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997) (right to marry, have children, marital privacy, to use contraception . . .).

137. *Wachocki*, 2010-NMCA-021, ¶ 36, 228 P.3d at 514.

138. *Richardson*, 107 N.M. 688, 692, 763 P.2d 1153, 1157.

139. *Id.* at 690, 763 P.2d at 1155.

140. *Id.* at 692–99, 763 P.2d at 1157–64.

141. *Trujillo I*, 110 N.M. at 624–625, 798 P.2d at 574–575.

142. *Trujillo II*, 1998-NMSC-031, ¶¶ 20–25, 965 P.2d at 311–12.

143. *Id.* ¶ 23, 965 P.2d at 311–12.

144. *Id.* ¶ 25, 965 P.2d at 312–13.

145. *Id.* ¶ 22, 965 P.2d at 311 (emphasis added).

146. *Id.* ¶ 21, 965 P.2d at 311.

147. *Id.*

the right of access to courts was not violated and did not include the right to unlimited government tort liability.¹⁴⁸

IV. DAMAGE CAPS IN GOVERNMENTAL TORTS: OTHER STATES AND FEDERAL

Every state outside of New Mexico has either abolished or substantially abridged sovereign immunity for governments.¹⁴⁹ Many other jurisdictions have some type of limitation for recoverable damages against government tortfeasors.¹⁵⁰ However, there are twelve states that do not have caps comparable to New Mexico.¹⁵¹ For example, Alaska, Connecticut, and Hawaii do not have caps for damages.¹⁵² California and West Virginia uncapped compensatory damages, while Maine capped loss of consortium and punitive damages rather than actual damages.¹⁵³ There are seven jurisdictions that have caps with higher recovery amounts than New Mexico's.¹⁵⁴ For example, Georgia has a cap of \$1 million per individual and \$3 million per occurrence.¹⁵⁵ However, there are other states that have substantially less amounts for caps, including Virginia, which has a \$100,000 cap for causes of action against the government.¹⁵⁶ When the Virginia Tech shootings occurred in 2007, leaving thirty-two people

148. *Id.* ¶ 23, 965 P.2d at 311.

149. Restatement (Second) of Torts § 895B (1979); 43 A.L.R.4th 19 (Originally published in 1986).

150. *Id.*

151. See ALASKA STAT. §§ 09.50.250 *et seq.* (2008); ARIZ. REV. STAT. §§ 12-820.01 *et seq.* (2010); CAL. GOVT. CODE ANN. §§ 815 *et seq.* (West 2008); CONN. GEN. STAT. §§ 4-141 *et seq.* (West 2011); D.C. CODE §§ 12-309 *et seq.* (2004); HAW. REV. STAT. §§ 662-1 *et seq.* (West 1988); KY. REV. STAT. ANN. §§ 65.2002 *et seq.* (West 1988); ME. REV. STAT. ANN. tit. 14 §§ 8101 *et seq.* (2003); MICH. COMP. LAWS. SERV. §§ 691.1401 *et seq.* (LexisNexis 2001); N.Y. CT. CL. ACT §§ 8 *et seq.* (Consol. 2011); WASH. REV. CODE § 4.92.090 (West 2006); W. VA. CODE ANN. § 29-12A-7 (LexisNexis 2011).

152. ALASKA STAT. §§ 09.50.250 *et seq.* (2008); CONN. GEN. STAT. §§ 4-141 *et seq.* (West 2011); HAW. REV. STAT. §§ 662-1 *et seq.* (West 1988).

153. CAL. GOVT. CODE ANN. §§ 810 *et seq.* (West 2008); W. VA. CODE ANN. § 29-12A-7 (LexisNexis 2011); ME. REV. STAT. ANN. tit. 14 §§ 8101 *et seq.* (2003).

154. See GA. CODE ANN. § 50-21-29 (2011) (\$1 million per individual, \$3 million per occurrence); IND. CODE ANN. § 34-13-3-4 (West 2003) (\$700,000 per individual, \$5 million per occurrence); MONT. CODE ANN. § 2-9-108 (West 1986) (\$750,000 per individual, \$1.5 million per occurrence); NEB. REV. STAT. ANN. § 13-926 (West 1996) (\$1 million per individual, \$5 million per occurrence); N.H. REV. STAT. ANN. § 541-B:14 (2007) (\$475,000 per individual, \$3,750,000 per occurrence); N.C. GEN. STAT. § 143-299.2 (2011) (\$1 million per individual, per occurrence); UTAH CODE ANN. § 63G-7-604 (LexisNexis 2011) (\$2 million per individual, per occurrence).

155. GA. CODE ANN. § 50-21-29 (2011).

156. VA. CODE ANN. § 8.01-195.3 (West).

dead, parents of one of the victims had their judgment against Virginia Tech capped from a \$4 million dollar jury award to a mere \$100,000, a 3,900,000 difference.¹⁵⁷

A recent example of the extreme disproportion between caps and damage caused by governmental negligence arose from the wildfire that occurred in Colorado in March, 2012.¹⁵⁸ State workers conducted a controlled burn that raged out of control, leaving at least twenty-seven homes demolished and two people dead.¹⁵⁹ Despite the enormous amount of damage caused by a prescribed burn authorized and conducted by state officials, the numerous victims are left to divide a mere \$600,000, as provided by Colorado law.¹⁶⁰

If a cap is challenged, most jurisdictions uphold the constitutionality of the cap.¹⁶¹ Equal protection arguments are always analyzed under rational basis scrutiny, following the reasoning that restrictions on damages involve an "economic right."¹⁶² Federal cases also employ rational basis scrutiny when analyzing limits placed on recoverable damages.¹⁶³ However, the Montana Supreme Court once held that limiting recoverable

157. Steve Szkotak, *State Weighs Appeal in Virginia Tech Negligence Verdict for Delayed Response to '07 Shootings*, STARTRIBUNE, March 15, 2012, at 1, available at <http://www.startribune.com/142607796.html>.

158. Conifer, *Colorado Holds Back On Prescribed Burns After Deadly Wildfire*, U.S. NEW ON MSNBC.COM, March 28, 2012, available at http://usnews.msnbc.msn.com/_news/2012/03/28/10908316-colorado-holds-back-on-prescribed-burns-after-deadly-wildfire.

159. *Id.* This tragedy is strikingly similar to the Cerro Grande fire, which began as a prescribed fire and burned through Los Alamos, New Mexico, in 2000. The extent of the damage was estimated at \$1 billion; if it had not been for a federal grant to compensate the victims, damages would have been capped subject to the TCA rule at \$700,000. See Bill Gabert, *Cerro Grande Fire, 10 Years Ago Today*, WILDFIRE TODAY, May 10, 2010, available at <http://wildfiretoday.com/2010/05/10/cerro-grande-fire-10-years-ago-today>; Linda M. Calbom, *Weaknesses Exist in the Cerro Grande Fire Assistance Claim Validation Process* (2001), available at <http://www.gao.gov/new.items/d01848.pdf>.

160. COLO. REV. STAT. ANN. § 24-10-114 (West) (2012) (limiting damages for \$600,000 per occurrence and not more than \$150,000 per person).

161. See, e.g., *Stanhope v. Brown County*, 280 N.W.2d 711 (Wis. 1979) (holding that limiting liability of governmental tortfeasors and limiting recovery of victims of governmental tortfeasors to \$25,000 did not deny equal protection); *Cauley v. City of Jacksonville*, 403 So. 2d 379 (Fla. 1981) (holding that statutory limit to amount of money damages recoverable in tort against municipality furthers equal protection of the law under federal and state constitutions). See also 43 A.L.R.4th 19 (Originally published in 1986).

162. See 43 A.L.R.4th 19 (Originally published in 1986). See also 18 McQuillin Mun. Corp. § 53.03 (3d ed.).

163. See *Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59 (1978).

damages against the government affected a fundamental right under the Montana Constitution, and thus applied strict scrutiny.¹⁶⁴ The legislature's limit on damage in that case failed, but the holding was later overturned and the level of scrutiny returned to rational basis.¹⁶⁵

Challenges under due process or right of access to courts also fail based on the reasoning that the restrictions do not impair a fundamental right and unlimited recovery is synonymous with right of access to courts.¹⁶⁶ The overall view of most jurisdictions appears to be that restrictions on recoverable damages provides for effective risk management, while also providing victims of government torts with some relief.¹⁶⁷

Some jurisdictions, however, require the legislature continually to review the financial status of the state, and to adjust the limit on damages to ensure the cap remains pegged to the fiscal stability of the state.¹⁶⁸ In Utah, the legislature requires a risk manager to calculate the appropriate increase or decrease in the limit on damages every even numbered year, based on the consumer price index for that year.¹⁶⁹ Thus, Utah's legislature provides transparency in its calculation of the cap, and continually amends the limit on damages.

V. WACHOCKI V. BERNALILLO COUNTY SHERIFF'S DEPARTMENT

The New Mexico Court of Appeals filed the decision in *Wachocki v. Bernalillo County Sheriff's Dept.* on November 24, 2009. The court based much of its ruling on New Mexico precedent and well-settled principles of caselaw. The following sections will discuss the facts of the case and the reasoning of the court that led to the holding on the constitutional challenges to the TCA cap.

A. Statement of Facts

On August 21, 2004, a collision occurred west of Albuquerque, New Mexico, at the intersection of Shelly Road and Speedway Boulevard.¹⁷⁰ Shelley Road is a narrow, two-lane road that runs north-south and makes a T-intersection with Speedway Boulevard, which is located on the far

164. *White v. State*, 661 P.2d 1272, 1275 (1983), *overruled by* *Meech v. Hillhaven W., Inc.*, 776 P.2d 488 (1989).

165. *Meech*, 776 P.2d at 491.

166. 43 A.L.R. 4th 19 (Originally published in 1986).

167. *Id.*

168. *See* U.C.A. 1953 § 63G-7-604(3), (4).

169. U.C.A. 1953 § 63G-7-604(4)(a).

170. *Wachocki*, 2010-NMCA-021, ¶ 4, 228 P.3d at 508.

West Mesa, south of I-40.¹⁷¹ The Bernalillo County Sheriff's Department (BCSD) is in charge of patrolling both Shelley Road and Speedway Boulevard.

Before 2003, Shelley Road provided access to the Albuquerque Solid Waste Management Department (SWMD) and the Sandia Motor Speedway (SMS).¹⁷² SWMD had reported to the BCSD on multiple occasions prior to the accident that there was a major traffic problem on Shelley Road, including excessive speeding and motorist failure to follow traffic signals.¹⁷³ BCSD responded by conducting "traffic specials" and training SWMD officials to use radar guns to monitor the speed of vehicles so that SWMD could regulate traffic.¹⁷⁴

In 2003, the Metropolitan Detention Center (MDC) opened and traffic increased substantially on Shelley Road.¹⁷⁵ Around seventy-five to one-hundred employees at MDC and other members of the general public began using Shelley Road to get to and from MDC.¹⁷⁶ In the time between the opening of MDC and Jason Wachocki's death, BCSD received numerous complaints about traffic violations and requests that BCSD enforce the traffic laws along Shelley Road.¹⁷⁷

On the night of the fatal collision, Jason was leaving SMS where he worked as a fire and safety crew employee.¹⁷⁸ He traveled east on Speedway and arrived at around 11:00 p.m. at the intersection with Shelley Road, where he came to a complete stop.¹⁷⁹ A corrections officer from MDC, Willie Hiley, was leaving his shift and traveling along Shelley road as he approached the intersection approximately the same time as Jason.¹⁸⁰ Officer Hiley turned his vehicles headlights off before reaching the intersection, evidently to determine if other vehicles were on the road.¹⁸¹ Jason proceeded through the intersection, unable to see Officer Hiley's

171. *Id.* See also Plaintiff's First Amended Complaint ¶ 20, Wachocki, 2010-NMCA-021.

172. The Albuquerque Solid Waste Management Department is a landfill and the Sandia Motor Speedway is an asphalt racetrack. Wachocki, 2010-NMCA-021, ¶¶ 4,7, 228 P.3d at 508; Plaintiff's First Amended Complaint ¶ 21, Wachocki, 2010-NMCA-021.

173. Wachocki, 2010-NMCA-021, ¶ 6, 228 P.3d at 508.

174. *Id.*

175. *Id.* ¶ 7, 228 P.3d at 508.

176. *Id.*

177. *Id.* ¶ 8, 228 P.3d at 508-509.

178. *Id.* ¶ 5, 228 P.3d at 508.

179. *Id.*

180. *Id.*

181. *Id.*

vehicle approaching at high speed without headlights.¹⁸² Officer Hiley ran the stop sign, driving at a speed of seventy-five miles per hour in a forty-five mile per hour zone, and hit Jason's vehicle.¹⁸³ Jason was killed immediately upon impact.¹⁸⁴

B. Trial Court

Jason's parents and adult brother brought a wrongful death action against BCSD, and the trial court held in favor of the plaintiffs.¹⁸⁵ The district court concluded that BCSD had failed to respond adequately to the requests that traffic be better controlled on the road, and it knew that its failure to correct the problem could result in a serious accident.¹⁸⁶ The total compensatory damages were set at \$3,707,563.82 and BCSD's comparative fault amount was \$1,112,269.15.¹⁸⁷ However, pursuant to TCA cap¹⁸⁸ the comparative fault portion was capped at \$400,000, leaving approximately \$712,000 of the judgment unrecoverable by the Wachockis.¹⁸⁹

C. Claims on Appeal

BCSD appealed on four claims, three of which were dismissed.¹⁹⁰ Jason's parents cross-appealed, claiming that the cap was unconstitutional under the State and Federal Constitutions.¹⁹¹ The parents argued that the cap violates equal protection rights since victims with minor injuries under \$400,000 receive full compensation, while victims with injuries greater than \$400,000 are not fully compensated.¹⁹² They further claimed that victims of non-government tortfeasors are not subject to the cap, while victims of government tortfeasors must limit their compensation

182. *Id.*

183. *Id.*

184. *Id.*

185. *Id.* ¶ 9, 228 P.3d at 509.

186. *Id.*

187. *Id.* ¶ 13, 228 P.3d at 509.

188. NMSA 1978, Section 41-4-19 (A)(3) (1991) (amended 2007),

189. *Supra* note 187.

190. The claims were dismissed for failure to follow rules of appellate procedure. *Id.* ¶ 1, 228 P.3d at 507. The fourth claim was that the district court had improperly determined that the wrongful death claim fell within a waiver of immunity for government officers, to which the court affirmed the district court's decision. *Id.*

191. *Id.* Jason Wachocki's brother also claimed the district court improperly denied his claim for loss of consortium, but the court of appeals affirmed the lower court's decision. *Id.* The New Mexico Supreme Court granted certiorari on February 8, 2010 on the loss of consortium issue, and released its opinion in December of 2011. The supreme court affirmed the court of appeals decision. See *Wachocki v. Bernalillo County Sheriff's Dept.*, 2011-NMSC-039, 265 P.3d 701, for a full analysis of that claim.

192. *Id.* ¶ 38, 228 P.3d at 515.

due to the cap.¹⁹³ The Wachockis urged the court to analyze this claim under intermediate scrutiny,¹⁹⁴ and argued that even under rational basis scrutiny, the cap was unconstitutional because it did not include an increase for cost-of-living and inflation, rendering it irrational under law.¹⁹⁵ They offered that while the cap may have been constitutional at the time of enactment, it has become unconstitutional.¹⁹⁶

Additionally, the Wachockis argued that the cap violates substantive due process rights when the cap does not allow individuals to hold the government fully accountable, and the failure to increase the cap in accordance with inflation reduces the effect of deterrence for governmental negligence.¹⁹⁷

The Wachockis made two other constitutional arguments on the grounds that the cap encroached on the right to trial by jury or right to access courts, and the Separation of Powers Clause.¹⁹⁸ They reasoned that the TCA cap prevents the jury's right to act as a fact-finder and determine the appropriate amount of damages.¹⁹⁹ The Wachockis further argued that a fixed legislative cap infringes on judicial procedure and practices under *Ammerman v. Hubbard*.²⁰⁰ They argued that the cap compels judges to grant predetermined remittitur.²⁰¹ Thus, the legislature was impeding practices that should be left to the courts.²⁰²

D. Court of Appeals

The New Mexico Court of Appeals held that the cap on damages was constitutional.²⁰³ The court first held, in accordance with *State v. Gomez*, that the plaintiffs failed to show a divergence between the State and Federal Constitutions, and thus limited its analysis to the Federal Constitution.²⁰⁴ The court first discussed the Wachocki's claim that the cap violated their substantive due process rights. The court held that the right to recover compensation in proportion to inflation from a government tortfeasor is not fundamental, as argued by the Wachockis.²⁰⁵ "Fed-

193. *Id.*

194. *Id.* ¶ 40, 228 P.3d at 515.

195. *Id.* ¶ 42, 228 P.3d at 515-16.

196. *Id.* ¶ 43, 229 P.3d at 515.

197. *Id.* ¶ 35, 229 P.3d at 514.

198. *Id.* ¶ 44, 229 P.3d at 516.

199. *Id.*

200. *Id.* ¶ 47, 229 P.3d at 517.

201. *Id.* ¶ 46, 229 P.3d at 515-16.

202. *Id.*

203. *Id.* ¶ 2, 228 P.3d at 507.

204. *Id.* ¶ 34, 228 P.3d at 514.

205. *Id.* ¶ 35, 228 P.3d at 514.

eral substantive due process protection extends only to a narrow and limited set of fundamental rights, which include the rights to marry, to have children . . . to use contraception, to bodily integrity, and to abortion.”²⁰⁶ The supreme court has been reluctant to extend protection beyond these recognized fundamental rights, and this court was not willing to create a new area of fundamental rights.²⁰⁷ Thus, the Wachockis would have had to argue that the right to a fully recovery falls within one of the already recognized fundamental rights.²⁰⁸ The Wachockis made no such argument, and thus could not receive damages from substantive due process violations.²⁰⁹

On the claim of equal protection violations, the court determined that supreme court precedent requires that the analysis be conducted under rational basis scrutiny.²¹⁰ The court cited *Trujillo II* in support of its decision.²¹¹ “[*Trujillo II*] applied intermediate scrutiny to a constitutional challenge of the cap, but its holding was clearly limited only to the facts of that case, based on the doctrine of law of the case, which is inapplicable here.”²¹² This court held that the facts of this case, however, warrant rational basis under *Trujillo I*’s guidance.²¹³ The New Mexico Supreme Court in *Trujillo II* held that when equal protection is challenged under the TCA cap, “[t]he interests at stake . . . are of economic or financial nature” and intermediate scrutiny is not appropriate given the nature of the rights affected.²¹⁴ Thus, the court proceeded with its analysis under rational basis.²¹⁵

The court found that, although it appreciated Wachocki’s weighted arguments, it could not find that the cap was not rationally related to the government interest of preserving the public treasury.²¹⁶ The court cited *Trujillo I*, which stated the importance of this government interest was “self-evident.”²¹⁷ The court found that allowing the cap to fluctuate as a percentage of damages, rather than remain fixed, would create a risk for catastrophic danger towards the state treasury.²¹⁸ The court further rea-

206. *Id.* ¶ 36 (citing *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997)).

207. *Id.* ¶ 37, 228 P.3d at 514–15.

208. *Id.*

209. *Id.*

210. *Id.* ¶ 40, 228 P.3d at 515.

211. *Id.* ¶ 41, 228 P.3d at 515.

212. *Id.*

213. *Id.*

214. *Id.*

215. *Id.* ¶¶ 42–43, 228 P.3d at 514–15.

216. *Id.*

217. *Id.* ¶ 43, 228 P.3d at 516.

218. *Id.*

soned that, even if a system could be designed by the courts to better accomplish the legislative goal, any revision to the cap should be left to the legislature.²¹⁹

The court determined that there was no encroachment on the Separation of Powers Clause or the right to trial by jury.²²⁰ The court first reasoned that the Wachockis never requested a right to trial by jury, nor did they argue that one would have been denied.²²¹ Further, there was a failure to demonstrate how the right to access courts includes a right to full recovery, as held in *Trujillo II*.²²² Thus, the court quickly dismissed these contentions.

The court went on to analyze the claim of encroachment on the judicial branch.²²³ It held that *Ammerman* should not be read so broadly, and that the TCA cap did not eclipse the court's power to grant remittitur.²²⁴ Further, the cap did not prevent a court from ordering remittitur when appropriate.²²⁵ Thus, the legislative cap was held not to be an encroachment on the judiciary power. Consequently, the New Mexico Court of Appeals was not persuaded by any of the above constitutional arguments made by the Wachockis, and the TCA cap was found to be constitutional.

VI. ANALYSIS AND CONSEQUENCES

The *Wachocki* opinion discussed multiple issues that are currently important to New Mexico common law. Although the court quickly dismissed the state constitutional claims through the interstitial approach, the interstitial approach has major implications for constitutional claims in New Mexico. Further, there is a question as to whether the courts should begin interpreting the equal protection and due process clauses of the state constitution more expansively. Finally, if the cap was held unconstitutional, one wonders what the legislature's response would be to such a holding. The following sections will discuss these issues.

A. *Implications of the Interstitial Approach*

Although the substantive, constitutional issues in the *Wachocki* decision are the primary focus of this case note, the court's reliance on

219. *Id.*

220. *Id.* ¶¶ 44–49, 228 P.3d at 516–17.

221. *Id.* ¶ 44, 228 P.3d at 516.

222. *Id.* ¶ 45, 228 P.3d at 516.

223. *Id.* ¶ 46, 228 P.3d at 516–17.

224. *Id.* ¶ 49, 228 P.3d at 517.

225. *Id.* For the purpose of this note, the separation of powers arguments will not be addressed in the analysis.

Gomez's "raise and preserve" rule offers an instructive view of New Mexico's use of the interstitial approach. The *Gomez* court essentially adopted this preservation approach based on theories of efficiency and fair practices:²²⁶ by requiring the party asserting the state constitutional claims to provide developed reasons at the trial level for divergence from federal precedent, the trial court is able to develop an appropriate holding.

However, rigid applications of such preservation rules are at odds with the function of the New Mexico Supreme Court, which is to shape the state constitution.²²⁷ By abandoning state constitutional issues due only to a lack of proper preservation, the courts run the risk of side-stepping important state issues that are in need of interpretation and review. Even the court in *Gomez* offered an exception to the interstitial approach, stating that even if there was a failure to preserve, the court could nevertheless consider the claim since there was a fundamental right involved.²²⁸ By inserting this exception, one can infer from the *Gomez* opinion that too rigid application of the rule might inhibit courts from analyzing important constitutional issues. Further, there is a question as to why a higher burden exists for preserving state constitutional claims.²²⁹ As noted by Justice Bosson of the New Mexico Supreme Court, "Why impose a greater burden on our state litigants to invoke our own Constitution?"²³⁰ Reliance on the parties to assert reasons for divergence in order to address state constitutional claims, as the *Wachocki* court has done here, is not sufficient.²³¹ Instead, New Mexico should require appellate courts to be more proactive when a state constitutional issue is asserted.²³²

Despite the problems that may arise from the procedural aspect of the interstitial approach, there may be substantial implications for equal protection and due process in *Wachocki*'s holdings. Justice Bosson noted in his dissent that "it is our duty and privilege to interpret and develop the New Mexico Constitution . . . [I]t is imperative that our State Constitution develop to its full potential and protect the rights of our citizens where we deem federal law lacking."²³³ The interstitial approach prevents

226. *Id.* ¶ 23; Michael M. Browde, *Gomez Redux: Procedural and Substantive Developments Twelve Years On*, 40 N.M. L. REV. 179, 183 (2010).

227. Browde, *supra* note 226, at 184.

228. *Gomez*, 1997-NMSC-006, n.4.

229. *See* *State v. Garcia*, 2009-NMSC-046, ¶ 57, 217 P.3d 1032 (Bosson, J., concurring).

230. *Id.*

231. Browde, *supra* note 226, at 186.

232. *Id.*

233. *Garcia*, 2009-NMSC-046, ¶ 57, 217 P.3d at 1046 (Bosson J., concurring).

courts from adequately developing the New Mexico Constitution, particularly within the civil area. *Gomez* relied on case law to support the theory that New Mexico has adopted the interstitial approach and has abandoned the lock-step approach.²³⁴ However, much of the caselaw reflected more expansive protections in the criminal field, such as warrantless search and seizures and the knock and announce rule.²³⁵ Since *Gomez*, courts have continued to extend protection under the state constitution in criminal areas where federal protection is limited.²³⁶

Yet courts have been reluctant to extend protection where the state and federal constitution contain analogous provisions in civil cases.²³⁷ In *NARAL*, the court used the interstitial approach and found greater protection under the state's Equal Rights Amendment.²³⁸ Upon reviewing that case, one might wonder why the interstitial approach was considered at all. The interstitial approach is intended to apply to analogous provisions,²³⁹ whereas the New Mexico Constitution clearly contained an equal-gender clause that the federal constitution did not contain.²⁴⁰ Thus, the contention could be made that court did not even need to address the interstitial approach, since the New Mexico Constitution, on its face, provided more protection than its federal counterpart.²⁴¹

In *Breen*, the interstitial approach was avoided entirely.²⁴² The court in that case did find greater protection under the state equal protection clause, but nevertheless used a federal mode of analysis to reach its decision.²⁴³ Essentially, the *Breen* court relied on precedent that found independent state protection, and thus conducted the federal mode of analysis under the state constitution, claiming that federal precedent was merely persuasive.²⁴⁴ Although Justice Maes found the class of individuals with

234. *Gomez*, 1997-NMSC-006, ¶¶ 17–20, 932 P.2d at 6–7.

235. *Id.* See also *State v. Attaway*, 117 N.M. 141, 870 P.2d 103 (1994); *State v. Gutierrez*, 116 N.M. 431, 863 P.2d 1052 (1993).

236. See, e.g., *supra* note 53.

237. See, e.g., *Marrujo*, 118 N.M. 753, 887 P.2d 747; *Coleman v. United Engineers & Constructors*, 118 N.M. 47, 878 P.2d 996 (1994).

238. *New Mexico Right to Choose/NARAL*, 1999-NMSC-005, ¶ 28, 975 P.2d at 852.

239. See *Gomez*, 1997-NMSC-006, ¶ 22, 932 P.2d at 8 (“[w]hen a litigant asserts a claim under a provision in the New Mexico constitution that is *parallel or analogous* to the federal constitution . . .”) (emphasis added).

240. See *New Mexico Right to Choose/NARAL*, 1999-NMSC-005, ¶ 27, 975 P.2d at 850–51.

241. The court stated that it did not base its decision on a “mere textual difference;” perhaps it felt that the interstitial approach applied since it was not only the text that caused the court to depart from federal precedent. *Id.* ¶ 31, 975 P.2d at 852.

242. *Breen*, 2005-NMSC-028, ¶ 14, 138 N.M. 331, 120 P.3d 413, 418–19.

243. *Id.* ¶¶ 11–13, 120 P.3d at 418.

244. *Id.*

mental disabilities warranted a heightened level of scrutiny, she did not indicate how equal protection under state law affords greater constitutional protection beyond those fact-specific circumstances.²⁴⁵ Thus, the class of individuals received greater protection, but the mode of analysis remained the same as for federal precedent.²⁴⁶

While the interstitial approach may function as intended in the criminal field, it appears to be stuck in lock-step approach, masquerading as interstitial, in civil claims.²⁴⁷ Perhaps New Mexico courts should consider adopting a different approach than the federal “three-boxes of scrutiny” analysis. As noted by Justice Thurgood Marshall of the U.S. Supreme Court, who criticized the three-tiered approach throughout his career, some cases “simply def[y] easy characterization in terms of one or the other of these ‘tests.’”²⁴⁸

Alternatively, the interstitial approach may function exactly as the *Gomez* court intended when it rejected the primacy approach in favor of interstitialism.²⁴⁹ The federal analysis of equal protection and due process claims may be the most efficient and well-articulated mode of analysis available today.²⁵⁰ New Mexico’s departure from these modes could lead to analyses that lack cogency and reason.²⁵¹ Regardless, the courts should remain mindful that, just as there is a duty to analyze the rights asserted, there is an equivalent duty to analyze the method by which those rights are examined.²⁵²

B. State Constitutional Claims

Although the Wachockis did not preserve the state constitutional arguments, the question remains whether or not a more expansive view of the state’s Equal Protection and Due Process Clauses would have altered the *Wachocki* court’s decision. The *Wachocki* court was bound by the New Mexico Supreme Court’s holding in *Trujillo II*, and correctly based its decision to conduct the equal protection analysis using rational basis on the reasoning in *Trujillo II*: the interests were economic or financial, thus a heightened level of scrutiny was not appropriate.²⁵³ The question is, thus, when is rational basis scrutiny ever not “largely toothless” as

245. *Id.*

246. *Id.*

247. See Browde, *supra* note 226, at 193.

248. *Dandridge v. Williams*, 397 U.S. 471, 520 (1970).

249. *Gomez*, 1997-NMSC-006, ¶ 21, 932 P.2d at 7–8.

250. *Id.*

251. *Id.*

252. Browde, *supra* note 226, at 193.

253. *Wachocki*, 2010-NMCA-021, ¶ 41, 147 N.M. 720, 228 P.3d 504, 515.

the *Trujillo II* court contends?²⁵⁴ Further, is there a valid argument that the courts should be assigning a higher level of scrutiny?

New Mexico jurisprudence indicates that simply assigning rational basis review to a claim because it is economic in nature is not sufficient.²⁵⁵ In *NARAL*, the rights involved state funding for abortions, and were thus partly financially motivated, yet the court looked beyond the economic nature of the rights.²⁵⁶ The court looked to the importance of the class facing discrimination and found that gender-classification warranted heightened scrutiny.²⁵⁷ Similarly, in *Breen*, the rights asserted were financial, since the unequal payment for mental disabilities versus physical disabilities was at issue.²⁵⁸ Yet the court held that persons with mental disabilities constituted a "sensitive class," and thus intermediate review was appropriate, despite the economic nature of the rights.²⁵⁹ Thus, the way courts classify the group of individuals claiming discrimination appears to be crucial to determining whether a heightened level of scrutiny is warranted.

There are two ways to classify individuals receiving unequal treatment with regards to the TCA cap. The first way differentiates between government and non-government tort victims: government tort victims may not be fully compensated due to the cap, while non-government tort victims can be fully compensated.²⁶⁰ The *Wachocki* court did not consider the sensitivity of the governmental tort victims class, but only considered the nature of the rights asserted.²⁶¹ Conversely, both the *Breen* and *NARAL* courts looked to the type of classes analyzed when they conducted their equal protection analysis.²⁶² Both cases looked to New Mexico's history to determine that the classes involved deserved heightened review.²⁶³ *NARAL* held that women had suffered longstanding discrimination and that laws continually had to be repealed to allow woman equal political and societal status to men.²⁶⁴ Similarly, the court in *Breen* held

254. *Trujillo II*, 1998-NMSC-031, ¶ 30, 125 N.M. 721, 965 P.2d 305, 314.

255. See, e.g., *New Mexico Right to Choose/NARAL*, 1999-NMSC-005, 975 P.2d 841; *Breen*, 2005-NMSC-028, 120 P.3d 413.

256. *New Mexico Right to Choose/NARAL*, 1999-NMSC-005, ¶ 37, 975 P.2d at 854.

257. *Id.*

258. *Breen*, 2005-NMSC-028, ¶ 17, 120 P.3d at 419.

259. *Id.* ¶¶ 17, 28, 120 P.3d at 419, 422–23.

260. *Wachocki*, 2010-NMCA-021, ¶ 38, 147 N.M. 720, 228 P.3d 504, 515.

261. *Id.* ¶¶ 38–41, 228 P.3d at 515.

262. *Breen*, 2005-NMSC-028, ¶¶ 22–28, 120 P.3d at 421–23; *New Mexico Right to Choose/NARAL*, 1999-NMSC-005, ¶¶ 32–35, 975 P.2d at 852–53.

263. *Id.*

264. *New Mexico Right to Choose/NARAL*, 1999-NMSC-005, ¶¶ 32–35, 975 P.2d at 852–53.

that people with mental disabilities had always suffered from extreme discrimination.²⁶⁵ The court noted that New Mexico had demonstrated the importance it placed on providing increased protection for persons with mental disabilities through its laws.²⁶⁶ Thus, the court held that the historical discrimination and New Mexico's valued interest in abolishing such discrimination meant that persons with mental disabilities deserved a higher standard of review.²⁶⁷

Similar arguments can and should be made for government tort victims. Sovereign immunity was a doctrine recognized from the beginning of statehood until the mid-1970's.²⁶⁸ Victims of governmental negligence have long been unable to recover just compensation, whereas private tortfeasor victims have been able to collect the full amount of damages awarded.²⁶⁹ Similar to the New Mexico legislature's attempts to diminish the unequal treatment of women and persons with mental disabilities by statute, New Mexico has taken steps to avoid the unfair and prejudicial effects of sovereign immunity.²⁷⁰ It enacted the TCA in an effort to create fairness and less disparity for government tort victims, and continued to amend the TCA to achieve this goal.²⁷¹ Thus, the contention could be made that historical inequity against such victims warrants a greater importance, and thus greater standard of review, to be placed on that class of victims.²⁷² Realistically, however, the argument that may give "teeth" to rational basis or possibly raise the level of scrutiny appears to lie within the second classification for the group of individual subject to the TCA cap: victims with catastrophic injuries that exceed \$400,000 versus those without such catastrophic injuries.

As previously noted, *Trujillo II*, consolidated with *Rogers*, was a personal injury case in which the judgments for plaintiffs were substan-

265. *Breen*, 2005-NMSC-028, ¶ 22, 120 P.3d at 421.

266. *Id.* ¶ 27, 120 P.3d at 420-21.

267. *Id.* ¶ 28, 120 P.3d at 422-23.

268. *See supra* Part I.

269. *Id.*

270. *See* NMSA 1978, §§ 41-4-1 to -29 (amended 1991).

271. *Id.*

272. Conversely, government tort victims may be distinguishable from those classes found in *Breen* and *NARAL*, and thus do not rise to the level of "sensitive." Classifications based on gender and mental disabilities require a person to hold a specific, immutable characteristic in order to subject that person to discrimination. Namely, a person must be female to be subject to discrimination of the restrictive abortion funding law in *NARAL*, while a person must have mental disability to face discrimination under the act in *Breen*. *See New Mexico Right to Choose/NARAL*, 1999-NMSC-005, 975 P.2d 841; *Breen v. Carlsbad Municipal Schools*, 2005-NMSC-028, 120 P.3d 413.

tially limited, particularly with regards to the judgment for the victim in *Rogers*.²⁷³ The jury in that case was provided with testimony that explained how much care the little girl would require for the rest of her life and the dollar estimates of that care.²⁷⁴ The estimates ranged from \$10,000-\$15,000 per month.²⁷⁵ However, due to the TCA cap, the tort victim could only recover approximately five percent of her judgment.²⁷⁶

There are two reasons why victims with catastrophic injuries, like the tort victim in *Rogers*, deserve greater constitutional protection in New Mexico. The first reason is that New Mexico has demonstrated a heightened value on state funding for medical expenses to those in need of assistance.²⁷⁷ The second reason is that the TCA cap could substantially limit the ability of a victim to receive the medical care required for that victim to live a dignified life or, to even continue to live his or her life, at all.²⁷⁸ Both *NARAL* and *Breen* demonstrated a value in the first reason.²⁷⁹ *Breen* did so by assigning heightened scrutiny for a discriminatory law that reduced state funding for mental disabilities, and *NARAL* did so by assigning heightened scrutiny to a law that limited funding for Medicaid-eligible persons on the basis of gender.²⁸⁰ Although those cases involved economic interests, they also involved interests in funding for medical care to those who require assistance.²⁸¹ Similarly, those who are catastrophically injured require a substantial amount of medical care.²⁸² Even more analogous is when a catastrophic injury results in brain damage, thus requiring medical funding similar to that found in *Breen*.²⁸³ The TCA cap does not affect only financial interests of the state, but also affects medical funding. The great importance that New Mexico has placed on medical funding warrants a heightened level of scrutiny for that class of victims under the TCA.

273. Trujillo, No. 19,118 & 19,118, slip op. at 4 (1994); Trujillo v. City of Albuquerque ("Trujillo II"), 1998-NMSC-031, ¶ 29, 125 N.M. 721, 965 P.2d 305.

274. *Rogers v. City of Albuquerque*, Appellee's Answer Brief, No. 10,437, at 3 (Ct. App.).

275. *Id.*

276. *Id.*

277. See *New Mexico Right to Choose/NARAL*, 1999-NMSC-005; *Breen*, 2005-NMSC-028.

278. See, e.g., Appellee's Answer Brief, *Rogers v. City of Albuquerque*, No. 10-437 (N.M. Ct. App.).

279. See *New Mexico Right to Choose/NARAL*, 1999-NMSC-005, 975 P.2d 841; *Breen*, 2005-NMSC-028, 120 P.3d 413.

280. See *id.*

281. *Id.*

282. See, e.g., Appellee's Answer Brief 3, *Rogers v. City of Albuquerque*, No. 10-437.

283. *Breen*, 2005-NMSC-028, 120 P.3d 413.

The second argument applies to victims who are catastrophically injured. If the victim in *Rogers* had not passed away, her quality of life would have been determined entirely by the type of care, treatment, and rehabilitation her custodian was able to provide, which in turn, depended on the amount of financial support received by the custodian for her care.²⁸⁴ Victims that require a similar degree of medical care to survive, but cannot receive adequate compensation for their medical costs, constitute a class of individuals with interests more fundamental than those who suffer injuries, but whose injuries do not require constant medical care to survive and live a dignified life. Life is a fundamental right in our society. Instead of framing the argument to focus on the victim's right to be fully compensated, as the *Trujillo II* court has done, the court should frame the discussion around a victim's right to receive the necessary medical funding for his injuries. These rights and this class of victims deserve greater protection under New Mexico law.

There is no doubt that limits on damages for governmental torts can create highly inequitable results, as seen in *Rogers*, the Colorado wildfire tragedy, and the Virginia Tech shootings.²⁸⁵ However, the New Mexico courts have made clear that the standard of review for equal protection under the TCA cap will remain rational basis, despite the classification utilized in the court's analysis.²⁸⁶ The same is true for due process.²⁸⁷ Although the Wachockis asserted the right to hold one's government accountable is a "fundamental right," the court indicated that it was hesitant to extend rights beyond those already recognized by the supreme court.²⁸⁸ Since equal protection claims are typically coupled with due process claims, a more expansive view in one of the clauses would likely create greater protection for the other, as well.²⁸⁹ At most, however, the arguments for heightened scrutiny or extended rights based on catastrophic injury victims may provide circumstances in which rational basis will fail because of the greater importance New Mexico places on medical funding. If the New Mexico constitution were interpreted more expansively, thus causing the TCA cap to be held unconstitutional in the future, the legislature would likely respond rather than leaving the government open to unlimited liability. The next section will discuss the possible alter-

284. Appellee's Answer Brief 3, *Rogers v. City of Albuquerque*, No. 10-437.

285. See *supra* Part IV.

286. *Wachocki*, 2010-NMCA-021, 228 P.3d 504; *Trujillo II*, 1998-NMSC-031, 965 P.2d 305.

287. *Id.*

288. *Wachocki*, 2010-NMCA-021, ¶ 35, 228 P.3d at 514.

289. See *ACLU of NM*, 2006-NMCA-078, ¶ 16, 137 P.3d 1215, 1223 (citations omitted).

natives regarding implementation of the TCA cap that the New Mexico legislature could adopt to maintain the constitutionality of the cap, while still preserving the state treasury.

C. TCA Cap and New Mexico's Legislature

New Mexico courts, as well as courts throughout the United States, have consistently held that limits on recoverable damages against the government are rationally related to preserving the state treasury.²⁹⁰ The New Mexico legislature does not provide legislative history on how it calculated the number for the cap in 1976,²⁹¹ but New Mexico courts appear to draw the conclusion that the legislature created the cap based on rational reasoning and calculations.²⁹² Other states, however, have demonstrated that financial stability is still achievable with substantially higher caps or no caps at all.²⁹³ For example, the Wachockis would have been able to recover almost the full award against BCSD if Georgia's cap had applied.²⁹⁴ The argument may be that those states are more financially viable than New Mexico, although the legislature does not provide the financial data needed to verify such a claim. The TCA cap, enacted in 1976, was likely based on costs of medical expenses and personal injury awards during that same year.²⁹⁵ Similarly, the amended increase in 1991 was likely based of values from 1991. While the TCA cap may have been constitutional when it was enacted in 1976, the argument is that it could become unconstitutional due to the legislature's failure to increase the cap in accordance with inflation.²⁹⁶ Thus, the legislature should ensure that the TCA cap continues to be based on present values, taking into account inflation and costs-of-living increases.

One alternative is to require that the cap be amended more frequently and on a regular basis.²⁹⁷ The legislature in Utah demonstrates that this mechanism is possible, by requiring the damage cap to be

290. *See supra*, Part IV.

291. *See* NMSA 1978, § 41-4-19 (2011).

292. *See, e.g., Wachocki*, 2010-NMCA-021, 228 P.3d 504; *Trujillo II*, 1998-NMSC-031, 965 P.2d 305.

293. *See supra*, Part IV.

294. *See* GA. CODE ANN. § 50-21-29 (2011).

295. *See* Plaintiffs/Cross-Appellants Reply in Support of Brief in Chief 12, *Wachocki v. Bernalillo County Sheriff's Dept.*, 2010-NMCA-021, 228 P.3d 504.

296. *Gallagher v. Evans*, 536 F.2d 899 (1976) (holding that a "valid statute may become invalid by change in conditions to which it is applied.").

297. *See, e.g., IND. CODE ANN. § 34-13-3-4* (2011) (increasing amount of maximum liability by \$200,000 against governmental entities every two years); *UTAH CODE ANN. § 63G-7-604* (2011) (requiring the amount of the limitation to be reviewed and raised every even-numbered year).

amended every even number of years in accordance with the state's Consumer Price Index (CPI).²⁹⁸ New Mexico's CPI has nearly doubled since the cap was last amended in 1991.²⁹⁹ The Utah legislature's approach provides a method to ensure the cap remains rationally related to the state's financial stability, while also providing transparency to its citizens.

Another alternative is to require recoverable damages not to exceed a certain ratio of awarded compensatory damages.³⁰⁰ This approach is similar to the method sometimes used by the courts in civil cases; punitive damages are a ratio of compensatory damages.³⁰¹ The problem with this alternative is that the cap only presents a constitutional issue for tort victims who were grossly undercompensated and whose recoverable damages were unjustified compared to the extreme governmental negligence that was committed.³⁰²

These alternative approaches, of course, are unlikely to come from the courts, as it "is not the duty of the court to rewrite legislature." Regardless, those methods used by other states' legislatures undoubtedly provide more equitable results for governmental tort victims.

VII. CONCLUSION

The *Wachocki* decision on the constitutionality of the TCA cap was based primarily on federal views. Perhaps the court of appeals in that case did not have a duty to analyze possible reasons for a divergence from federal precedent, based on the procedural requirements of interstitialism. However, based on the history of New Mexico and the conflicting jurisprudence over the constitutionality of the TCA cap, there may be a need for the courts to look at whether or not equal protection and due process deserve greater protection in civil claims under state law. The courts may determine that the TCA cap remains in sync with the values of New Mexico as a state, regardless of independent interpretation. Alternatively, however, a greater focus on independent interpretation may prompt courts to shy away from the "lock-step" modes of analysis, or to

298. U.C.A. 1953 § 63G-7-604(4)(a).

299. New Mexico Department Workforce Solutions, Labor Market Information (2011), available at <http://www.dws.state.nm.us/LMI/dws-data.html>.

300. See, e.g., *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003) (requiring punitive damages to not exceed a single-digit ratio of compensatory damages).

301. *Id.*

302. *Wachocki*, 2010-NMCA-021, ¶ 13, 228 P.3d 504 (capping damages from over \$1 million to \$400,000 for wrongful death).

place a greater importance on medical funding for catastrophically injured victims, and could result in different consequences for future constitutional challenges to the TCA cap.