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Matthew W. Light

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* J.D., Washington and Lee University, anticipated 2001; B.A., Classical Languages, Drew University, 1998. The author would like to thank Professor Adam Scales and Becky Rees for the many hours they spent editing and commenting on this Note. In addition, he would like to thank the following people for their encouragement and support during the long and arduous note-writing process: Niles, Darlene, and Carrie Light, Rick, Vickie, Joel, and Aaron Parker, and Robert Hedglen, Jr.

I. Introduction

James Madison wrote that in designing the structure of a well-ordered government, writers of constitutions should give "those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others.... Ambition must be made to counteract ambition."[1] The framers of the United States Constitution thought that interbranch strife would keep each branch in check.[2] Thus, the Constitution divides authority among legislative, executive, and judicial branches.[3] The Constitution grants responsibility to each department, but each branch enjoys some control over the actions of the others.[4] The contest for power among the branches produces the stability the framers considered necessary for good government.[5] Madison predicted that tyranny would result, however, if one branch were to become too powerful and to take unto itself the functions of another.[6]

State constitutions reflect similar organization; the constitutions of states existing at the time of the federal Constitutional Convention influenced the writers of the federal Constitution.[7] Furthermore, state constitutions written after the adoption of the United States Constitution mirror the federal separa-

1. THE FEDERALIST NO. 51, at 347 (James Madison) (Carl van Doren ed., 1973).

2. *See id.* at 348 ("[T]he constant aim is to divide and arrange the several offices in such a manner as that each may be a check on the other – that the private interest of every individual may be a sentinel over the public rights.").

3. *See* U.S. CONST. art. I, § 1 (establishing legislative branch); *id.* art. II, § 1 (authorizing executive branch); *id.* art. III, § 1 (chartering judicial branch).

4. *See, e.g., id.* art. I. § 7, cl. 4 (establishing presidential veto); *id.* art. I, § 9, cl. 7 (prescribing congressional power over all appropriations); *id.* art. II, § 2, cl. 4 (establishing Senate check on presidential power to make treaties).

5. *See generally* THE FEDERALIST NO. 51, *supra* note 1 (promoting merits of establishing checks and balances among independent government branches as means to achieve stability).

6. *See id.* at 347 (warning against "gradual concentration of the several powers [of government] in the same department").

7. *See* MASS. CONST. pt. I, art. 30 (providing in 1780 for division of government power between independent executive, legislative, and judicial branches); THE FEDERALIST NO. 47, at 324-29 (James Madison) (Carl van Doren ed., 1973) (discussing separation-of-powers provisions of state constitutions existing in 1788).

tion of powers scheme.[8] Thus, states experience interbranch struggles for power much like those the framers envisioned that the federal government would experience.[9]

This Note discusses one interbranch struggle currently being waged throughout the country: the battle between courts and legislatures for control over the tort system.[10] The conflict over modern tort reform originated in the liability insurance crises of the 1970s and 1980s.[11] The number of multi-million dollar jury verdicts doubled between 1972 and 1983.[12] The two decades saw huge increases in the cost of medical malpractice insurance and general liability insurance.[13] In response to insurance cost increases, nearly every state adopted tort reform measures of some sort.[14] The statutes proposed several different methods of solving the liability crisis, such as the

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8. *See, e.g.*, ILL. CONST. art. II, § 1 (establishing three independent branches in state government); OHIO CONST. art. II, § 1 (prescribing legislative branch); *id.* art. III, § 5 (chartering executive branch); *id.* art. IV, § 1 (authorizing judicial branch); OR. CONST. art. III, § 1 (establishing three independent branches).

9. *Compare infra* Parts II, III, & IV (discussing struggle between legislative and judicial branches over tort system), *with supra* notes 1-6 and accompanying text (explaining framers' anticipation of interbranch tension). The dispute over the proper boundaries between judicial and legislative authority is a timely one, and was an underlying theme in the proceedings surrounding the recent disputed presidential election. *Cf.* Gore v. Harris, 772 So. 2d 1243, 1249 (Fla. 2000) ("Although courts are, and should be, reluctant to interject themselves in essentially political controversies, the Legislature has directed . . . that an election contest shall be resolved in a judicial forum."), *rev'd sub nom.* Bush v. Gore, 121 S. Ct. 525 (2000); *Gore*, 772 So. 2d at 1270 (Wells, C.J., dissenting) ("[T]here is uncertainty as to whether the Florida Legislature has ever given the courts of Florida any power to resolve contests or controversies in respect to presidential elections.").

10. *See* Stephen J. Werber, *Ohio Tort Reform Versus the Ohio Constitution*, 69 TEMP. L. REV. 1155, 1156 (1996) ("The Ohio Constitution forms the battleground for an ongoing war between the tort policies and power of the judicial branch and those of the legislative and executive branches of state government.").

11. *See* PETER W. HUBER, LIABILITY: THE LEGAL REVOLUTION AND ITS CONSEQUENCES 138-42 (discussing liability insurance crisis of 1970s and 1980s). Legislatures and courts have struggled over tort reform before, most notably in the context of workers compensation laws, which replaced common law tort actions with state insurance schemes. *See* Ives v. S. Buffalo Ry. Co., 94 N.E. 431, 441 (N.Y. 1911) (declaring that workers compensation law was unconstitutional taking of property without compensation).

12. *See* JOHN G. FLEMING, THE AMERICAN TORT PROCESS 16-17 (1988) (reporting doubling in number of million-dollar jury verdicts between 1972 and 1983).

13. *See* HUBER, *supra* note 11, at 138-41 (reporting increase in insurance premiums); Scott E. Harrington, *Prices and Profits in the Liability Insurance Market*, *in* LIABILITY: PERSPECTIVES AND POLICY 42, 42 (Robert E. Litan & Clifford Winston eds., 1988) (same).

14. *See* Elizabeth A. Schartz et al., Comment, *Caps, "Crisis," and Constitutionality – Evaluating the 1986 Kansas Medical Malpractice Legislation*, 35 U. KAN. L. REV. 763, 765 n.18 (1987) (reporting that nearly every state enacted tort reform laws).

abolition of the collateral source rule,[15] the establishment of panels of lawyers and doctors to screen medical malpractice claims, and the creation of a statutory limit on damages.[16]

This Note discusses the controversy between courts and legislatures over damage caps. Various legislatures across the country responded to the perceived liability crisis by attempting to limit the liability of tortfeasors.[17] Some statutes limit only noneconomic damages; others limit all damages in specific types of claims.[18] Whatever form the statutes take, parties finding their tort

15. *Cf. infra* note 16 (mentioning collateral source rule). The collateral source rule allows a jury, when determining the amount by which an injury damages a plaintiff, to consider evidence that a plaintiff's insurance compensated the plaintiff for the injury. *See* BLACK'S LAW DICTIONARY 256 (7th ed. 1999) (defining collateral source rule).

16. *See* Best v. Taylor Mach. Works, 689 N.E.2d 1057, 1062 (Ill. 1997) (outlining provisions of Illinois reform statute); Werber, *supra* note 10, at 1157 (listing provisions of Ohio reform statute). The Ohio statute provides a good example of various provisions aimed at reducing liability. The statute redefines "defect" to make showing a defective design more difficult. Werber, *supra* note 10, at 1171. It eliminates the liability of successor corporations for their predecessors' products and limits the situations in which courts can impose liability on an industry as a whole. *Id.* at 1172-73. The statute reforms the rules of evidence to allow tortfeasors to defend themselves by blaming an injury on the plaintiff's substance abuse, *id.* at 1173-74, and by showing that the plaintiff failed to heed a product recall notice, *id.* at 1174-75. Under the new statute, tortfeasors might defend against a punitive damages claim by showing that they complied fully with government regulations. *Id.* at 1176. The statute also contains a fifteen-year statute of repose for wrongful death actions, forbidding actions when a product more than fifteen years old causes a death. *Id.* at 1177-78. Another portion of the law requires a plaintiff to bring medical malpractice actions within six years from the act or omission causing the injury. *Id.* at 1192-96. The law abolishes wrongful death actions when the decedent receives compensation for an injury while living. *Id.* at 1178-80. The legislature also changed the standard for summary judgment in toxic tort cases so that defendants would be able to obtain easier dismissal of claims. *Id.* at 1180-83. The act abrogated the collateral source rule, allowing a jury to consider evidence that a victim's insurance company has already compensated an injury. *Id.* at 1183-86. Finally, the legislature attempted to place limits on punitive and compensatory damages. *Id.* at 1196-99.

17. *See, e.g.*, 735 ILL. COMP. STAT. 5/2-1115.1 & 1115.2 (West Supp. 1999) (limiting noneconomic damages to $500,000 per plaintiff); KAN. STAT. ANN. §§ 60-19a01 & 60-19a02 (1994) (limiting noneconomic damages to $250,000); MD. CODE ANN., CTS. & JUD. PROC. § 11-108 (Michie Supp. 2000) (limiting noneconomic damages to $500,000); OHIO REV. CODE ANN. § 2323.54 (West Supp. 2000) (limiting noneconomic damages to certain amounts depending on nature of injury); OR. REV. STAT. § 18.560 (1999) (limiting noneconomic damages to $500,000); VA. CODE ANN. § 8.01-581.14 (Michie 2000) (limiting all medical malpractice damages to $1.5 million). The legislatures thought they acted in response to rising liability costs. *See* Civil Justice Reform Amendments of 1995, Pub. Act 89-7, 1995 Ill. Laws 286, 286-88 (finding that "current systemic costs of tort liability are unacceptable"); Act of Sept. 26, 1996, Am. Sub. H.B. 350, 146 Ohio Laws 3567, 4028 (citing state's interest in "stabilizing costs" as reason for enacting damage cap).

18. *Compare* KAN. STAT. ANN. § 60-19a02 (1994) (limiting only noneconomic damages to $250,000), *with* VA. CODE ANN. § 8.01-581.15 (Michie 2000) (limiting damages of all types

recovery suddenly limited have often challenged the statutes on state constitutional grounds, beseeching state supreme courts to curtail an allegedly unconstitutional exercise of legislative power.[19] Often, courts have sustained the challenges and struck down the law.[20] This Note examines constitutional challenges to damage caps in six states: three states in which the caps fell (Illinois, Ohio, and Oregon)[21] and three states in which they survived (Kansas, Maryland, and Virginia).[22]

This Note focuses on three theories that parties have used to attack the damage cap statutes.[23] Part II explores challenges based on the right to a jury trial, an issue that involves questions concerning the power of juries at com-

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in medical malpractice cases to $1.5 million). Often, the statutes define "noneconomic damages" in similar terms. For example, under the Maryland statute, noneconomic damages include "pain, suffering, inconvenience, physical impairment, disfigurement, [and] loss of consortium." MD. CODE ANN., CTS. & JUD. PROC. § 11-108 (Michie 1998). In Ohio, they include loss resulting from "pain and suffering, loss of society, consortium, companionship, care, assistance, attention, protection, advice, counsel, instruction, training, or education, mental anguish, and any other intangible loss." OHIO REV. CODE ANN. § 2323.54(A)(2) (West Supp. 1998).

19. *See infra* Parts II, III, & IV (discussing constitutional challenges to damage cap statutes).

20. *See infra* note 21 (listing several cases holding that damage caps violate state constitutions).

21. *See* Best v. Taylor Mach. Works, 689 N.E.2d 1057, 1066-81 (Ill. 1997) (striking down damages cap); State *ex rel.* Ohio Acad. of Trial Lawyers v. Sheward, 715 N.E.2d 1062, 1092-95 (Ohio 1999) (same); Lakin v. Senco Prods., Inc., 987 P.2d 463, 467-475 (Or. 1999) (same).

22. *See* Samsel v. Wheeler Transp. Servs., Inc., 789 P.2d 541, 557-58 (Kan. 1990) (upholding damages cap); Murphy v. Edmonds, 601 A.2d 102, 107-18 (Md. 1992) (same); Pulliam v. Coastal Emergency Servs. of Richmond, Inc., 509 S.E.2d 307, 311-19 (Va. 1999) (same); Etheridge v. Med. Ctr. Hosps., 376 S.E.2d 525, 528-34 (Va. 1989) (same).

23. *See infra* Part II (discussing challenges to damage caps based on jury trial guarantees); Part III (considering due process, equal protection, and special legislation challenges to damage caps); Part IV (examining challenges to damage caps based on abuse of legislative prerogatives). Parties have attacked damage caps on theories other than the ones this Note discusses. For example, parties have alleged that the cap on damages constitutes an illegal taking of property. *See Pulliam*, 509 S.E.2d at 317-18 (rejecting Takings Clause challenge to damage cap); *cf.* U.S. CONST. amend. V (prohibiting taking of private property for public use without just compensation); VA. CONST. art. I, § 11 (same). Those challenges are outside the scope of this Note, although many observations that this Note makes about the struggle between courts and legislatures also are relevant to those challenges. Furthermore, this Note is concerned primarily with challenges based on state constitutional law, rather than ones based on the federal Constitution. The latter have been unsuccessful. *See* Duke Power Co. v. Carolina Envtl. Study Group, Inc., 438 U.S. 59, 88 (1978) (rejecting Fifth Amendment due process challenge to federal limit on nuclear accident liability); Ferguson v. Garmon, 643 F. Supp. 335, 340 (D. Kan. 1986) (rejecting federal due process challenge to state damage cap); Fein v. Permanente Med. Group, 695 P.2d 665, 679-82 (Cal. 1985) (sustaining damage cap), *appeal dismissed for want of substantial federal question*, 474 U.S. 892 (1985).

mon law and the power of legislatures to change common law.[24] Part III discusses challenges to caps based on equal protection, due process, and special legislation clauses of state constitutions.[25] Equal protection, due process, and special legislation analyses all rest upon rational basis review.[26] The Note explores whether the courts correctly apply the relevant tests when considering the constitutionality of damage caps under these provisions.[27] Part IV considers challenges to damage caps based on abuse of legislative prerogatives. It examines Kansas's quid pro quo rule for abolition of common law actions[28] and Ohio's jurisprudence on legislative alteration of trial court jurisdiction.[29] Finally, Part V of this Note concludes that the decisions upholding damage caps against constitutional attack are better-reasoned than those rejecting the caps.[30]

II. Challenges to Damage Caps Based on Jury Trial Guarantees

One commentator has described trial by jury as the "hallmark of the American tort system."[31] Lawyers challenging damage caps often have grounded their attacks in state constitutional guarantees of a right to a civil trial by jury.[32] This Part explores whether statutory damage caps invade the right to a jury trial by analyzing the decisions that courts handed down in four representative states: Kansas, Oregon, Maryland, and Virginia.[33]

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24. *See infra* Part II (discussing right to jury-trial challenges to damage caps).

25. *See infra* Part III (analyzing challenges to damage caps based on due process, equal protection, and special legislation clauses).

26. *See infra* notes 203-14, 259-62, and accompanying text (determining appropriate standard of review for due process and equal protection analysis).

27. *See infra* notes 224-44, 266-84, and accompanying text (exploring whether damage caps fail due process or equal protection rational basis review).

28. *See infra* Part IV.A (exploring quid pro quo rule in Kansas).

29. *See infra* Part IV.B (chronicling Ohio dispute over legislative power to grant or withhold trial court jurisdiction).

30. *See infra* Part V (concluding that better-reasoned decisions allow damage caps).

31. FLEMING, *supra* note 12, at 101. Fleming noted that unlike the United States, most common law jurisdictions no longer use civil juries. *Id.*

32. *See* KAN. CONST., BILL OF RIGHTS, § 5 (providing for civil trials by jury); MD. CODE ANN., MD. CONST., DECL. OF RIGHTS art. 23 (same); OR. CONST. art. I, § 17 (same); VA. CONST. art. I, § 11 (same); *cf.* Lakin v. Senco Prods., Inc., 987 P.2d 463, 475 (Or. 1999) (sustaining challenge to damage cap based on jury trial guarantee); *infra* Part II.A (examining cases in which courts rejected challenges to damage caps based on jury trial guarantees).

33. *See infra* notes 35-67 and accompanying text (discussing leading cases from Kansas, Oregon, Maryland, and Virginia). This section analyzes whether damage caps burden or deny the right to a civil jury trial. If damage caps burden a fundamental right like the right to a jury trial, courts might engage in heightened scrutiny similar to that used in due process or equal

A. Cases Rejecting Challenges to Damage Caps Based on Jury Trial Guarantees

Several states have rejected challenges to damage caps based on the jury trial guarantees of their respective state constitutions.[34] This Note examines three such jurisdictions: Kansas, Virginia, and Maryland. Although these states do not constitute an exhaustive list of decisions rejecting jury trial guarantee challenges to the caps, they are a representative sample.

In Kansas, tort reform was comprehensive and included a damage cap.[35] In *Samsel v. Wheeler Transport Services, Inc.*,[36] the Kansas Supreme Court considered the constitutionality of that cap.[37] The court began with an inquiry

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protection analysis. *See* Shapiro v. Thompson, 394 U.S. 618, 634 (1969) (finding that strict scrutiny applies to classifications burdening fundamental right); Dimick v. Schiedt, 293 U.S. 474, 486 (1935) ("[A]ny seeming curtailment of the right to a jury trial should be scrutinized with the utmost care."); James R. Andersen, Note, *Blasting the Cap: Constitutional Issues Arising from Maryland's Limitation of Noneconomic Damages in Personal Injury Claims*, 16 U. BALT. L. REV. 327, 333-34 (1987) (suggesting incorrectly that Maryland Court of Appeals will apply strict scrutiny to damage cap because it interferes with right to jury trial). Courts generally have used rational-basis scrutiny in this analysis, however, and not heightened scrutiny. *See infra* notes 203-14, 259-62, and accompanying text (discussing appropriate level of scrutiny for caps).

34. *See* Johnson v. St. Vincent Hosp., Inc., 404 N.E.2d 585, 591-93 (Ind. 1980) (rejecting jury clause challenge to damage cap); English v. New England Med. Ctr., Inc., 541 N.E.2d 329, 331-32 (Mass. 1989) (same); *infra* Part II.A (discussing cases from Kansas, Maryland, and Virginia).

35. *See* KAN. STAT. ANN. § 60-19a02 (1994) (limiting noneconomic damages to $250,000); Samsel v. Wheeler Trans. Servs., Inc., 789 P.2d 541, 544-45 (Kan. 1990) (discussing tort reform in Kansas). In 1976, the legislature established a panel of doctors to screen medical malpractice claims, shortened the statute of limitations, and modified the collateral source rule. *Samsel*, 789 P.2d at 544. The Kansas Supreme Court struck down the modification of the collateral source rule. *See* Wentling v. Med. Anesthesia Servs., P.A., 701 P.2d 939, 951 (Kan. 1985). The 1985 act again modified the collateral source rule and capped punitive damages in medical malpractice actions. *Samsel*, 789 P.2d at 544. Finally, the 1986 tort reform act included provisions making the malpractice screening panel reports admissible at trial, required court approval of attorney fees, limited the qualifications of expert witnesses, and attempted to cap compensatory noneconomic damages. *Id.* at 545.

36. 789 P.2d 541 (Kan. 1990).

37. Samsel v. Wheeler Trans. Servs., Inc., 789 P.2d 541, 543-58 (Kan. 1990). In *Samsel*, the United States District Court for the District of Kansas had certified the question whether Kansas's cap on noneconomic damages violated the Kansas Bill of Rights. *Id.* at 543. The Kansas Supreme Court detailed the history of tort reform in the state. *Id.* at 544-45. Then, the court reviewed the decisions of other states on the question of damage caps. *Id.* at 545-47. The court noted that its role is to declare statutes unconstitutional only when it is clear that they violate the constitution. *Id.* at 550. The court determined that it is unclear whether English common law recognized a right to a jury determination of the quantum of damages. *Id.* at 550-51. However, the court found the right in state common law. *Id.* at 551. The court also concluded that under state common law, the jury trial right includes the right to have a jury

into whether common law juries regularly determined damages.[38] Professing confusion over whether the right existed at English common law, the court instead located the right in state common law.[39] The court reasoned that individuals have no vested interest in the common law; thus, a legislature can abolish common law rights if it provides a substitute benefit.[40] The court found a substitute right in a statutory provision *requiring* a judge to enter judgment for the amount of the cap whenever a jury returned a verdict in excess of the cap.[41] Thus, the court upheld the cap.[42]

A slightly different analysis of the jury trial guarantee swayed the Maryland Court of Appeals in *Murphy v. Edmonds*.[43] The scope of the tort reform

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determine damages for pain and suffering. *Id.* at 552. Nevertheless, the court declared that the legislature retained the power to change the common law if it provided a benefit to replace the loss of a common law right. *Id.* at 555. In this statute, the legislature did provide that quid pro quo: It took away the power of judges to order a further remittitur after reducing a jury's over-the-cap verdict to the amount of the cap. *Id.* at 557-58. Thus, the court upheld the statute because of the legislature's power to change the common law. *Id.* at 558.

38. *Id.* at 550.

39. *Id.* at 551.

40. *Id.* at 555. For further discussion of Kansas's requirement that the legislature provide a substitute remedy for abolished common law actions, see *infra* Part IV.A.

41. *Samsel*, 789 P.2d at 557-58. Because of the requirement, devices like remittitur are unavailable when a jury returns a verdict in excess of the cap. *Id.* at 558. Under remittitur, a plaintiff allows a judge to enter judgment on an amount less than a jury verdict in exchange for the judge's denial of the defendant's motion for a new trial. *See* BLACK'S LAW DICTIONARY 1298 (7th ed. 1999) (defining remittitur).

42. *Samsel*, 789 P.2d at 558.

43. Murphy v. Edmonds, 601 A.2d 102 (Md. 1992). In *Murphy*, the plaintiff was injured after a tractor trailer suffered a tire blowout and struck her car. *Id.* at 104-05. The plaintiff and her husband sued the driver of the tractor trailer and his employer. *Id.* The jury returned a verdict in excess of the statutory damage cap. *Id.* at 105. The trial court, believing that the cap violated the equal protection clause of the Maryland Constitution, entered judgment on the verdict. *Id.* at 105-06. The Maryland Court of Special Appeals reversed. *Id.* at 106. The Maryland Court of Appeals found the statute constitutional. *Id.* at 118. Reviewing the equal protection claim, the court found that the Maryland equal protection clause was identical in meaning to the federal clause. *Id.* at 108. The appellants alleged that the cap created a classification between slightly injured victims and severely injured victims. *Id.* The court found that the classification warranted only rational basis scrutiny because tort victims are not a suspect class. *Id.* at 111-12. Furthermore, heightened scrutiny was unwarranted on the grounds that the cap burdened a fundamental right. *Id.* at 113-14. Applying the rational basis test, the court found that the cap was rationally related to a legitimate state purpose; thus, it did not violate the equal protection guarantee. *Id.* at 114-16. Turning to the jury trial guarantee challenge, the court reasoned that the Maryland General Assembly had utilized its power over the common law to abolish causes of action for damages exceeding the statutory cap. *Id.* at 116. Abolishing an action did not interfere with the right to a jury trial because the right to a jury trial guarantees only that those issues of fact determined in a judicial proceeding will be determined by a jury. *Id.* at 116-17. When no cause of action exists the issue is not determinable in a judicial proceeding, and the right to a jury trial does not apply. *Id.* The court also adopted the splitting

effort in Maryland was smaller than in other states, but the legislature did enact a cap on noneconomic damages.[44] In *Murphy*, the plaintiffs challenged the cap under the state constitution.[45]

In ruling on the damage cap, the *Murphy* court focused on the power of legislatures to change the common law and reasoned that the Maryland legislature simply had abolished causes of action for amounts in excess of the damage cap.[46] The Maryland Court of Appeals also concluded that the damage cap did not interfere with the jury's ability to assess how much damage the plaintiff suffered, and therefore did not violate the constitution.[47] Under the cap, the jury freely determines damages as part of its function to find the facts; for instance, the jury might find that a plaintiff suffered noneconomic damages in the amount of $600,000.[48] The law says that when a person suffers damages in an amount greater than $500,000, that person can recover only $500,000.[49] When a jury finds that a plaintiff suffered noneconomic damages in an amount greater than $500,000, a judge applies the law to the facts as the jury found them, determines that the law permits recovery for $500,000, and enters judgment for that amount.[50] No constitutional violation occurs because the jury retains its right to assess whether and how much the plaintiff has suffered; a judge then determines the legal consequences of the facts the jury finds.[51] Following this reasoning, the *Murphy* court upheld the statutes against the challenge.[52] This Note refers to this

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theory to explain its decision. *Id.* at 117; *see also infra* notes 47-53, 108-18, and accompanying text (explaining splitting theory). Therefore, the court upheld the statute. *Murphy*, 601 A.2d at 118. Finally, the court determined that the evidence of gross negligence in the case was insufficient to support an award of punitive damages. *Id.* at 118-19.

44. *See* Act of May 27, 1986, ch. 639, 1986 Md. Laws 2348 (codified at MD. ANN. CODE., CTS. & JUD. PROC. §§ 10-913, 11-108, & 11-109) (enacting tort reform in Maryland). That bill included only a cap on noneconomic damages and a provision requiring periodic payment of judgments. *Id.*

45. *Murphy*, 601 A.2d at 107.

46. *See id.* at 116-17 (reasoning that General Assembly in essence abolished actions for damages in excess of cap).

47. *See id.* at 117 (finding that ability of jury to deliver verdict is unchanged); *infra* notes 108-18 and accompanying text (analyzing theory that damage caps are constitutional because jury can still deliver verdict).

48. *See Murphy*, 601 A.2d at 117 (finding that damage cap does not limit jury's role).

49. *See* MD. CODE ANN., CTS. & JUD. PROC. § 11-108 (Michie 1998) (limiting noneconomic damages to $500,000).

50. *Cf. Murphy*, 601 A.2d at 117 ("No question exists concerning the role of the judge versus the jury with respect to noneconomic tort damages [in excess of the cap]."). Thus, the *Murphy* court found that the jury trial guarantee was not implicated. *Id.*

51. *See id.* (determining that cap does not interfere with jury's ability to resolve pertinent factual issues).

52. *Id.* at 118.

analysis distinguishing the roles of judge and jury as the "splitting theory" and explores it in greater detail below.[53]

The Virginia Supreme Court employed similar reasoning in *Etheridge v. Medical Center Hospitals*.[54] The Virginia reform statute targeted medical malpractice claims only and included a cap on all damages, economic and noneconomic, in medical malpractice cases.[55] Adjudicating a jury guarantee challenge to the cap, the *Etheridge* court focused on the meaning of a common law jury verdict.[56] The court found that although a party had a right at common law to a jury determination of the facts of a case, nothing required the court automatically to enter final judgment in favor of the party prevailing with the jury.[57] By writing substantive law, the legislature could determine

53. *See infra* notes 108-18 and accompanying text (discussing splitting theory).

54. Etheridge v. Med. Ctr. Hosps., 376 S.E.2d 525 (Va. 1989). In *Etheridge*, the plaintiff had undergone surgery to remove a deteriorating jawbone. *Id.* at 526. She emerged from the surgery severely brain damaged and permanently paralyzed. *Id.* at 527. The jury returned a verdict for $2,750,000; the trial court entered judgment for $750,000, the amount of the cap. *Id.* The plaintiff contended that the cap violated several provisions of the Virginia constitution. *Id.* The Virginia Supreme Court found that the cap did not violate the right to trial by jury because no constitutional right to judgment on a jury verdict existed. *Id.* at 529. The court adopted the splitting theory, reasoning that once a jury determined the quantum of damages, its constitutional role is fulfilled. *Id.* The plaintiff also raised a procedural due process challenge to the cap, claiming that it created an irrebuttable presumption that her damages did not exceed the amount of the cap. *Id.* at 529-31. The court rejected the procedural due process claim, however, because the cap did not deny to the plaintiff "reasonable notice and a meaningful opportunity to be heard." *Id.* at 531. The court additionally rejected a substantive due process claim, finding that an individual has no fundamental right to full recovery in tort. *Id.* The court held that the cap did not violate the separation of powers provisions of the Virginia constitution because the legislature has the power to change the common law and to set the jurisdiction of Virginia trial courts. *Id.* at 532. The plaintiffs alleged that the cap violated the Virginia constitution's provision against special legislation in that it applied only to medical malpractice claims and not to all tort claims. *Id.* The court rejected this challenge as well because the classification was "'a reasonable and not an arbitrary one.'" *Id.* at 533. Furthermore, the classification bore a "reasonable and substantial relation" to the legitimate state goal of reducing costs to doctors. *Id.* The court rejected an equal protection challenge on similar reasoning. *Id.* at 534. Thus, the court upheld the cap. The court also found that under the cap a plaintiff could receive only $750,000 per action, not $750,000 per doctor named as a defendant. *Id.* at 534-35. Finally, the court determined that charitable immunity limited the liability of a charitable hospital to an amount lower than the cap. *Id.* at 535.

55. *See* Act of April 9, 1976, ch. 611, 1976 Va. Acts 784 (codified as amended at VA. CODE. ANN. 8.01-581.15 (Michie 2000)) (capping noneconomic damages in medical malpractice actions). The act also included a provision establishing screening panels of doctors and lawyers to review medical malpractice claims before parties could file them in court. *Id.* The Virginia act is narrow in scope compared to other acts that apply to all actions rather than just medical malpractice ones and that include more reform provisions. *Cf. supra* note 16 (outlining Ohio tort reform law).

56. *See Etheridge*, 376 S.E.2d at 529 (finding no common law right to judgment on jury verdict).

57. *See id.* (discussing common law procedures by which court might nullify jury verdict).

the effect of the facts that a jury finds and could prevent a plaintiff from recovering the full amount of the verdict.[58] Ten years later, in *Pulliam v. Coastal Emergency Services*,[59] the Virginia Supreme Court again upheld the cap on reasoning similar to that of *Etheridge*.[60]

B. Cases Upholding Challenges to Damage Caps Based on Jury Trial Guarantees

The Oregon Supreme Court voided Oregon's damage cap in *Lakin v. Senco Products, Inc.*[61] The court found that the Oregon Constitution guaran-

58. *See id.* (adopting splitting theory); *see also* notes 108-18 and accompanying text (explaining splitting theory).

59. 509 S.E.2d 307 (Va. 1999).

60. *See* Pulliam v. Coastal Emergency Servs. of Richmond, Inc., 509 S.E.2d 307, 314 (Va. 1999) ("It is not the role of the jury but of the legislature to determine the legal consequences of the jury's factual findings."). In *Pulliam*, the plaintiff had gone to the hospital emergency room complaining of aching legs, but was released. *Id.* at 311. She returned to the emergency room the next day complaining of general weakness; later that day, she died in the hospital. *Id.* An autopsy revealed that she died of bacterial pneumonia. *Id.* The jury returned a verdict for the plaintiff's estate in the amount of $2,045,000; the trial court, applying the cap, entered judgment for the plaintiff for $1,000,000. *Id.* at 310. On appeal, the plaintiff's estate argued that *Etheridge* was decided wrongly and that the cap on damages was unconstitutional. *Id.* at 311-12. The court determined that under the cap, the jury was able to determine the quantum of damages. *Id.* at 312. However, the court reaffirmed that it is the role of the legislature to prescribe the consequences of the jury's factual findings. *Id.* at 314. Furthermore, the court stated that the legislature can abolish a cause of action or extinguish it with a statute of limitations without violating the jury trial guarantee. *Id.* The court found that such powers are logically consistent with the power to limit a recovery. *Id.* Regarding the plaintiff's special legislation challenge, the court found that any classifications the cap created were reasonable and bore a reasonable and substantial relation to the object of the legislation. *Id.* at 317. The plaintiff alleged that the cap resulted in a taking of property in violation of the Takings Clause of the United States Constitution. *Id.* at 317-18; *cf.* U.S. CONST. amend. V (prohibiting state taking of private property without just compensation). The court rejected the challenge, finding that the plaintiff did not have a vested interest in the rules of law underlying a particular claim until that claim accrued; thus, the damage cap was permissible because it was not retroactive. *Pulliam*, 509 S.E.2d at 317-18. The plaintiff alleged substantive due process and equal protection claims; the court rejected these because the cap had a reasonable relation to a proper purpose and was neither arbitrary nor discriminatory. *Id.* at 318. The court also rejected claims based on separation of powers, deciding that under the Virginia Constitution the legislature has power to determine the jurisdiction and rules of Virginia courts. *Id.* at 319. Additionally, the court held that the cap applied to the defendant corporation, which provided outside doctors to hospital emergency rooms and then billed the hospitals for the doctors' services. *Id.* at 319-20. Finally, the court determined that the cap prevented the recovery of prejudgment interest from the date of the plaintiff's death. *Id.* at 320-21.

61. Lakin v. Senco Prods., Inc., 987 P.2d 463, 475 (Or. 1999). In *Lakin*, a nail gun manufactured by the defendant misfired and penetrated the plaintiff's brain. *Id.* at 467. The plaintiff suffered permanent brain damage that rendered him an invalid. *Id.* He and his wife filed claims for both negligence and strict products liability. *Id.* at 466. The jury returned a verdict for $3,323,413 in economic damages, $2,000,000 in noneconomic damages, and

tees the right to a jury trial in all cases cognizable at common law.[62] The court also found that one common law function of a jury was to assess damages.[63] Thus, the court reasoned that the Oregon Constitution guarantees the right to have a jury assess a party's damages in common law actions.[64] The court rejected the splitting theory, arguing that it eviscerated the common law understanding of the right to trial by jury.[65] Therefore, the court invalidated the damages cap.[66] Other courts have applied similar reasoning to strike down damage caps using jury trial guarantees.[67]

C. Analysis of the Challenges

The Seventh Amendment of the United States Constitution guarantees that "[i]n suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved."[68] The Supreme Court has recognized that the right to a civil jury trial in federal courts exists both in causes of action cognizable at common law and in those statutory causes of action that are "analogous" to those cognizable in English law courts.[69] Significantly, the English right was not absolute; it did not extend to causes of action similar to those tried in courts of equity or admiralty.[70]

$4,000,000 in punitive damages. *Id.* Applying Oregon's damage cap, the trial court entered judgment for each plaintiff for only $500,000 in noneconomic damages. *Id.* The Oregon Supreme Court found that the Oregon Constitution guarantees the right to a jury trial in all cases cognizable at common law. *Id.* at 468. The court also found that it was the common law function of a jury to assess damages; thus, the court reasoned, the Oregon Constitution guarantees the right to have a jury assess a party's damages in common law actions. *Id.* at 470. The court rejected arguments by the defendant that legislative power to alter the common law saved the statute, reasoning that legislative alterations to the common law must themselves conform to the state constitution. *Id.* at 473. Thus, the court struck down the cap. *Id.* at 475.

62. *Id.* at 468; *see also* OR. CONST. art. I, § 17 ("In all civil cases the right of Trial by Jury shall remain inviolate."). Many states define the scope of their jury trial guarantees using the common law. *See infra* notes 68-76 and accompanying text (discussing common law underpinnings of jury trial guarantee).

63. *Lakin*, 987 P.2d at 470; *cf. infra* notes 68-76 and accompanying text (finding assessment of damages a common law jury function).

64. *Lakin*, 987 P.2d at 470.

65. *See id.* at 473-74 (rejecting splitting theory). *But cf. infra* notes 108-18 and accompanying text (discussing logic behind splitting theory).

66. *Lakin*, 987 P.2d at 475.

67. *See* Moore v. Mobile Infirmary Ass'n, 592 So. 2d 156, 159-65 (Ala. 1991) (striking down damage cap because of state jury trial guarantee); Sofie v. Fibreboard Corp., 771 P.2d 711, 723 (Wash. 1989) (same).

68. U.S. CONST. amend. VII.

69. *See* Feltner v. Columbia Pictures Television, Inc., 523 U.S. 340, 348 (1998) (defining reach of Seventh Amendment (citing Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 42 (1989)).

70. *See id.* at 348 (reporting lack of jury trial rights in equity and admiralty proceedings). The Supreme Court has recognized this distinction since the early days of the Republic. *See*

The Supreme Court has not utilized the Due Process Clause of the Fourteenth Amendment to apply the Seventh Amendment to the states.[71] Thus, state constitutions are the sole source of civil jury trial rights in state court proceedings.[72] The language of these state provisions varies somewhat.[73] Nevertheless, courts in all four states mentioned above echoed the federal interpretation whether they ultimately upheld or struck down the cap.[74] They all agreed on the common law underpinnings of the jury trial guarantees and found that the clauses guaranteed jury trials only in actions cognizable at common law at the time the state adopted its constitution.[75] However, they disagreed on the scope of that right.[76] Because the common law defines the scope of jury trial guarantees, it is appropriate to inquire whether, at common law, the assessment of damages was a function of the jury.

1. Common Law Juries and Damage Assessments

The great weight of commentators, early case law, federal precedent, and state court decisions reflect that common law juries regularly assessed damages.[77] According to Sir William Blackstone, the quintessential authority on

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Parsons v. Bedford, 28 U.S. (3 Pet.) 433, 446-47 (1830) (distinguishing legal and equitable proceedings in Seventh Amendment analysis).

71. *See* Letendre v. Fugate, 701 F.2d 1093, 1094 (4th Cir. 1983) (finding that Seventh Amendment does not apply to states through Fourteenth Amendment).

72. *See* Boyd v. Bulala, 672 F. Supp. 915, 921 (W.D. Va. 1987) ("State court proceedings are not governed by the seventh amendment, but by corresponding provisions in state constitutions"), *rev'd on other grounds*, 877 F.2d 1191 (4th Cir. 1989).

73. *Compare* MD. CODE ANN., CONST., DECL. OF RIGHTS, art. 23 ("The right of trial by jury [in civil cases] . . . shall be inviolably preserved."), *and* OR. CONST. art. I, § 17 ("In all civil cases the right of Trial by Jury shall remain inviolate."), *and* KAN. CONST., BILL OF RIGHTS, § 5 ("The right of trial by jury shall be inviolate."), *with* VA. CONST. art. I, § 11 ("That in controversies respecting property, and in suits between man and man, trial by jury is preferable to any other, and ought to be held sacred."). The Oregon Supreme Court attempted to distinguish its decision striking down the Oregon damage cap from the Virginia opinion upholding damage caps by pointing to the difference in this language. *See* Lakin v. Senco Prods., Inc., 987 P.2d 463, 473 n.10 (Or. 1999). Nevertheless, because courts interpret the clauses similarly regardless of their language, *see infra* note 75 and accompanying text (reporting similar interpretations of clauses), it is hard to see how the difference in the text is material to the damage cap issue.

74. *See supra* notes 68-72 and accompanying text (analyzing right to jury trial in federal courts).

75. *See* Swarz v. Ramala, 66 P. 649, 650 (Kan. 1901) (finding right to trial by jury in cases cognizable at common law when state constitution was adopted); Knee v. Balt. City Passenger Ry. Co., 40 A. 890, 891 (Md. 1898) (same); State v. 1920 Studebaker Touring Car, 251 P. 701, 703 (Or. 1926) (same); W.S. Forbes & Co. v. S. Cotton Oil Co., 108 S.E. 15, 21 (Va. 1921) (same).

76. *See supra* notes 21-22 and accompanying text (listing cases striking down and upholding damage caps).

77. *See infra* Part II.C.1 (exploring role of common law jury in damage assessment). The common law is the "the embodiment of broad and comprehensive unwritten principles, inspired

English common law, a determination of the *quantum* of damages a party suffers "cannot be done without the intervention of a jury."[78] Even when a defendant admits liability, the court must call a jury to assess damages.[79] A nineteenth century commentator, Theodore Sedgwick, wrote that the amount of damages "being in most cases intimately blended with the questions of fact, must have been from the outset generally left with the jury."[80] Modern commentators agree.[81]

From early English cases through recent federal opinions, courts consistently have supported allowing the jury to determine damages. For example, in an early English case, the court commented that "by the law the jury are the judges of the damages."[82] In a recent case, the United States Supreme Court

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by natural reason and an innate sense of justice, and adopted by common consent for the regulation and government of the affairs of men." Samsel v. Wheeler Trans. Servs., Inc., 789 P.2d 541, 550 (Kan. 1990) (citing 15A AM. JUR. 2D *Common Law* § 1 (1976)). It consists of judicial decisions and practice, rather than statutes. *See* BLACK'S LAW DICTIONARY 270 (7th ed. 1999) (defining "common law"). The American colonists inherited the English common law precedent existing at the time of this country's founding, *see* 15A AM. JUR. 2D *Common Law* § 4 (reporting transfer of English common law to American courts), and it is this early precedent that is most relevant to jury trial guarantees. *Cf.* Feltner v. Columbia Pictures Television, Inc., 523 U.S. 340, 348 (1998) (finding that historical common law defines scope of jury trial guarantee (citing Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 42 (1989)). However, because no authority explicitly states the rules of the historical common law, one must consult a variety of sources when attempting to determine its content. *Samsel*, 789 P.2d at 550. Evidence for what the common law was at a given time includes the works of contemporary common law commentators, judicial decisions of common law courts in England and the United States, and modern judicial opinions that express a sense of what the common law was. *Cf. Samsel*, 789 P.2d at 550 (commenting that courts sometimes look to English practice to determine common law at given time).

78. 3 WILLIAM BLACKSTONE, COMMENTARIES *397.

79. *See id.* at *398 (opining that jury is necessary to assess damages).

80. 1 THEODORE SEDGWICK, A TREATISE ON THE MEASURE OF DAMAGES, § 19, at 20 (New York, Baker Voorhis, 8th ed. 1891); 1 J.G. SUTHERLAND, A TREATISE ON THE LAW OF DAMAGES § 2 (Chicago, Callaghan 1884) (stating that jury determines damages as matter of fact). The time Sedgwick wrote is important because states claim to look to the common law at the time they adopted their constitution to determine the appropriate interpretation. *See* Lakin v. Senco Prods., Inc., 987 P.2d 463, 468 (Or. 1999) (finding that parameters of right were set when state adopted constitution); Etheridge v. Med. Ctr. Hosps., 376 S.E.2d 525, 528 (Va. 1989) (same). Nevertheless, the opinions do not seem concerned with differentiating the common law in 1857, when Oregon adopted its constitution, *Lakin*, 987 P.2d at 468, from the common law in 1776, when Virginia adopted its constitution, *Etheridge*, 376 S.E.2d at 529.

81. *See* 1 JEROME H. NATES ET AL., DAMAGES IN TORT ACTIONS § 1.04(1)(a) (1999) (stating that assessment of damages is jury function); RESTATEMENT (SECOND) OF TORTS § 328C (1965) (allowing jury to determine amount of plaintiff's compensation for "legally compensable harm").

82. Townsend v. Hughes, 86 Eng. Rep. 994, 995 (C.P. 1677). In *Townsend*, the defendant allegedly said that the plaintiff was "an unworthy man, and acts against law and reason." *Id.* at 994. The plaintiff brought an action for slander, and the jury awarded him £4000. *Id.*

stated that the Seventh Amendment precluded the court from independently assessing damages in an action at law.[83] The Court found "overwhelming evidence that the consistent practice at common law was for juries to award damages."[84]

State courts have reached similar conclusions about the common law. Early cases from the states in question show juries assessing damages in tort actions.[85] Modern cases agree. For example, the Virginia Supreme Court found that "[w]ithout question, the jury's fact finding function extends to the assessment of damages."[86] The Oregon Supreme Court reached the same conclusion.[87] The Kansas Supreme Court misread federal precedent as stating that damage-finding was not a jury function at English common law, yet proceeded to find that right under Kansas common law.[88] It is evident that

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One juror confessed afterwards that the jury had made the verdict so high in order that the plaintiff "might have the greater opportunity to show himself noble in the remitting of [the damages]." *Id.* The defendant asked for a new trial. *Id.* With one justice dissenting, the court denied his appeal and declined to inquire into a jury's reasoning when awarding damages. *Id.* Other English cases also involved juries awarding damages. *See* Feltner v. Columbia Pictures Television, Inc., 523 U.S. 340, 353 (1998) (listing English cases in which juries awarded damages).

83. *See Feltner*, 523 U.S. at 353-55 (finding that Seventh Amendment requires jury determination of damages). In *Feltner*, the judge had determined the quantum of damages in a copyright infringement action, rather than allowing the jury to pass on the question. *Id.* at 344.

84. *Id.* at 353. Older Supreme Court precedent is in agreement. *See id.* at 352 (listing previous federal cases in which jury awarded damages); Hetzel v. Prince William County, 523 U.S. 208, 211-12 (1998) (per curiam) (finding Seventh Amendment right to jury determination of damages); Dimick v. Schiedt, 293 U.S. 474, 486 (1935) (determining that it is for jury to "determine . . . the extent of the injury by an assessment of damages").

85. *See, e.g.*, Hefley v. Baker, 19 Kan. 9, 12 (1877) (recording jury's finding of damages in trespass action); Marshall v. Addison, 4 H. & McH. 352, 353 (Md. 1773) (recording jury's assessment of damages in slander action); Cooke v. Thornton, 27 Va. (6 Rand.) 8, 8 (1824) (reporting jury instruction on finding damages in negligence action).

86. Etheridge v. Med. Ctr. Hosps., 376 S.E.2d 525, 529 (Va. 1989); *see also* O'Brien v. Snow, 210 S.E.2d 165, 167 (Va. 1974) (finding right to trial by jury on punitive damage claim).

87. *See* Lakin v. Senco Prods., Inc., 987 P.2d 463, 470 (Or. 1999) (concluding that assessment of damage is function of common law jury).

88. *See* Samsel v. Wheeler Trans. Servs., Inc., 789 P.2d 541, 550-51 (Kan. 1990) (finding that United States Supreme Court concluded no common law right exists to jury determination of damages and locating right in Kansas common law). The *Samsel* court cited *Tull v. United States*, 481 U.S. 412 (1987), for the proposition that the common law jury right did not extend to damages. *Samsel*, 789 P.2d at 550-51. In *Tull*, the Supreme Court considered a defendant's contention that he was entitled to a jury trial on his alleged violations of the Clean Water Act. *Tull*, 481 U.S. at 414. The *Tull* Court found that civil penalty suits under the Clean Water Act were analogous to actions in debt and therefore required a jury for a determination of liability. *Id.* at 420. Nevertheless, the jury role did not extend to determining the amount of the civil penalty under the Act because a civil penalty is not a "fundamental elemen[t]" of a jury trial. *Id.* at 426. The Kansas Supreme Court in *Samsel* apparently failed to anticipate the distinction

common law juries, which form the basis of jury trial guarantees in state constitutions, regularly assessed damages.

2. Common Law Verdicts and Common Law Judgments

Determining whether damage caps violate jury trial guarantees requires an examination of the distinct functions of jury and judge. A jury is responsible for making findings of fact and for rendering a verdict.[89] A judge is responsible for applying the law and for entering a judgment.[90] A proper understanding of that relationship clarifies the constitutional jury right in two ways. First, under the common law, a party never had a right to judgment solely on the basis of a jury verdict; thus, damage caps do not interfere with the right to a jury trial.[91] Second, using the "splitting theory," courts can conceptualize damage caps in a way that they do not interfere with the functions of a jury.[92]

a. Review of Jury Verdicts at Common Law

No right existed at common law to judgment on a jury's assessment of damages.[93] The jury's assessment always was subject to controls.[94] Blackstone himself contemplated several instances in which a court need not enter judgment on the jury's verdict. He commented that "new trials are every day awarded" when a jury's verdicts are "given *without*, or *contrary to*, evidence."[95] He noted that "[i]f every verdict was final in the first instance, it

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between a civil penalty, which is similar to a criminal sentence, and damages in tort, which a jury historically has assessed. *See* Feltner v. Columbia Pictures Television, Inc., 523 U.S. 340, 354-55 (1998) (distinguishing tort damages from civil penalty). The United States Supreme Court clearly has concluded that damages assessment was a function of the common law jury. *Id.* at 355.

89. *See infra* notes 108-18 and accompanying text (distinguishing functions of judge and jury).

90. *See infra* notes 108-18 and accompanying text (contrasting role of judge with that of jury).

91. *See infra* notes 93-107 and accompanying text (discussing absence of common law right to judgment on jury verdict).

92. *See supra* notes 47-53 and accompanying text (discussing splitting theory); *infra* notes 108-18 and accompanying text (same).

93. *See* 3 BLACKSTONE, *supra* note 78, at *389 ("Our ancestors saw that [a jury verdict] ought not finally to conclude the question in the first instance"); *id.* at *387 (commenting that court can set aside verdict in certain circumstances).

94. *See id.* at *387 (referring to ancient "superintendent powers" of courts over juries and stating that court can prevent jury from acting contrary to evidence by granting new trial).

95. *Id.* at *375 (emphasis in original); *see also id.* at *387 (noting that court may set aside verdict if jury has acted "without or contrary to evidence"). Blackstone contrasted this practice, current in his day, with the more ancient practice of giving effect to jury verdicts even in the absence of evidence. *Id.* Originally, a jury consisted of men with personal knowledge of the

would tend to destroy this valuable method of trial."[96] Of particular significance to the topic of damage caps, Blackstone cited an early case in which a judge ordered a new trial in a slander action because the jury returned excessive damages.[97]

Judicial opinions in this country reflect similar controls on the jury. From the very beginning, federal courts acknowledged the power of the jury to find facts, yet were willing to set aside jury verdicts that were not in conformity with the law[98] or that were grossly excessive.[99] Furthermore, the United States Supreme Court has decided that in cases involving punitive damage verdicts, the Due Process Clause not only allows but also requires some form of judicial review as to the quantum of damages.[100]

State courts also recognize controls on jury verdicts. For instance, the Virginia Supreme Court determined that if no disputed facts remain after presentation of the case, "the jury [is] not empowered to give specific legal effect to its decisions."[101] The Maryland Court of Appeals found that the practice of remittitur[102] "was not unknown" when Maryland adopted its consti-

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facts at issue; thus, it was logical to allow them to deliver a verdict based on personal knowledge rather than on testimony. *Id.* Of course, modern courts do not follow every admonition from Blackstone. Nevertheless, his jurisprudence might produce fewer hung juries. He reports that the jurors were kept "without meat, drink, fire or candle" until they agreed. *Id.* at *375. If they did not agree by the time the judge left town, he might carry them around in a cart with him until they returned a verdict. *Id.* at *376.

96. *Id.* at *390.

97. *Id.* at *388 (citing Wood v. Gunston, 82 Eng. Rep 867 (K.B. 1655)); *see also Wood*, 82 Eng. Rep. at 867 (setting aside jury verdict on grounds that it was excessive). In *Wood*, an action for slander, the jury had awarded £1500. *Id.* Chief Justice Glyn commented that "it is *frequent* in our books for the Court to take notice of miscariages [sic] of juries, and to grant new tryals [sic] upon them." *Id.* (emphasis added).

98. *See* Walker v. Smith, 29 F. Cas. 56, 56 (C.C.D. Pa. 1804) (No. 17,087) (commenting on willingness to set aside verdict not in conformity with jury charge).

99. *See* Whipple v. Cumberland Mfg. Co., 29 F. Cas. 934, 938 (C.C.D. Me. 1843) (No. 17,516) (Story, J.) (stating that court will set aside verdict for excessive damages under certain circumstances).

100. *See* Honda Motor Co. v. Oberg, 512 U.S. 415, 435 (1994) (declaring unconstitutional Oregon's attempt to eliminate judicial review of punitive damage awards).

101. Etheridge v. Med. Ctr. Hosps., 376 S.E.2d 525, 529 (Va. 1989) (citing Edith Guild Henderson, *The Background of the Seventh Amendment*, 80 HARV. L. REV. 289, 305-06 (1966)). For a complete discussion of the many methods of controlling or avoiding juries in the eighteenth century, see Henderson, *supra*, at 299-320.

102. *See* BLACK'S LAW DICTIONARY 1298 (7th ed. 1999) (defining "remittitur"). A remittitur occurs when a jury verdict seems excessive to a court, and the judge requests a party to accept judgment for a smaller amount as a condition for denying the other party's motion for a new trial. *Id.* Some courts have suggested that the permissibility of remittitur is not relevant to the issue of damage caps because a remittitur can occur only with the plaintiff's consent, and a damage cap takes effect without the plaintiff's consent. *See* Lakin v. Senco Prods., Inc., 987

tution.[103] The Maryland Court of Appeals also acknowledged the power to set aside a verdict on the grounds that the verdict was against the weight of the evidence.[104] Even in Oregon, where a 1910 constitutional amendment severely limits judicial control of juries,[105] a court need not enter judgment on a verdict if no evidence supports it.[106] Both historical and modern case law reflect that the historical common law and, thus, the constitutional provisions that the common law defines, never recognized a right to judgment on a jury verdict.[107]

b. The "Splitting Theory"

Several state courts have adopted what this Note refers to as the "splitting theory" to explain their decisions to uphold damage caps.[108] An ancient maxim states that "[t]he judges answer questions of law; the jurors, ones of fact."[109] These proper, traditional functions of judge and jury are the key

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P.2d 463, 471 (Or. 1999). Nevertheless, no right to judgment on the verdict exists because a court might still order a new trial without the plaintiff's consent. Theoretically, a court might order new trials indefinitely. *See* STEVEN C. YEAZELL, CIVIL PROCEDURE 739 (1996) (commenting on theoretical possibility that court might continuously order new trials).

103. Turner v. Wash. Suburban Planning Comm'n, 158 A.2d 125, 130 (Md. 1960).

104. *See id.* (acknowledging power to set aside verdict contrary to evidence).

105. *See* OR. CONST. art. VII (amended), § 3 (prohibiting reexamination of jury verdict unless no evidence supports it); *Lakin*, 987 P.2d at 471 (citing 1910 constitutional amendment that eliminated power of court to set aside verdict on ground that it is excessive). The United States Supreme Court has held this provision of the Oregon Constitution unconstitutional under the federal Constitution as applied to punitive damages. *See Honda Motor Co.*, 512 U.S. at 435 (finding provision unconstitutional in punitive damages case). For additional discussion of the implications of the provision, which ultimately should not prohibit the enactment of a damage cap, see *infra* notes 122-32 and accompanying text.

106. OR. CONST. art. VII (amended), § 3 (prohibiting reexamination of jury-determined facts "*unless there is no evidence to support the verdict*") (emphasis added).

107. *But cf.* 3 BLACKSTONE, *supra* note 78, at *379 (opining that trial by jury is "the glory of the English law"). The reader should not interpret this Note's conclusion that no right to judgment on a jury verdict existed at common law in a way that would allow a court completely to disregard a jury's findings of fact, something that even the ancients considered improper. *Cf.* 2 MARCUS TULLIUS CICERO, ACTIONIS SECUNDAE IN C. VERREM, § 31 (n.d.) (worrying that corrupt judge automatically will enter judgment against party that jury favors). A jury's factual conclusions, supported by appropriate evidence, should bind a judge as he determines a remedy by applying them to the substantive law. *See infra* notes 108-18 and accompanying text (describing splitting theory).

108. *See* Murphy v. Edmonds, 601 A.2d 102, 117 (Md. 1992) (implicitly adopting splitting theory); Pulliam v. Coastal Emergency Servs. of Richmond, Inc., 509 S.E.2d 307, 312-15 (Va. 1999) (reaffirming splitting theory adopted originally in Etheridge); Etheridge v. Med. Ctr. Hosps., 376 S.E.2d 525, 529 (Va. 1989) (adopting splitting theory). *But see* Lakin v. Senco Prods., Inc., 987 P.2d 463, 473-74 (Or. 1999) (rejecting splitting theory).

109. 1 SEDGWICK, *supra* note 80, § 18, at 20 ("*[A]d questiones legis respondent judices; ad questiones facti juratores.*").

to understanding the relationship between damage caps and the jury guarantee.[110]

Under the splitting theory's conception of damage caps, the judge and the jury serve unique roles, and the damage caps do not impair the jury function.[111] The jury finds as a matter of fact that the plaintiff has been damaged in the amount of *X* dollars, an amount which may be above the statutory damage cap for that jurisdiction. This verdict satisfies the common law right to a jury determination of the quantum of damages.[112] Thus, the finding fulfills the "constitutional mandate" of the jury function.[113] The judge then takes the fact found by the jury – the quantum of damages – and applies the substantive law of the jurisdiction, which caps the damages, to that fact. Applying the law to the fact, the court determines what amount the law permits a plaintiff to recover for the damages the jury verdict recognized and then enters judgment for that amount.[114] Both judge and jury perform their functions, yet the legal effect of the facts that the jury found remains under the control of the court.[115]

A jury is not a roving judgment-producing machine; it is a fact-finding body that exercises its function within the parameters of the law. The common law clearly recognized that principle.[116] Blackstone observed that "if,

110. *Cf.* Balt. & Carolina Line, Inc. v. Redman, 295 U.S. 654, 657 (1935) (interpreting Seventh Amendment to "retain the common-law distinction between the province of the court and that of the jury"). Justice van Devanter noted that under the amendment, issues of law were for the court and issues of fact were for the jury. *Id.*

111. *See Etheridge*, 376 S.E.2d at 529 (opining that damage cap does not interfere with jury function under splitting theory).

112. *See supra* notes 77-88 and accompanying text (finding common law right to jury determination of damages).

113. *Etheridge*, 376 S.E.2d at 529.

114. *See id.* (commenting on role of court in applying law to facts); *cf. id.* ("A remedy is a matter of law, not of fact."). One justice has suggested that the role of a judge in entering judgment after a civil jury verdict is analogous to the role of a judge sentencing a defendant after a verdict of guilty in a criminal trial. *See* Samsel v. Wheeler Trans. Servs., Inc., 789 P.2d 541, 558 (Kan. 1990) (McFarland, J., concurring) (comparing civil judgments to criminal sentences). Furthermore, the court remedies only those damages the jury has found to exist. *Cf.* Dimick v. Schiedt, 293 U.S. 474, 486-87 (1935) (upholding remittitur but striking down additur). The *Dimick* Court reasoned that an additur, which allowed the increase of a jury verdict that the judge thought insufficient, permitted recovery of damages that no jury ever determined to exist. *Id.* A remittitur, in contrast, allowed the elimination of excess damages and judgment on the remaining amount, in which amount a jury had found the defendant damaged. *Id.* at 486.

115. *See* Etheridge v. Med. Ctr. Hosps., 376 S.E.2d 525, 529 (Va. 1989) ("Thus, although a party has the right to have a jury assess his damages, he has no right to have a jury dictate through its award the legal consequences of its assessment."); *cf.* Murphy v. Edmonds, 601 A.2d 102, 117 (Md. 1992) (reasoning that jury fulfills role when jury assesses damages, even if cap later reduces actual award to plaintiff).

116. *See* Balt. & Carolina Line, Inc. v. Redman, 295 U.S. 654, 659 (1935) (mentioning

notwithstanding the issue of fact be regularly [without corruption] decided, it appears that the complaint was . . . not actionable in itself," a court need not enter judgment.[117] Moreover, procedural devices like the 12(b)(6) motion implicitly require determinations that even if the jury found all the facts the plaintiff alleges, the law would not permit the jury to return a verdict for the plaintiff or permit the judge to enter judgment on that verdict.[118]

In light of the common law, the Maryland and Virginia courts were correct in accepting the splitting theory. In contrast, the Oregon Supreme Court erred in rejecting the splitting theory. The court determined in *Lakin* that although Oregon's damage cap allowed the jury to determine noneconomic damages as a matter of fact, allowing a court applying the cap to enter judgment on a lesser amount "prevent[ed] the jury's award from having its full and intended effect."[119] Thus, the *Lakin* court decided that the splitting theory did violence to the common law understanding of the phrase "Trial by Jury."[120] However, as discussed above, the common law recognized no right to judgment on a jury verdict; a judge need not give a verdict its "full and intended effect" when doing so would violate the substantive law of the jurisdiction.[121]

In Oregon, judges have less power over jury verdicts than they do in other states,[122] but the splitting theory still does not violate the Oregon Constitution. The Oregon Constitution forbids courts from re-examining "[any] fact tried by a jury . . . unless the court can affirmatively say that there is no evidence to support the verdict."[123] The Oregon Supreme Court has determined that this unusual clause, which forbids re-examination of jury verdicts even under common law procedures, prevents Oregon courts from ordering a remittitur.[124] The court's reasoning is crucial to understanding why the

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common law practice of ruling on questions of law only after jury verdict determined facts, even though this sometimes resulted in upsetting verdict).

117. 3 BLACKSTONE, *supra* note 78, at *387.

118. *See* FED. R. CIV. P. 12(b)(6) (allowing dismissal of complaint for failure to state cause of action); *cf.* Conley v. Gibson, 355 U.S. 41, 45-46 (1957) ("[A] complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove *no set of facts . . . which would entitle him to relief.*") (emphasis added).

119. Lakin v. Senco Prods., Inc., 987 P.2d 463, 473 (Or. 1999).

120. *See id.* (opining that splitting theory "eviscerates" trial by jury).

121. *See supra* notes 93-107 and accompanying text (finding no right to judgment on jury verdict at common law).

122. *See Lakin*, 987 P.2d at 471 (discussing Oregon constitutional provision limiting judicial review of jury verdicts, and commenting that it "eliminated" existing common law power to grant new trials).

123. OR. CONST. art. VII, § 17.

124. *Compare* Van Lom v. Schneiderman, 210 P.2d 461, 463-65 (Or. 1949) (finding that Oregon Constitution forbids remittiturs), *and* Buchannan v. Lewis A. Hicks Co., 134 P. 1191, 1192 (Or. 1913) (same), *with* Robinson v. Old Dominion Freight Line, Inc., 372 S.E.2d 142, 144 (Va. 1988) (finding "common-law authority" to order remittitur). The Oregon Supreme

splitting theory passes muster even under Oregon's jury-empowering constitution. When determining whether to order a remittitur, a judge must form an opinion (make a factual finding) on the excessiveness of a jury verdict.[125] The court must decide that the jurors were wrong – that their verdict was excessive.[126] In second-guessing the jurors, the judge invades their province by ruling on a question of fact, and therein lies the "re-examination" that the Oregon constitution completely forbids.[127]

In contrast, under the splitting theory conceptualization of damage caps, no "re-examination" of a jury's finding of fact takes place. The judge need not make an assessment of the jurors' decision to determine whether their verdict is wrong or excessive. Rather, the court accepts the validity of the jury's assessment of damages and applies the relevant law to it.[128] In *Lakin*, the jury found that the plaintiff suffered $2,000,000. in noneconomic damages.[129] Under the splitting theory, the court would apply the cap to that finding and enter judgment for $500,000.[130] The jury's factual determination would stand; however, substantive law would dictate the consequences of that determination.[131] Applying the law to a fact does not constitute a re-examination of that fact because the judge's opinion about the fact does not enter into the process. Thus, damage caps constitutionally are distinguishable from remittiturs and the Oregon Supreme Court erred in determining that the Oregon Constitution forbids them.[132]

In summary, the decisions of the Kansas, Maryland, and Virginia courts contain better reasoning than the Oregon decision. They recognize both the

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Court found that, when a judge labels a verdict excessive and orders a remittitur, the action constitutes the re-examination of a jury fact. *See Von Lom*, 210 P.2d at 463 (determining that inquiry into whether verdict is excessive involves "examination of a question of fact"). The court pointed out that, unlike Oregon's clause, other constitutional provisions prohibiting the re-examination of facts tried by a jury exempt from their scope re-examination through common law procedures like remittitur. *Id.* at 465; *cf.* U.S. CONST. amend. VII (allowing re-examination of fact tried by jury according to "the rules of the common law"). Oregon's Constitution forbids even common law re-examinations. *Von Lom*, 210 P.2d at 465.

125. *Cf. Von Lom*, 210 P.2d at 462 ("This court is of the *opinion* that the verdict . . . is excessive.") (emphasis added).

126. *Cf. id.* at 464 (reporting that before adoption of amendment, court could set aside verdict if it was unreasonable, outrageous, or irrational).

127. *See id.* (finding that passing on excessiveness of verdict is "question of fact").

128. *Cf.* Etheridge v. Med. Ctr. Hosps., 376 S.E.2d 525, 529 (Va. 1989) ("A trial court applies the [cap] only *after* the jury has fulfilled its fact-finding function.").

129. Lakin v. Senco Prods., Inc., 987 P.2d 463, 466 (Or. 1999).

130. *See* OR. REV. STAT. § 18.560(1) (1999) (capping noneconomic damages at $500,000).

131. *Cf.* Pulliam v. Coastal Emergency Servs. of Richmond, Inc., 509 S.E.2d 307, 314 (Va. 1999) ("[I]t is not the role of the jury but of the legislature to determine the legal consequences of the jury's factual findings.").

132. *Cf. id.* at 313 ("[R]emittitur and the cap are not equivalent.").

correct scope of the common law right to a jury trial[133] and the distinction between the judge's findings of law and the jury's findings of fact.[134] They thereby correctly conclude that damage caps do not violate jury trial guarantees.[135] As one Kansas Supreme Court justice aptly put it, any other conclusion "has the effect of lumping together the right to trial by jury on the question of liability and the remedy to be afforded if liability is established, and then freezing the lump in a common law time warp."[136]

3. Jury Trial Guarantees and Legislative Power over the Common Law

One additional consideration suggests that jury trial guarantees do not create a right to judgment on a jury's assessment of damages in actions cognizable at common law. Legislatures can abolish common law causes of action and with them the right to a jury determination of damages in those actions.[137] Conceptually, damage caps simply abolish the cause of action for damages in an amount greater than the cap. Because a plaintiff has no right to damages, this abolition does not interfere with jury trial guarantees.[138]

Courts in Kansas, Maryland, Oregon, and Virginia all agree that the state legislature has the power to change the common law and to abolish common law causes of action.[139] Legislatures typically have exercised this power to abolish common law torts that no longer conform to modern social norms, such as actions for alienation of affections and seduction.[140] Additionally,

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133. *See supra* Part II.C.1 and accompanying text (discussing scope of jury trial guarantees).

134. *See supra* notes 108-18 and accompanying text (analyzing splitting theory).

135. *See* Samsel v. Wheeler Trans. Servs., Inc., 789 P.2d 541, 558 (Kan. 1991) (rejecting jury trial guarantee challenge to damage cap); Murphy v. Edmonds, 601 A.2d 102, 118 (Md. 1992) (same); *Pulliam*, 509 S.E.2d at 314 (same); Etheridge v. Med. Ctr. Hosps., 376 S.E.2d 525, 529 (Va. 1989) (same). *But see* Lakin v. Senco Prods., Inc., 987 P.2d 463, 475 (Or. 1999) (striking down cap).

136. *Samsel*, 789 P.2d at 558 (McFarland, J., concurring).

137. *See infra* Part II.C.3 (discussing legislative power over common law and implications for jury trial guarantees).

138. *See infra* Part II.C.3 (reasoning that when legislature abolishes cause of action, it abolishes right to jury determination of damages in action and that therefore right is not absolute).

139. *See, e.g., Samsel*, 789 P.2d at 557 (recognizing legislative power to alter common law); Branch v. Indemnity Ins. Co., 144 A. 696, 697 (Md. 1929) (same); Noonan v. City of Portland, 88 P.2d 808, 822 (Or. 1938) (same); Howell v. Commonwealth, 46 S.E.2d 37, 40 (Va. 1948) (same); *see also* Munn v. Illinois, 94 U.S. 113, 134 (1876) ("A person has no property, no vested interest, in any rule of the common law."); 1 SPEISER ET AL., THE AMERICAN LAW OF TORTS § 1:41, at 152 (commenting that statutes may abolish common law tort remedies).

140. *See* MD. CODE ANN., FAM. LAW §§ 3-101 to 3-103 (Michie 1999) (abolishing actions for breach of promise to marry and alienation of affections unless individual is pregnant); OR. REV. STAT. §§ 30.840 – 30.850 (1999) (abolishing actions for alienation of affections and

legislatures abolished common law actions for negligence against employers when they enacted workers compensation schemes.[141] Occasionally, parties have argued that abolishing common law actions interferes with the right to a jury trial in common law cases, but courts have rejected these arguments.[142] The Maryland Court of Appeals commented:

> [T]he constitutional right to a jury trial is concerned with whether the court or the jury shall decide those issues which are to be resolved in a judicial proceeding. Where, however, the General Assembly has provided that a matter shall not be resolved in a judicial proceeding, by legislatively abrogating or modifying a cause of action, no question concerning the right to a jury trial arises.[143]

Similarly, the Washington Supreme Court, in evaluating a challenge to a workers compensation law, found that

> the right to trial by jury accorded by the constitution, as applicable to civil cases, is incident only to causes of action recognized by law.... If the power to do away with a cause of action... exists in any case at all in the exercise of the police power of the state, then the right of trial by jury is thereafter no longer involved in such cases. The right of jury trial being incidental to the right of action, to destroy the one is to leave the other nothing upon which to operate.[144]

Logically, the power to abolish causes of action *a fortiori* includes the power to interfere with the right to a jury trial in those actions.[145]

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criminal conversation); VA. CODE ANN. § 8.01-220 (Michie 2000) (abolishing actions for alienation of affections, breach of promise to marry, criminal conversation, and seduction).

141. *See, e.g.*, KAN. STAT. ANN. § 44-501(b) (2000) (abolishing actions for compensation other than compensation provided by act); OR. REV. STAT. § 656.018(1)(a) (1999) (same); VA. CODE ANN. § 65.2-307 (Michie 2000) (abolishing actions "at common law or otherwise" for injuries covered under act).

142. *See, e.g.*, Mountain Timber Co. v. Wash., 243 U.S. 219, 235 (1917) ("[T]he act abolishes all right of recovery . . . and therefore leaves nothing to be tried by jury."); Boyd v. Bulala, 877 F.2d 1191, 1196 (4th Cir. 1989) (finding that abolition of cause of action does not violate Seventh Amendment); Branch v. Indemnity Ins. Co., 144 A. 696, 697 (Md. 1929) (finding that jury trial is not required in abolished common law action); Jacobs v. Adams, 505 A.2d 930, 940 (Md. Ct. Spec. App. 1986) (same); Pulliam v. Coastal Emergency Servs. of Richmond, Inc., 509 S.E.2d 307, 314 (Va. 1999) (same); State *ex rel.* Davis-Smith Co. v. Clausen, 117 P. 1101, 1119 (Wash. 1911) (finding that when legislature abolishes common law action, no right to jury trial exists in that action). A review of the cases reveals no challenges to the abolition of alienation of affections actions based on jury trial guarantees. However, in "almost all instances," courts have upheld statues abolishing causes of action for alienation of affections against various constitutional challenges. 7 SPEISER, *supra* note 139, § 22.5, at 556.

143. Murphy v. Edmonds, 601 A.2d 102, 116 (Md. 1992).

144. State *ex rel* Davis-Smith Co. v. Clausen, 117 P. 1101, 1119 (Wash. 1911); *cf.* Barnes v. Cauthen, 510 A.2d 930, 940 (Md. Ct. Spec. App. 1986) ("If there is no cause of action, there is nothing to which the right of trial by jury can attach.").

145. *See supra* notes 137-44 and accompanying text (concluding that abolishing cause of action does not interfere with right to jury trial).

Two conclusions emerge from this consideration. First, the right to have a jury assess damages in a common law action is not unlimited; legislatures can abolish it when they abolish a cause of action.[146] Second, damage caps simply abolish causes of action for damages in amounts above the statutory limit; the caps abolish the right to a jury trial with the cause of action.[147] Providing for a judge to resolve the question of the quantum of damages would certainly violate the jury trial guarantees, because a jury did assess damages at common law.[148] However, because the caps abolish the action for damages in excess of the cap altogether, they do not violate jury trial guarantees.

III. The Courts as Boss: Challenges to Damage Caps Based on Equal Protection, Due Process, and Special Legislation Clauses

The Fourteenth Amendment to the United States Constitution provides that no state shall "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."[149] State constitutions contain similar provisions, and sometimes also forbid the state from passing "special legislation."[150] In Illinois, Maryland, Ohio, and Virginia, litigants have assailed damage caps under these provisions.[151] Here again, the better-reasoned decisions uphold the caps.

A. Cases Rejecting Challenges

In *Etheridge v. Medical Center Hospitals*,[152] the Virginia Supreme Court rejected special legislation and equal protection challenges to its damage

146. *See supra* notes 143-45 and accompanying text (commenting that legislature can abolish right to jury trial when it abolishes cause of action).

147. *See Murphy*, 601 A.2d at 117 (reasoning that damage caps do not violate jury trial guarantee because they abolish cause of action for damages in excess of cap, and with it right to jury trial in those actions).

148. *See* Feltner v. Columbia Pictures Television, Inc., 523 U.S. 340, 355 (1998) (reversing judge who determined quantum of damages); *supra* Part II.C.1 (finding it function of common law jury to assess damages).

149. U.S. CONST. amend. XIV, § 1. The United States Supreme Court has found that damage caps do not offend the due process provision of the federal Constitution. *See* Duke Power Co. v. Carolina Envtl. Study Group, Inc., 438 U.S. 59, 182-84 (1978) (rejecting due process challenge to federal limit on nuclear accident liability); *cf.* Boyd v. Bulala, 877 F.2d 1191, 1196-97 (4th Cir. 1989) (declining to strike down damage cap under federal Due Process or Equal Protection Clauses).

150. For due process clauses, see ILL. CONST. art. I, § 2; MD. CODE ANN., MD. CONST., DECL. OF RIGHTS §23, OHIO CONST. art. I, § 16; and VA. CONST. art. I, § 11. For equal protection clauses, see ILL. CONST. art. I, § 2; OHIO CONST. art. I, § 16; and VA. CONST. art. I, § 11. For special legislation clauses, see ILL. CONST. art. IV, § 13 and VA. CONST. art. IV, § 14.

151. *See infra* notes 152-99 and accompanying text (outlining cases litigating damage caps under due process, equal protection, and special legislation clauses).

152. 376 S.E.2d 525 (Va. 1989).

cap.[153] In considering the special legislation challenge, the court explained that in Virginia, a statute survives a special legislation challenge if the classification it draws is "'a reasonable and not a arbitrary one,'" and if it "bears 'a reasonable and substantial relation to the object sought to be accomplished by the legislation.'"[154] The *Etheridge* court found that the cap of $750,000 in medical malpractice actions had a substantial relationship to the goal of ensuring a sufficient supply of doctors in Virginia.[155] The court further concluded that the statute did not create a classification at all.[156] Under its equal protection analysis, the court applied a "rational basis" test to the statute, asking whether the statute's alleged classification between slightly injured plaintiffs and severely injured plaintiffs promoted a legitimate state purpose.[157] Finding that it did, the court rejected the equal protection challenge.[158]

Ten years later in *Pulliam v. Coastal Emergency Services of Richmond, Inc.*,[159] the Virginia Supreme Court reaffirmed its holding in *Etheridge*.[160] The *Pulliam* court also faced a substantive due process challenge to the cap.[161] The court again applied a rational basis test and concluded that the statute was rationally related to a legitimate state purpose.[162]

In *Murphy v. Edmonds*,[163] the Maryland Court of Appeals addressed an equal protection challenge to its damage cap.[164] The plaintiffs rested their challenge to the damage cap entirely upon the theory that the court should subject the cap to intermediate or strict scrutiny rather than rational basis review.[165] The court reviewed the three levels of scrutiny associated with the

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153. Etheridge v. Med. Ctr. Hosps., 376 S.E.2d 525, 532-34 (Va. 1989). For a summary of *Etheridge*, see *supra* note 54.

154. *Id.* at 533 (quoting Mandell v. Haddon, 121 S.E.2d 516, 525 (Va. 1961); *Ex Parte* Settle, 77 S.E. 496, 497 (Va. 1913)).

155. *Etheridge*, 376 S.E.2d at 533.

156. *Id.*

157. *Id.* at 534.

158. *Id.*

159. 509 S.E.2d 307 (Va. 1999).

160. Pulliam v. Coastal Emergency Servs. of Richmond, Inc., 509 S.E.2d 307, 321 (Va. 1999). For a summary of *Pulliam*, see *supra* note 60.

161. *Id.* at 318-19.

162. *Id.*

163. 601 A.2d 102 (Md. 1991).

164. *See* Murphy v. Edmonds, 601 A.2d 102, 107-13 (Md. 1992) (evaluating and ultimately rejecting equal protection challenge to damage cap). For a summary of *Murphy*, see *supra* note 43. Maryland's Constitution has no express equal protection clause. *Murphy*, 601 A.2d at 107. However, the Maryland Court of Appeals has read an equal protection component into the Maryland Constitution's due process clause. *Id.*; *cf.* Bolling v. Sharpe, 347 U.S. 497, 499-500 (1954) (finding equal protection component in Fifth Amendment Due Process Clause).

165. *Murphy*, 601 A.2d at 111.

federal equal protection analysis, which the court declared identical with Maryland equal protection analysis.[166] The court found that rational basis review was the appropriate standard.[167] It then noted that the cap might create "greater ease in calculating premiums," attracting insurers into the Maryland market and ultimately reducing premiums.[168] Thus, the cap was "reasonably related to a legitimate legislative objective" – ensuring the availability of insurance in Maryland.[169] Courts in other states have rejected similar challenges.[170]

B. Cases Upholding Challenges

The Illinois Supreme Court struck down Illinois's cap on noneconomic damages in *Best v. Taylor Machine Works*.[171] The court based its conclusion on the "special legislation" clause of the Illinois constitution,[172] which guar-

166. *Id.* at 107-11; *see also id.* at 107 (finding that extent of Maryland equal protection clause parallels federal Equal Protection Clause).

167. *Id.* at 114.

168. *Id.* at 115.

169. *Id.*

170. *See* Fein v. Permanente Med. Group, 695 P.2d 665, 681, 682-84 (Cal. 1985) (rejecting due process and equal protection challenges to medical malpractice damages cap); Robinson v. Charleston Area Med. Ctr., Inc., 414 S.E.2d 877, 886-87 (W. Va. 1992) (same).

171. Best v. Taylor Mach. Works, 689 N.E.2d 1057, 1062-80 (Ill. 1997). Tort reform in Illinois passed as part of one comprehensive act; in *Best*, the Illinois Supreme Court struck down many of the provisions and declined to sever the unconstitutional ones from the others. *Id.* at 1105. Thus, the court struck down the entire Illinois tort reform package. *Id.* at 1106. The plaintiff was injured when operating a forklift at work and sued the manufacturer of the lift. *Id.* at 1064. Before trial, Best sought a declaratory judgment that the tort reform act, including the damage cap that would limit his recovery, was unconstitutional. *Id.* at 1065. The trial court granted the motion for a declaratory judgment and struck down the act. *Id.* The defendants appealed to the Illinois Supreme Court. *Id.* First, the court determined that the case was ripe for review. *Id.* at 1066. Then, the court decided that the cap violated the Illinois Constitution's prohibition against special legislation because the legislature lacked a rational basis for the classifications it created. *Id.* at 1075-77. The court also found that the cap, a "one-size-fits-all legislative remittitur," violated the doctrine of separation of powers. *Id.* at 1078-81. The court found the provision modifying the rules through which tortfeasors could seek contributions from employers under workers compensation to be either arbitrary or superfluous and hence unconstitutional. *Id.* at 1081-84. The act additionally had abolished joint and several liability except in medical malpractice cases, *id.* at 1087; finding no rational basis for the distinction between medical malpractice cases and other cases, the court struck down the provision, *id.* at 1089. Another provision of the act made all patient records discoverable in a medical malpractice proceeding. *Id.* The court declared that this provision violated separation of powers because it interfered with the "uniquely judicial function" of "[e]valuating the relevance of discovery requests and limiting such requests to prevent abuse or harassment." *Id.* at 1093. The *Best* court also opined that the section interfered with the right to privacy inherent in physician-patient relationships. *Id.* at 1100. Because the unconstitutional provisions of the act were not severable from the other provisions, the court voided the act *in toto*. *Id.* at 1103-04.

172. *See id.* at 1069; *cf.* ILL. CONST. art. IV, § 13 ("The General Assembly shall pass no special or local law when a general law is or can be made applicable.").

antees the same rights as an equal protection clause.[173] The plaintiffs contended that the statute created three impermissible classifications, the most important of which was a classification distinguishing between slightly injured and severely injured individuals.[174] The court determined that because none of the classifications involved a suspect class, they merited review under the rational-basis test.[175] Under rational basis review, the classifications need only relate rationally to a legitimate state interest.[176] The court found that the classifications did not meet that standard because there was no relationship between the "costs of tort liability" and the level of damages insurers paid in tort actions.[177] The court then commented that if there was a relationship, there was no rational basis for forcing tort victims (that is to say, the people who benefit from a defendant's tort liability) to bear the entire burden of reducing the costs of that liability.[178] Thus, it struck down the damages cap.[179]

In *Morris v. Savoy*,[180] the Ohio Supreme Court faced damage caps for the first time.[181] Four of the seven justices concluded that the damage cap vio-

173. *See Best*, 689 N.E.2d at 1070-71 ("A special legislation challenge generally is judged under the same standards applicable to an equal protection challenge.").

174. *Id.* at 1075. The other two classifications allegedly separated between individuals with identical injuries who suffer those injuries at different times and discriminated by kinds of injury. *Id.* Elaborating on the second classification, the court explained that an individual who loses one leg in an accident and subsequently loses the other leg in a different accident can sue both tortfeasors and recover the full amount of the cap twice. *Id.* An individual who loses both legs in the same accident, however, can recover the full amount of the cap only once. *Id.* Regarding the third classification, the plaintiffs complained that the statute covered torts involving physical injury and did not affect torts, like intentional infliction of emotional distress, that also involve noneconomic damages. *Id.* at 1075-76.

175. *Id.* at 1071. *But cf.* Carson v. Maurer, 424 A.2d 825, 830-31 (N.H. 1980) (applying intermediate scrutiny to cap).

176. *See Best*, 689 N.E.2d at 1070 (stating rational basis review standard).

177. *Id.* at 1077.

178. *Id.*

179. *Id.* at 1078.

180. 576 N.E.2d 765 (Ohio 1991).

181. Morris v. Savoy, 576 N.E.2d 765 (Ohio 1991). In *Morris*, the plaintiff had surgery after a car accident and emerged from the surgery paralyzed from the neck down. *Id.* at 767. The jury returned a verdict for $2,216,000. *Id.* The trial court certified to the Ohio Supreme court the question whether the law limiting recovery to $200,000 violated the Ohio Constitution. *Id.* First, the court determined that because no fundamental right or suspect class was involved, the proper standard for reviewing a damage cap is rational basis scrutiny. *Id.* at 769-70. Engaging in substantive due process analysis, the court was unable to find "any evidence to buttress the proposition that there is a rational connection between awards over $200,000 and malpractice insurance rates." *Id.* at 770. The court also stated without discussion that the statute was "unreasonable and arbitrary." *Id.* at 771. Therefore, it struck down the cap as unconstitutional. Turning to an equal protection analysis, the court took note that the statute applied only to medical malpractice actions, and therefore created a classification between medical malpractice victims and other tort victims. *Id.* Nevertheless, the court found a rational basis for the distinc-

lated the due process clause of the Ohio Constitution.[182] Substantive due process in Ohio requires that a statute "bear a real and substantial relation to the public health, safety, or morals or general welfare" and that it not be "unreasonable or arbitrary."[183] The issue before the court was whether "any conceivable set of facts under which the classification rationally furthered a legitimate state objective" existed.[184] The court found no "rational connection" between large damage awards against doctors and [high] medical malpractice insurance rates,[185] and it opined that the General Assembly should explain itself better if it wanted the next statute upheld.[186] Thus, the *Morris* court struck down the cap as unconstitutional.[187] Turning to the other challenged portion of the statute, which partially abrogated the collateral source rule, the court concluded that no equal protection violation existed.[188] Preaching the wisdom of judicial restraint, the court found that a rational basis existed for treating medical malpractice victims differently than other tort victims.[189]

The struggle between the legislature and the court was not over. The legislature repealed the legislation *Morris* had struck down and enacted a new damage cap applying to all tort claims, not just to medical malpractice claims.[190] Obviously frustrated by the court, the legislature made a finding declaring that it had a "rational and legitimate state interest" in stabilizing liability costs and cited studies showing that damage caps would achieve that goal.[191]

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tion and rejected the equal protection analysis. *Id.* at 772. Reviewing the second challenged part of the statute, the court upheld the partial abrogation of the collateral source rule, and found that it was not "unreasonable or arbitrary" to deny double recovery to a plaintiff. *Id.*

182. *Id.* at 771; *id.* at 777 (Sweeney, J., concurring in part and dissenting in part).

183. *Id.* at 769 (quoting Mominee v. Scherbarth, 503 N.E.2d 717, 720-21 (Ohio 1986)).

184. *Id.* at 770 (quoting Denicola v. Providence Hosp., 387 N.E.2d 231, 234 (Ohio 1979)). Justice Sweeney's disagreement with the majority centered on this issue. He would have applied strict scrutiny to the cap, reasoning that it burdened the right to a jury trial. *Id.* at 779-80 (Sweeney, J., concurring in part and dissenting in part).

185. *Id.* at 770.

186. *See id.* at 771 ("Conceivably, such evidence [of the relationship between caps and premiums] may exist, but that would require a second trip to the General Assembly.").

187. *Id.*

188. *Id.* at 772; *see also id.* at 773 (describing statute's partial abrogation of collateral source rule).

189. *See id.* at 771-73 (upholding statute against equal protection attack). The statute voided in *Morris* applied only to medical malpractice claims. *Id.* at 768.

190. *See* State *ex rel.* Ohio Acad. of Trial Lawyers v. Sheward, 715 N.E.2d 1062, 1091-95 (Ohio 1999) (reporting repeal of older tort reform law and enactment of new one).

191. *See* Act of Sept. 26, 1996, Am. Sub. H.B. 350, 146 Ohio Laws 3567, 4028 (citing state's interest in "stabilizing costs" as reason for enacting damage cap). The legislature declared that damage caps would further the legitimate state interest in "stabiliz[ing] the costs of health care delivery, manufacturing, and the delivery of services." *Id.* The damage cap was part of a comprehensive tort reform bill. *See id.* (declaring purpose to enact "changes in the laws

The Ohio Academy of Trial Lawyers filed an action in the Ohio Supreme Court demanding a writ of prohibition enjoining Ohio trial court judges from enforcing the new tort reform law.[192] In *State ex rel. Ohio Academy of Trial Lawyers v. Sheward*,[193] the court granted the writ.[194] At times, the court seemed almost angry at the legislature; according to the court, both the court and the legislature have "respect[ed] the integrity and independence of [each] other, that is, until now."[195] The court accused the legislature of passing laws to attack the judiciary as a coordinate branch of government.[196] Turning to the damage cap question, the court again found that the cap violated substantive

pertaining to tort and other civil actions"); *supra* note 16 (describing provisions of 1999 Ohio tort reform act). The act "respectfully disagree[d]" with Ohio Supreme Court decisions rejecting tort reform legislation. *Sheward*, 715 N.E.2d at 1095. According to a later description, the act attempts to "declare itself constitutional." *Id.* A legislature can not pass a law that declares itself to be constitutional. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is empathetically the province and duty of the judicial department to say what the law is."). Nevertheless, the fact that the legislature passed the 1996 act, despite the holding in *Morris*, demonstrates the fierceness of the struggle this Note describes.

192. *Sheward*, 715 N.E.2d at 1068.

193. 715 N.E.2d 1062 (Ohio 1999).

194. State *ex rel.* Ohio Acad. of Trial Lawyers v. Sheward, 715 N.E.2d 1062, 1111 (Ohio 1999). *Sheward* was an original action in the Ohio Supreme Court by the Ohio Academy of Trial Lawyers, seeking an extraordinary writ against the enforcement of the comprehensive Ohio tort reform act. *Id.* at 1068; *see also supra* note 16 (describing Ohio tort reform bill). The court began by accusing the legislature of waging a frontal attack on the independence of the judiciary. *Sheward*, 715 N.E.2d at 1071-75. Looking at the history of the Ohio court system, the court demonstrated that Ohio courts have claimed the authority to pass on the constitutionality of statutes since the mid-nineteenth century. *Id.* at 1076-79. The court then determined that the case was an appropriate one for an extraordinary writ because the legislature had egregiously overstepped the bounds of its authority. *Id.* at 1079-85. Turning to the specific claims, the court struck down a statue of repose for construction services. *Id.* at 1087. The court found that the statute attempted to overrule a previous decision striking down statutes of repose and to enact the legal reasoning of the dissenting opinion. *Id.* The justices also voided a provision that required a plaintiff to get a certificate of merit before filing a medical malpractice claim on the grounds that it interfered with judicial authority to set rules of procedure for courts. *Id.* at 1087-88. Next, the court struck down the legislature's attempt to modify the collateral source rule on substantive due process grounds. *Id.* at 1090. Then, the court found that the cap on punitive damages violated the state constitution's guarantee of a jury trial. *Id.* at 1091. Regarding the noneconomic damages cap, the court found that it violated substantive due process because it bore no rational relationship to a legitimate state interest. *Id.* at 1091-95. The court also rejected the legislature's attempt to fix the summary judgment standard for toxic tort cases, *id.* at 1095-96, and to force the admission of evidence that an expert witness and a defendant had a common insurer, *id.* at 1096. Finally, the court further declared that the tort reform bill violated the one-subject rule of the Ohio Constitution because "tort reform" was too broad a subject for one bill. *Id.* at 1097-1102.

195. *Id.* at 1073. The court apparently considered that its earlier decision in *Morris*, striking down the noneconomic damages cap on substantive due process grounds, "respect[ed] the integrity and independence" of the Ohio legislature.

196. *Id.* at 1071.

due process.[197] The court then dismissed the legislature's finding that the cap bore a rational relationship to a legitimate state goal. The findings were "judicial, not legislative in nature, and are being used to justify the reenactment of legislation already determined to be unconstitutional."[198] "[N]o constitutional difference" existed between the new statute and the one voided in *Morris*; thus, the tort reform act could not stand.[199]

C. *Analysis of the Challenges*

When challenging damage caps under due process, equal protection, and special legislation clauses, parties have focused on two general arguments: First, parties often claim that the caps fail scrutiny under the substantive component of due process clauses.[200] Second, they generally contend that the caps create a legislative classification among injury victims – a classification they find impermissible under equal protection and special legislation clauses.[201] As demonstrated below, both arguments are flawed.[202]

1. *Substantive Due Process Challenges and Rational Basis Analysis*

The first step in any due process analysis is to ascertain the standard of review.[203] The federal scheme for resolving substantive due process challenges involves a two-tiered test. First, when a statute infringes upon fundamental rights, the federal standard requires that a court review the statute using strict scrutiny.[204] However, if no fundamental right is implicated, the Due Process Clause of the federal Constitution requires only that the statute have a rational relationship to a legitimate state interest.[205] In Virginia, courts

197. *Id.* at 1091-95.

198. *Id.* at 1094.

199. *Id.*

200. *See* Morris v. Savoy, 576 N.E.2d 765 (Ohio 1991) (upholding challenge to damage cap based on substantive due process); Pulliam v. Coastal Emergency Servs. of Richmond, Inc., 509 S.E.2d 307, 317 (Va. 1999) (rejecting similar challenge).

201. *See* Best v. Taylor Mach. Works, 689 N.E.2d 1057, 1069-78 (Ill. 1997) (sustaining special legislation and equal protection challenge to damage cap); Murphy v. Edmonds, 601 A.2d 102, 116 (Md. 1992) (rejecting equal protection challenge to damage cap); Etheridge v. Med. Ctr. Hosps., 376 S.E.2d 525, 534 (Va. 1989) (same).

202. *See infra* Parts III.C.1 & III.C.2 (elaborating on flaws in due process and equal protection arguments).

203. *See* Sammon v. N.J. Bd. of Med. Examiners, 66 F.3d 639, 643-44 (3d Cir. 1995) (explaining first step of due process analysis).

204. *See* Roe v. Wade, 410 U.S. 113, 155 (1973) (finding that infringement upon fundamental rights requires court to exercise strict scrutiny).

205. *See* Williamson v. Lee Optical Co., 348 U.S. 483, 491 (1955) (upholding statute against due process challenge because it was rationally related to legislative objective).

explicitly have stated that the due process clause of the state constitution has the precise meaning and scope of the Due Process Clause of the federal Constitution.[206] In Ohio, the "due course of law" provision of the state constitution[207] provides the same protections as the Due Process Clause of the Fourteenth Amendment.[208] Thus, both Virginia and Ohio employ the same two-tiered structure for due process analysis that the federal Constitution employs: strict scrutiny for statutes implicating a fundamental right and rational basis scrutiny for other statutes.[209]

The Virginia Supreme Court found that a damage cap implicated no fundamental right and thus employed rational basis review, despite the pleas of the plaintiffs for a more searching level of scrutiny.[210] In Ohio, the plurality of the *Morris* Court also determined that the damages cap affected no "fundamental right or suspect class" and thus qualified for review under the rational basis test.[211] Later, in *Sheward*, a majority of the Ohio court endorsed the *Morris* language, but cautioned against reading that language as a holding that the damages cap did not interfere with the right to trial by jury.[212] Neverthe-

206. *See* Leftwich v. Bevilacqua, 635 F. Supp. 238, 243 (W.D. Va. 1986) (finding that Virginia due process clause has same meaning as federal clause); *cf.* Archer v. Mayes, 194 S.E.2d 707, 711 (Va. 1973) (commenting that Virginia equal protection clause is identical in meaning to federal clause).

207. OHIO CONST. art. I, § 16.

208. *See* Keeton v. Mansifield Obstetrics & Gynecology Assocs., No. C80-1573A, 1981 WL 36207, at *6 (N.D. Ohio Mar. 5, 1981) (stating that state due course of law clause is equivalent in meaning to federal one, and analyzing state claim under federal clause); Sorrell v. Thevenir, 633 N.E.2d 504, 511 (Ohio 1994) ("The 'due course of law' provision [of OHIO CONST. art. I, § 16] is the equivalent of the 'due process of law' provision in the Fourteenth Amendment to the United States Constitution."); State *ex rel.* Heller v. Miller, 399 N.E.2d 66, 67 (Ohio 1980) ("We look to federal case law to delineate [due process and equal protection rights] under both the state and federal provisions."); City of Cleveland v. Nutter, 646 N.E.2d 1209, 1210 (Ohio Mun. Ct. 1995) (finding federal and state due process guarantees "substantially equivalent"). *But see* Stanton v. State Tax Comm'n, 151 N.E. 760, 764 (Ohio 1921) (suggesting state guarantee may be broader than federal one).

209. *See* Morris v. Savoy, 576 N.E.2d 765, 769-70 (Ohio 1991) (noting strict scrutiny standard for due process analysis when statute implicates fundamental right, and rational basis standard otherwise); Pulliam v. Coastal Emergency Servs. of Richmond, Inc., 509 S.E.2d 307, 318 (same); *see also* Roe v. Wade, 410 U.S. 113, 155 (1973) (finding similar standards under federal Constitution.).

210. *See Pulliam*, 509 S.E.2d at 318 (rejecting plaintiff's argument for strict scrutiny because court found no fundamental right implicated by damage cap).

211. *See Morris*, 576 N.E.2d at 769-70 (determining that rational basis review is correct level of scrutiny for damage cap).

212. *See* State *ex rel.* Ohio Acad. of Trial Lawyers v. Sheward, 715 N.E.2d 1062, 1091-92 & n.14 (1999) (quoting *Morris* rational basis test, but implying that damages cap might implicate jury trial guarantee). One Justice found that the damages cap implicated the right to trial by jury; he applied strict scrutiny and determined that the cap could not survive. *See Morris*,

less, the *Sheward* Court used the rational basis test, not the strict scrutiny test, to strike down the new damages cap.[213] In Ohio and Virginia, the rational basis test appears to be the correct one for classifications disadvantaging tort victims.[214]

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576 N.E.2d at 780-81 (Sweeney, J., concurring in part and dissenting in part) (applying strict scrutiny to strike down damages cap).

213. *See Sheward*, 715 N.E.2d at 1095 (striking down damage cap because it is "unreasonable and arbitrary," language from the rational basis test).

214. *Cf. supra* Part III.A (explaining that damage caps do not violate jury trial guarantees). Although the Note has not undertaken a full analysis of the Ohio jury guarantee provision, the provision is similar enough to those examined above that it appears likely a damage cap would not violate the guarantee for the same reasons the damage caps of other states should survive. Ohio guarantees jury trials only in those actions cognizable at common law. *See* Belding v. State *ex rel.* Heifner, 169 N.E. 301, 302 (Ohio 1929) (finding jury trial exists only in actions cognizable at common law at time constitution was adopted); *cf. supra* notes 69-76 and accompanying text (same). Like other states upholding the cap from attack under jury trial guarantees, Ohio recognizes no right to judgment on a jury verdict. *See* Bartlebaugh v. Penn. Ry. Co., 82 N.E.2d 853, 855 (Ohio 1948) (upholding remittitur from state constitutional attack); *cf. supra* notes 93-107 and accompanying text (finding no right to judgment on jury verdict). Moreover, the Ohio legislature can abolish common law causes of action. *See* Clifton Hills Realty Co. v. City of Cincinnati, 21 N.E.2d 993, 998 (Ohio Ct. App. 1938) ("'A person has no right, no vested interest, in any rule of the common law.'" (quoting Munn v. Illinois, 94 U.S. 113, 134 (1876))); *cf. supra* notes 137-45 and accompanying text (explaining that damage caps are legislative abolitions of actions for damages in excess of amount of cap). Thus, damage caps should survive jury-trial guarantee attacks in Ohio for the same reasons they should in other states.

Some state courts have found a constitutional right to full recovery in tort and have therefore applied a higher level of scrutiny. *See* David Randolph Smith, *Battling a Receding Tort Frontier: Constitutional Attacks on Medical Malpractice Laws*, 38 OKLA. L. REV. 195, 205-06 (1985) (finding that Arizona and Montana treat full recovery in tort as fundamental right). The Montana Supreme Court applied strict scrutiny to a damage cap because of its determination that full recovery in tort was a fundamental right and, thus, struck down the cap. White v. State, 661 P.2d 1272, 1275 (Mont. 1983). Other states, such as New Hampshire, Idaho, North Dakota, and Indiana, have applied intermediate scrutiny to tort reform efforts. Smith, *supra*, at 206-10. If the constitution contains no language guaranteeing full recovery in tort as a fundamental right, applying a heightened level of scrutiny arguably involves a judicial attempt to rewrite the substantive tort law. *See id.* at 205 (stating that state cases recognizing fundamental right to full recovery in tort ignore federal decisions "upholding economic and social legislation under rationality principles"). At least one commentator has suggested a relationship between the standard of review and the survival of the cap. *See* Andersen, *supra* note 33, at 336 & n.54 (opining that caps subjected to heightened scrutiny are adjudicated unconstitutional and that ones subjected to rational basis scrutiny survive). That observation was not true in Ohio. *See Morris*, 576 N.E.2d at 771 (striking down damage cap under rational basis review).

Still other states explicitly ban damage caps in their constitutions, which is a legitimate way to prohibit them without any judicial overreaching. *See* ARIZ. CONST. art. 18, § 6 ("The right of action to recover damages for injuries shall never be abrogated, and the amount recovered shall not be subject to any statutory limitation."); Smith, *supra*, at 205-06 (discussing Arizona constitutional ban on damage caps). The Ohio and Virginia constitutions have no such provisions.

In both Ohio and Virginia, due process analysis entails review under a standard similar to the federal one under which a statute survives if it is "rationally related to legitimate government interests."[215] In both states, the test is not very searching. In Virginia, a court should resolve all doubts about legislation in favor of its constitutionality.[216] "If any state of facts can be reasonably conceived that would sustain [a statute], that state of facts at the time the law was enacted must be assumed."[217] Ohio courts likewise acknowledge that they must uphold a statute if "any conceivable set of facts"[218] exists under which the statute rationally furthers "any possible legitimate end of government."[219]

Furthermore, in many Ohio court opinions rational basis analysis is as cursory in practice as it seems in theory.[220] In a case decided just two years ago, the Ohio Supreme Court took three sentences to decide that a statute created jobs, that creation of jobs is a legitimate state purpose, and that the questioned statute is constitutional.[221] One Ohio Court of Appeals case simply quoted the legislative statement of purpose to satisfy the legitimate state interest component of due process analysis.[222] In another case, the Ohio Supreme Court seemed quite willing to speculate on what reasons might exist for a statute.[223]

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215. Washington v. Glucksberg, 521 U.S. 702, 728 (1997). The Virginia Supreme Court articulates the test slightly differently, upholding the statute if it "has a reasonable relation to a proper purpose and is not arbitrary or discriminatory." Pulliam v. Coastal Emergency Servs. of Richmond, Inc., 509 S.E.2d 307, 318 (Va. 1999). The Ohio test is similar. The Ohio Supreme Court will uphold a statute if it "bears a real and substantial relationship to 'public health or welfare'" and if it is not "'unreasonable and arbitrary'." Morris v. Savoy, 576 N.E.2d 765, 769 (Ohio 1991); *cf.* Nebbia v. New York, 291 U.S. 502, 537 (1934) (upholding statute that has "a reasonable relation to a proper legislative purpose" and is not "arbitrary [or] discriminatory").

216. *See* King v. Va. Birth-Related Neurological Injury Comp. Program, 410 S.E.2d 656, 659 (Va. 1991) (commenting that courts should resolve doubts about constitutionality of statute in favor of upholding it).

217. Martin's Ex'rs v. Commonwealth, 102 S.E. 77, 80 (Va. 1920). Although the *Martin's* court made this statement in a special legislation context, the court has applied this language to due process claims also. *See King*, 410 S.E.2d at 659-60 (applying *Martin's* equal protection analysis to due process claim).

218. *Morris*, 576 N.E.2d at 770.

219. Envirosafe Servs. of Ohio, Inc. v. City of Oregon, 609 N.E.2d 1290, 1292 (Ohio Ct. App. 1992) (citing Exxon Corp. v. Governor of Maryland, 437 U.S. 117 (1978)).

220. *See supra* notes 215-19 and accompanying text (outlining rational basis test).

221. *See* Desenco, Inc. v. City of Akron, 706 N.E.2d 323, 333 (Ohio 1999) (upholding statute from substantive due process attack with cursory, conclusory analysis); *cf.* Palm Beach Mall, Inc., v. Cuyahoga County Bd. of Revision, 645 N.E.2d 767, 772 (Ohio Ct. App. 1994) (determining in one paragraph that tax statute rationally related to orderly administration of state tax system).

222. *See Envirosafe*, 609 N.E.2d at 1293-94 (quoting legislative declaration of purpose to find legitimate government purpose in challenged statute).

223. *See* Holloway v. Brown, 403 N.E.2d 191, 198 (Ohio 1980) (finding that state can

Nevertheless, in the tort reform context of *Morris*, the court found that Ohio's damages cap failed the cursory rational basis test.[224] A fortiori, the *Morris* Court must have concluded that it could conceive of no set of facts under which a damage cap would rationally relate to a legitimate state interest.[225] The Ohio Legislature stated that it was stabilizing the "costs of health care delivery, manufacturing, and the delivery of services."[226] Stabilizing the costs of health care delivery seems like a legitimate state interest, and the *Morris* court did not suggest otherwise in its opinion. However, in a lengthy analysis, the court determined that the cap would not have the effect of stabilizing liability costs.[227] This conclusion is poorly reasoned in at least two ways.

First, the evidence on the effectiveness of caps is at least inconclusive. The *Morris* court cited a study that suggested no relationship between damage caps and insurance premiums.[228] Nevertheless, some scholars have disagreed with the court.[229] Liability insurance premiums increased sharply in the mid-1970s, and again in the mid-1980s.[230] One scholar noted that in the years 1974 and 1975, malpractice insurance premiums in some states increased by over 300%.[231] In response to higher awards, insurers "jacked up their rates, reduced coverage limits, and increased deductibles."[232] From 1984 to 1986, medical malpractice insurance premiums almost doubled.[233] Insurers and re-insurers

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regulate professional donation solicitors because regulations rationally relate to "much greater potential for misrepresentation and fraud" inherent in solicitors' actions).

224. *See* Morris v. Savoy, 576 N.E.2d 765, 785 (Ohio 1991) (striking down damage cap on due process grounds).

225. *Cf. id.* at 770 (commenting that statutes will be upheld if they pass rational basis test on any conceivable set of facts).

226. *See* Act of Sept. 26, 1996, Am. Sub. H.B. 350, 146 Ohio Laws 3567, 4028 (citing state's interest in "stabilizing costs" as reason for enacting damage cap).

227. *See Morris*, 576 N.E.2d at 770-71 (arguing that damage cap has no relationship to liability insurance premiums).

228. *See id.* (citing Texas Supreme Court study disputing correlation between malpractice insurance premiums and damage caps, and citing similar study by Insurance Service Organization). The court implicitly suggested that there was no liability crisis at all. *Id.* at 771.

229. *See infra* notes 230-41 and accompanying text (discussing scholarly debate over liability crisis).

230. *See* HUBER, *supra* note 11, at 138 (comparing cost increases in mid-70s and 80s to sudden earthquake).

231. Patricia M. Danzon, *Medical Malpractice Liability*, *in* LIABILITY: PERSPECTIVES AND POLICY 101, 101 (Robert E. Litan & Clifford Winston eds., 1988). Danzon blamed the increase on "rising claim costs." *Id*; *cf.* Scott E. Harrington, *Liability Insurance: Volatility in Prices and in the Availability of Coverage*, *in* TORT LAW AND THE PUBLIC INTEREST 47, 77 (Peter H. Schuck ed., 1991) (blaming rate increases of 1980s on "underestimated growth in claim costs").

232. HUBER, *supra* note 11, at 138.

233. W. Kip Viscusi & Patricia Born, *Medical Malpractice Insurance in the Wake of Liability Reform*, 24 J. LEGAL STUD. 463, 463 (1995).

either escalated prices sharply or simply stopped writing policies altogether.[234] These rising liability costs continued to plague the healthcare industry into the 1990s.[235] Dealing with such a situation certainly seems like an important state interest, especially if the difficulty in obtaining insurance reduced the availability of medical services to the public.[236]

Furthermore, it appears that very large damage awards – the ones limited by damage caps – accounted for a disproportionate fraction of the total amount spent paying tort judgments.[237] One study indicated that half of all dollars paid to settle medical malpractice claims went to satisfy only five percent of claims filed.[238] The study also found that the rate of increase in premiums was smaller in states that had enacted damage caps.[239] A 1995 study of malpractice insurance in the late 1980s concluded that damage caps eased the crisis by making the insurance business profitable again.[240]

Whether there indeed is a liability crisis in the country or whether damage caps affect the crisis, issues that scholars sharply dispute,[241] lies beyond

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234. *See* HUBER, *supra* note 11, at 141 (reporting that insurers and reinsurers pulled out of American market in mid-80s, viewing it as "'banana republic'"). Huber blamed escalating jury verdicts for the cost increases and pointed out that it is difficult for an insurer to predict what noneconomic damages a jury would award, for instance, to a mother rendered sterile by a defective contraceptive device. *Id.* at 140. Because of this uncertainty, insurers raised rates to a level that assured them a profit. *Id.* at 141. Even this practice sometimes failed to provide sufficient funding to meet obligations, so some insurers stopped issuing the policies. *Id.* In 1986, thirty cities in California were unable to obtain any liability insurance coverage at all. *Id.* at 139; *see also* George L. Priest, *Puzzles of the Tort Crisis*, 48 OHIO ST. L.J. 497, 497 (1987) (referring to "the withdrawal of the insurance industry from the business of insurance").

235. *See* Smith, *supra* note 214, at 196-200 (summarizing 1980s studies showing crisis in tort system); American Tort Reform Association, *Facts or Fiction: You Be the Judge, available at* http://www.atra.org/factfict.htm (last visited Feb. 24, 2001) (finding that liability costs increased by 10% per year from 1990-1994, when inflation averaged 3 to 4% (citing TILLINGHAST POWERS PERRIN, TORT COST TRENDS: AN INTERNATIONAL PERSPECTIVE (1995)).

236. *Cf.* Pulliam v. Coastal Emergency Servs. of Richmond, Inc., 509 S.E.2d 307, 315 (Va. 1999) (noting legislative determination that increase in liability insurance decreased availability of medical services and threatened public health).

237. *See* Shirley Brantingham, *Civil Justice Reform: The Continuing Search for Balance*, 10 HAMLINE L. REV. 387, 401-02 (1987) (quoting PATRICIA DANZON, NEW EVIDENCE ON THE FREQUENCY AND SEVERITY OF MEDICAL MALPRACTICE CLAIMS 3 (1986) (reporting that large damage awards constitute a disproportionate fraction of total amount of tort judgments)).

238. Patricia M. Danzon, *The Effects of Tort Reforms on the Frequency and Severity of Medical Malpractice Claims*, 48 OHIO ST. L.J. 413, 416 (1987).

239. *See* Danzon, *supra* note 231, at 101-02 ("[T]he rate of increase [of premiums] was somewhat slower in states that enacted caps on awards and collateral source offsets.").

240. *See* Viscusi & Born, *supra* note 233, at 488-90 (concluding that damage caps in Michigan and Wisconsin resulted in a "clear-cut shift in the performance of liability insurance").

241. *Compare* Danzon, *supra* note 238, at 413-17 (arguing that crisis exists and tort reforms ameliorate it), *with* Richard L. Abel, *The Real Tort Crisis – Too* Few *Claims*, 48 OHIO

the scope of this Note. However, the truth of the studies is less important than the notion that they form a "conceivable set of facts" from which the Ohio Legislature could conclude that its statute furthered the state's interest in controlling liability costs for doctors and businesses.[242] The *Morris* court correctly stated the correct rational basis test, but misapplied it.[243] Intuition suggests that reducing large tort awards will reduce the level of the premiums necessary to fund the awards. This may be factually wrong, but it is at least plausible.[244] By finding that the damages cap did not rationally relate to the need to reduce the costs of liability, the Ohio Supreme Court essentially disagreed with the legislature in an inconclusive scholarly debate about the existence, scope, and solution to a tort liability crisis.

The second failure in the *Morris* court's reasoning is that it interferes with legislative prerogatives much like the now discredited United States Supreme Court decision in *Lochner v. New York*.[245] In *Lochner*, the Court

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ST. L.J. 443, 446 (1987) (asserting that no liability crisis exists because insurance premiums still represent a miniscule portion of costs), *and* Marc Galanter, *Real World Torts: An Antidote to Anecdote*, 55 MD. L. REV. 1093, 1120-26 (1996) (opining that noneconomic damage awards are not arbitrary and are not growing as quickly as awards for economic loss). Of course, Benjamin Disraeli once commented that "[t]here are three kinds of lies: lies, damned lies and statistics." THE OXFORD DICTIONARY OF QUOTATIONS 249 (1992).

242. *See* Morris v. Savoy, 576 N.E.2d 765, 769 (Ohio 1991) (articulating concerns of Ohio General Assembly); *see also* Minnesota v. Clover Leaf Creamery Co., 449 U.S. 467, 464 (1981) (finding under rational basis test that legislature is "not required to convince the courts of the correctness of their legislative judgments"). The question for determination, according to the *Clover Leaf* Court, was whether the party challenging the statute showed that the facts supporting the statute's rationality "'could not reasonably be conceived to be true by the governmental decisionmaker.'" *Id.* (quoting Vance v. Bradley, 440 U.S. 93, 111 (1979)). If the question is "at least debatable" – and judging from the scholarly material on damage caps, it is – the court must uphold the statute under rational basis review. *See* United States v. Carolene Prods. Co., 304 U.S. 144, 154 (1938) (restricting inquiries into legislative judgment).

243. *Cf. Morris*, 576 N.E.2d at 770 (declaring that statute must stand if "any conceivable state of facts" makes it rationally relate to a legitimate state objective).

244. *See supra* notes 239-40 and accompanying text (discussing evidence that caps ameliorate liability crisis).

245. 198 U.S. 45 (1905). In *Lochner*, the defendant employer was convicted of violating a New York labor law that prohibited an employee from working more than sixty hours per week. Lochner v. New York, 198 U.S. 45, 52 (1905). In the United States Supreme Court, he contended that his conviction violated the Due Process Clause of the Fourteenth Amendment. *Id.* at 53. The Supreme Court determined that the right to make a contract was part of the substantive liberty of the individual protected by the Constitution. *Id.* This liberty included the right of a laborer to sell as much labor as he liked. *Id.* Nevertheless, the Court decided that a state could exercise its police powers to prevent the making of certain contracts; thus, the police power comes into conflict with individual liberty. *Id.* at 53-54. The resolution of that conflict turned on whether the state's exercise of its police power was "fair, reasonable, and appropriate" or "unreasonable, unnecessary and arbitrary." *Id.* at 56. The Court found that there was no

invoked the Fourteenth Amendment to invalidate a piece of socio-economic legislation, a law establishing a maximum sixty-hour workweek in bakeries.[246] The legal theories underlying the Ohio Supreme Court's decisions in *Morris* and *Sheward* are strikingly similar to those supporting *Lochner*, a decision later Supreme Court cases sharply repudiated.[247] In all three cases, courts took sides in a policy dispute. In *Lochner*, the dispute was over whether laissez-faire was an appropriate economic policy.[248] In *Morris* and *Sheward*, the question was whether damage caps are useful to solve a liability crisis.[249] In each instance, the result was the same: The court read its own economic theories into a constitution, creating a faulty precedent allowing the nullifica-

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"reasonable foundation" for the act because there was no relationship to the number of hours worked and the health of a worker. *Id.* at 58-60, 64. The Court upbraided legislatures for their "interference . . . with the ordinary trades and occupations of the people." *Id.* at 63. Thus, the Court reversed the conviction. *Id.* at 64-65.

246. *See id.* at 52 (stating facts); *id.* at 64 (striking down law). Justice Holmes vigorously dissented. *Id.* at 74. He accused the Court of reading its economic theories into the Fourteenth Amendment, theories to which some scholars did not subscribe. *See id.* at 75 (Holmes, J., dissenting) ("[A] constitution is not intended to embody a particular economic theory.").

247. *See* Ferguson v. Skrupa, 372 U.S. 726, 730 (1963) (rejecting *Lochner*). The Court found that:

> The doctrine that prevailed in *Lochner* . . . and like cases – that due process authorizes courts to hold laws unconstitutional when they believe the legislature has acted unwisely – has long since been discarded. We have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws.

Id. Many commentators have noticed the resemblance between decisions voiding damage caps and the *Lochner* decision. *See* Brief for Amicus Curiae, Product Liability Advisory Council at 14-16, State *ex rel.* Ohio Acad. of Trial Lawyers v. Sheward, 715 N.E.2d 1062 (Ohio 1999) (arguing that striking down cap would resemble decision in *Lochner*); Smith, *supra* note 214, at 207 (identifying *Lochner* resemblance); Richard C. Turkington, *Constitutional Limitations on Tort Reform: Have the State Courts Placed Insurmountable Obstacles in the Path of Legislative Responses to the Perceived Liability Insurance Crisis?*, 32 VILL. L. REV. 1299, 1308-10 (1987) (same). Turkington suspected that

> [i]f Justice Holmes were alive today and tort reform legislation were challenged under due process and equal protection claims, he would say that the fourteenth amendment was not intended to embody the economic policies of the Insurance Institute and those who support tort reform, or the theories of social justice espoused by the American Trial Lawyers Association and others who oppose tort reform,

id. at 1309, just as Holmes wrote in 1905 that "[t]he Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics." *Lochner*, 198 U.S. at 75 (Holmes, J., dissenting).

248. *See Lochner*, 198 U.S. at 63 (criticizing legislature for interfering in economy).

249. *See* State *ex rel.* Ohio Acad. of Trial Lawyers v. Sheward, 715 N.E.2d 1062, 1092 (Ohio 1999) (finding no relationship between damage caps and insurance premiums) (Ohio 1999); Morris v. Savoy, 576 N.E.2d 765, 770-71 (Ohio 1991) (same).

tion of laws with which the judiciary disagrees.[250] The Supreme Court has since spoken of its "abandonment of the use of the 'vague contours' of the Due Process Clause to nullify laws which a majority of the Court believed to be economically unwise."[251] Yet, it seems *Lochner* is alive and well in Ohio. To allow a court to sit as a "superlegislature" for the review of Ohio law is contrary to the Ohio Constitution.[252]

The evidence demonstrates that there is a set of facts from which a legislature could conclude that capping damages would help solve the liability insurance crisis.[253] That should end the rational basis inquiry.[254] When courts strike down damage caps based on substantive due process, they usurp legislative power in a way the nation's highest court long ago repudiated.[255]

2. *Equal Protection and Special Legislation Analysis*

In Illinois, Virginia, and Maryland, courts have adjudicated challenges to damage caps based on equal protection and special legislation clauses of the state constitution.[256] Unlike a due process challenge, which focuses on the reasonableness of a law as a whole, an equal protection or special legislation challenge reviews the propriety of a statutory classification.[257] The state equal protection clauses bear a close relationship to their federal counterpart, and create the same standard of review.[258]

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250. *Compare Lochner*, 198 U.S. at 62 (opining that it is "unreasonable and entirely arbitrary" to think that relationship exists between health and hours worked), *with Morris*, 576 N.E.2d at 770 (finding no "rational connection" between high jury verdicts and malpractice insurance rates).

251. *Ferguson*, 372 U.S. at 731.

252. *See Sheward*, 715 N.E.2d 1062, 1071 (stating that Ohio court will not inquire into wisdom of statute because that inquiry is legislative function). *Compare* OHIO CONST. art IV, § 1 (authorizing *judicial* branch to exercise *judicial* power), *with* OHIO CONST. art II, § 1 (authorizing *legislative* branch to exercise *legislative* power) (emphasis added).

253. *See supra* notes 228-40 and accompanying text (sketching empirical data).

254. *See supra* notes 215-19 and accompanying text (outlining rational basis standard).

255. *See supra* notes 245-52 and accompanying text (comparing damage cap decisions with repudiated *Lochner* opinion).

256. *See, e.g.*, Best v. Taylor Mach. Works, 689 N.E.2d 1057, 1069-78 (Ill. 1997) (striking down cap based on special legislation clause of Illinois Constitution); Murphy v. Edmonds, 601 A.2d 102, 107-16 (Md. 1992) (upholding cap against equal protection challenge); Etheridge v. Med. Ctr. Hosps., 376 S.E.2d 525, 532-33 (Va. 1989) (rejecting challenges to cap based on special legislation and equal protection provisions).

257. *See* Ross v. Moffitt, 417 U.S. 600, 609 (1974) (discussing distinction between due process and equal protection clauses). Due process emphasizes fairness; equal protection emphasizes disparity in treatment. *Id.*

258. *See Best*, 689 N.E.2d at 1070 ("A special legislation challenge generally is decided under the same standards applicable to an equal protection challenge."); *id.* at 1071 (articulating

Like a substantive due process analysis, an equal protection analysis first entails determining what level of scrutiny to apply to a challenged classification.[259] The parties challenging the damage caps alleged that the caps discriminated against certain tort victims.[260] Courts in all three states agree that classifications burdening a fundamental right or discriminating against a suspect class are subject to heightened scrutiny.[261] However, courts in Illinois, Maryland, and Virginia all agree that tort victims do not constitute a suspect class; therefore, the rational basis test is appropriate when evaluating the classifications.[262]

The rational basis test in equal protection or special legislation analysis is similar to the rational basis test for substantive due process analysis.[263] The

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equal protection rational basis standard in considering whether classification is "rationally related to a legitimate state interest" (quoting *In re* Village of Vernon Hills, 658 N.E.2d 365, 367-68 (Ill. 1995))); *cf.* Washington v. Glucksburg, 501 U.S. 702, 728 (1997) (stating that federal rational basis standard asks if classification is "rationally related to a legitimate state interest"). Courts in Virginia and Maryland explicitly stated that their equal protection guarantees have exactly the same meaning as the federal guarantee. *See Murphy*, 601 A.2d at 107 (finding that Maryland's equal protection guarantee is synonymous with federal guarantee); Archer v. Mayes, 194 S.E.2d 707, 711 (Va. 1973) (commenting that Virginia equal protection clause is identical in meaning to federal clause). Maryland has no express equal protection guarantee, but reads equal protection doctrine into the state constitution's due process clause. *Murphy*, 601 A.2d at 107; *cf.* Bolling v. Sharpe, 347 U.S. 497, 499 (1954) (identifying equal protection component in Fifth Amendment Due Process Clause).

259. *See* Clark v. Jeter, 486 U.S. 456, 461 (1988) (commenting that court applies different levels of scrutiny to different challenged classifications).

260. *See Best*, 689 N.E.2d at 1075-76 (reciting three alleged classifications created by damage cap); *Murphy*, 601 A.2d at 108 (same).

261. *See Best*, 689 N.E.2d at 1071 (opining that strict scrutiny would apply to classification burdening suspect class); *Murphy*, 601 A.2d at 109-10 (noting heightened level of scrutiny for classifications that discriminate against suspect classes or that burden fundamental rights); Pulliam v. Coastal Emergency Servs. of Richmond, Inc. 509 S.E.2d 307, 318 (Va. 1999) (same).

262. *See* Best v. Taylor Mach. Works, 689 N.E.2d 1057, 1071 (Ill. 1997) (establishing rational basis test for classifications involving tort victims); Murphy v. Edmonds, 601 A.2d 102, 111 (Md. 1992) (same); Etheridge v. Medical Ctr. Hosps., 376 S.E.2d 525, 534 (Va. 1989) (same). Virginia evaluates challenges based on it special legislation provision under a standard similar to the rational-basis test. *See id.* at 533 (commenting that special legislation challenge will fail if classification is "a reasonable and not an arbitrary one"). Not all courts and commentators employ a rational basis standard for classifications disadvantaging tort victims; some apply heightened scrutiny. *See* Mary Ann Willis, Comment, *Limitation on Recovery of Damages Medical Malpractice Cases: A Violation of Equal Protection?*, 54 U. CIN. L. REV. 1329, 1350-51 (1986) (advocating intermediate scrutiny for classifications disadvantaging tort victims); *supra* note 214 (discussing states that apply heightened scrutiny to classifications involving tort victims).

263. *Cf. supra* notes 215-19 and accompanying text (discussing rational basis test used in due process analysis).

court must uphold the law if the classification is rationally related to a legitimate state interest.[264] Once again, the test is not a searching one. Instead, courts presume that the classification is constitutional and will uphold it if "any set of facts" conceivably shows that the classification is rational.[265]

The test is the same in all three states, but the courts somehow reached different results. Under the rational basis test, the Virginia Supreme Court and the Maryland Court of Appeals found that the classification between slightly injured tort victims and severely injured tort victims is rational.[266] The Supreme Court of Virginia opined that the cap might bring down insurance premiums and alleviate the difficulty medical providers experienced in obtaining insurance.[267] Similarly, the Maryland Court of Appeals found that the cap might lead to reduced premiums and attract insurers back into the market; thus, the legislature had not acted arbitrarily.[268] In contrast, the Illinois Supreme Court in *Best* found that the classification did not rationally relate to a legitimate state interest.[269]

The *Best* decision is poorly-reasoned in at least two ways. First, an intuitively rational basis supports denying full recovery to severely injured plaintiffs who win large verdicts but not denying it to slightly injured plaintiffs who win small verdicts. The *Best* court was not able to discern "how the limiting of noneconomic damages in personal injury actions may be considered rationally related" to attempts to reduce liability costs.[270] The rationale seems obvious – large damage awards in fact create more tort liability than small awards do. A five million dollar verdict will cost an insurance carrier more than a five hundred thousand dollar verdict; thus, a five million dollar verdict puts more pressure on an insurer to raise prices than a smaller verdict does. Studies have suggested that the price increases in liability insurance are fueled by increases in the cost of paying claims and that most money paid on

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264. *See In re* Village of Vernon Hills, 658 N.E.2d 365, 367-68 (Ill. 1995) (outlining rational basis test); *Murphy*, 601 A.2d at 108 (same); *Etheridge*, 376 S.E.2d at 532 (finding that court must uphold law if classification "bears 'a reasonable and substantial relation'" to legislative goal).

265. *Vernon Hills*, 658 N.E.2d at 367; *cf. Murphy*, 601 A.2d at 108 (noting presumption of constitutionality); Martin's Ex'rs v. Commonwealth, 102 S.E. 77, 80 (Va. 1920) (determining that classification must stand if any conceivable state of facts supports it).

266. *See infra* notes 267-68 and accompanying text (discussing rejection of equal protection challenges in Virginia and Maryland).

267. *See Etheridge*, 376 S.E.2d at 533 (rejecting special legislation challenge).

268. *See* Murphy v. Edmonds, 601 A.2d 102, 114-15 (Md. 1992) (explaining why damage cap does not violate equal protection guarantee).

269. *See* Best v. Taylor Mach. Works, 689 N.E.2d 1057, 1076 (Ill. 1997) (striking down damage cap as arbitrary).

270. *Best*, 689 N.E.2d at 1077.

claims is paid as part of large verdicts.[271] Some scholars have disagreed,[272] but whether the legislature is correct in its logic is irrelevant to a rational basis analysis. As Professor Tribe explained, the rational-basis test operates

> in the sphere of economic regulation quite apart from whether the "conceivable state of facts" [used to justify a classification] (1) actually exists, (2) would convincingly justify the classification if it did exist, or (3) has ever been urged in the classification's defense by those who either promulgated it or have argued in its support.[273]

This idea finds support in Illinois Supreme Court jurisprudence.[274] Passing on the wisdom of the tort reform statute,[275] the *Best* court took sides in a scholarly debate on tort reform.

The second flaw in the *Best* decision lay in the court's inability to identify a legitimate state interest supporting the damage cap. The court rejected the legislature's identified interest in reducing the "'systemic costs of tort liability.'"[276] The court expressed confusion over what constituted "'systemic costs of tort liability,'" but concluded that whatever this interest was, it had nothing to do with damage caps.[277] Nevertheless, equal protection analysis does not require the legislature to articulate any purpose for a classification; thus, a court may look beyond the legislature's articulations.[278]

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271. *See supra* notes 228-41 and accompanying text (discussing scholarly debate over causes of liability crisis).

272. *See supra* notes 228-41 and accompanying text (citing scholars who dispute existence of liability crisis and effectiveness of damage caps).

273. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 16-3, at 996 (1978); *see also supra* note 205 (citing federal case on applying rational basis test).

274. *See* Bernier v. Burris, 497 N.E.2d 763, 768 (Ill. 1986) ("Where there was evidence before the legislature reasonably supporting the classification, litigants may not procure invalidation of the legislation merely by tendering evidence in court that the legislature was mistaken." (quoting Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 464 (1981))); Wenger v. Finley, 541 N.E.2d 1220, 1225, 1226 (Ill. App. Ct. 1989) (commenting that court should defer to legislative conclusions of logic when issue is "fairly debatable"); Hayes v. Mercy Hosp. & Med. Ctr., 557 N.E.2d 873, 881 (Ill. 1990) (Ryan, J., specially concurring) (stating that legislature need not convince court of correctness of its judgment).

275. *But see Best*, 689 N.E.2d at 1069 (stating that court is not concerned with wisdom of statute). The *Best* court disavowed any intention to "balance the advantages and disadvantages of reform." *Id.* at 1063. Nevertheless, the court scolded the legislature for its determination of how to balance costs and benefits in the civil justice system. *See id.* at 1077 ("[T]he prohibition against special legislation does not permit the entire burden of the anticipated cost savings to rest on one class of injured plaintiffs."). The court's complaint apparently is true even if the "one class of injured plaintiffs" disproportionately causes the cost overruns. *Cf. supra* notes 237-39 and accompanying text (reporting that most money paid in claims is expended to pay large claims).

276. *Best*, 689 N.E.2d at 1077.

277. *Id.*

278. *See* Nordlinger v. Hahn, 505 U.S. 1, 15 (1992) ("To be sure, the Equal Protection

In a previous case, the Illinois Supreme Court had identified a legitimate state interest that applies to damage caps.[279] The court faced an equal protection challenge to a law establishing a special statute of limitations for medical malpractice actions[280] and upheld the statute.[281] The court recognized the existence of a "medical malpractice insurance crisis" and concluded that a legislative attempt to remedy the crisis by altering the statute of limitations was reasonable.[282] In light of the court's recognition of the state's interest in rectifying a liability insurance crisis, the court's confusion over the legislative goals of damage caps seems disingenuous.

The *Best* court also insufficiently distinguished an earlier precedent in which the Illinois Supreme Court sustained the constitutionality of a cap on damages in wrongful death actions.[283] Although the case involved no equal protection or special legislation challenge, the court sweepingly stated that in a statutory cause of action (as opposed to a common law action), the legislature's "power to limit the maximum recovery . . . cannot be questioned."[284] If a damage cap truly created an irrational classification between the slightly injured and the severely injured, however, then that classification would be irrational regardless of whether the cause of action arises from the common law (like negligence) or from a statute (like wrongful death). The *Best* court fails to explain why a damage cap was rational in 1957, when the court upheld the wrongful death cap, but was irrational forty years later, when it considered the tort reform bill.

Clause does not demand for purposes of rational-basis review that a legislature or governing decisionmaker actually articulate at any time the purpose or rationale supporting its classification.").

279. *See* Anderson v. Wagner, 402 N.E.2d 560, 570, 572 (Ill. 1979) (finding that remedying liability insurance crisis is legitimate state interest).

280. *Id.* at 561.

281. *Id.* at 573.

282. *Id.* at 562, 570.

283. *See* Hall v. Gillins, 147 N.E.2d 352, 354 (Ill. 1958) (sustaining constitutionality of cap on damages in wrongful death action); *cf.* Best v. Taylor Mach. Works, 689 N.E.2d 1057, 1072 n.3 (Ill. 1997) (distinguishing *Hall* on basis that it is statutory cause of action, not common law action).

284. *Hall*, 147 N.E.2d at 354. Although the court nowhere stated in *Hall* that the cap was rational, and the parties in *Hall* did not raise an express equal protection argument, certainly the court would not have sustained an irrational statute. Subsequent cases citing *Hall* distinguish it rather than overrule it; presumably it stands as good law. *See Best*, 689 N.E.2d at 1071, 1072 n.3 (distinguishing *Hall*); Wright v. Cent. Du Page Hosp. Ass'n, 347 N.E.2d 736, 742 (Ill. 1976) (distinguishing *Hall* in case striking down damage cap on economic medical malpractice damages). The Illinois Supreme Court also has upheld a damage cap in a dramshop act. *See* Cunningham v. Brown, 174 N.E.2d 153, 157 (Ill. 1961) (refusing other remedy as circumvention of damage cap in dramshop action).

In summary, Ohio and Illinois courts both invalidated their damage caps for failure to rationally relate to a legitimate state objective.[285] Ohio courts did so under the Ohio due process clause, and Illinois courts applied an equal protection analysis.[286] This conclusion is illogical, counterintuitive, and seems to relate more to the courts' policy judgment about damage caps than to the constitutional merits of the statutes.[287]

IV. Challenges to Damage Caps Based on Abuse of Legislative Prerogatives

The framers of the federal Constitution designed the government so that each branch would have its own area of responsibility and yet maintain some control over the others.[288] This Part analyzes challenges to damage caps based on allegedly improper use of legislative prerogatives. Specifically, it reviews an allegation that a legislature exceeded its power to change the common law[289] and a legislature's attempt to alter a trial court's jurisdiction.[290]

A. The Legislature as Boss: The Quid Pro Quo Requirement and the Kansas Experience

In *Kansas Malpractice Victims Coalition v. Bell*,[291] the Kansas Supreme Court declared unconstitutional a $250,000 limit on noneconomic damages in medical malpractice cases.[292] Only two years later, in *Samsel v. Wheeler*

285. *See supra* notes 228-52, 267-82 and accompanying text (exploring reasoning of opinions in Illinois and Ohio striking down caps).

286. *See supra* notes 225-249, 270-84, and accompanying text (discussing reasoning of Ohio and Illinois courts).

287. *Cf.* Werber, *supra* note 10, at 1159 ("[I]t is apparent that the [Ohio Supreme Court] is fostering its tort policy beliefs through constitutional analysis.").

288. *See* THE FEDERALIST NO. 51, *supra* note 1, at 347-48 (explaining establishment of three branches of federal government and proposing that they act as check on one another).

289. *See* Kan. Malpractice Victims Coalition v. Bell, 757 P.2d 251, 260-64 (Kan. 1988) (adjudicating challenge to damage cap alleging that legislature illegally abridged common law).

290. *See* State *ex rel.* Ohio Acad. of Trial Lawyers v. Sheward, 715 N.E.2d 1062, 1094 (Ohio 1999) (rejecting attempt to alter trial court jurisdiction).

291. 757 P.2d 251 (Kan. 1988).

292. *See* Kansas Malpractice Victims Coalition v. Bell, 757 P.2d 251, 260 (Kan. 1988). (striking down cap). In *Bell*, the Kansas Malpractice Victims Coalition claimed that the Kansas tort reform law was unconstitutional. *Id.* at 253. The tort reform act in question capped noneconomic damages at $250,000 and capped total recovery at $1,000,000 in all medical malpractice actions. *Id.* Under the act, if the $1,000,000 turned out to be insufficient to meet a successful plaintiff's future medical expenses, the plaintiff could petition a court for supplemental payments from a special state fund. *Id.* at 255-56. These supplemental payments might total $3,000,000 or the amount of the jury verdict, whichever was smaller. *Id.* The plaintiffs

Transport Services,[293] the same court upheld a very similar $250,000 cap and distinguished *Bell*.[294] Ultimately, the legislature was able to pass a cap that survived the Kansas Supreme Court's constitutional scrutiny.[295] Because the legislature triumphed in the end, the Kansas experience offers hope for those supporting damage caps.[296]

Generally, a state legislature may pass statutes modifying the common law of the state.[297] That power includes the power to abolish common law actions.[298] In Kansas, however, the legislature is not entirely free to modify the common law; it cannot abolish a common law right or remedy without providing an adequate substitute remedy.[299] This limitation on legislative power is known as the quid pro quo rule.[300]

Striking down the cap in *Bell*, the Kansas Supreme Court equated the cap on damages with abolishing the cause of action for damages in excess of the statutory amount.[301] In many states that would end the inquiry, but not in

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contended that the cap violated their right to a jury trial. *Id.* at 258. The *Bell* court determined that the jury trial right extended to all actions cognizable at common law, that negligence actions were among these, and that the right to a jury trial includes the right to have a jury determine damages. *Id.* However, the court noted that the legislature can modify the right to a jury trial by abolishing common law causes of action through its power to change the common law. *Id* at 260, 264. When the legislature exercises its power to abolish a common law action, however, it must provide an "adequate substitute remedy" or quid pro quo. *Id.* at 259, 263. Here, the damage caps interfered with a common law cause of action, but failed to provide any quid pro quo to an injured plaintiff whose common law action for damages in excess of the cap was abolished. *Id.* at 264. Thus, the *Bell* court declared the cap unconstitutional. *Id.* at 265.

293. 789 P.2d 541 (Kan. 1990). For a summary of *Samsel*, see *supra* note 37.

294. Samsel v. Wheeler Trans. Servs., 789 P.2d 541, 558 (Kan. 1990) (upholding cap).

295. *Id.*

296. *Compare id.* (upholding cap), *with Bell*, 757 P.2d at 260 (striking down previous cap).

297. *See* 15A AM. JUR. 2D *Common Law*, § 15, at 581-82 (2000) (commenting that state legislature may change common law).

298. *See id.* § 15, at 582 (reporting that legislature can "entirely abrogate" rules of common law).

299. *See* Kan. Malpractice Victims Coalition v. Bell, 757 P.2d 251, 258-59 (Kan. 1988) (identifying quid pro quo requirement for modification of common law); Rajala v. Doresky, 661 P.2d 1251, 1253 (Kan. 1983) (upholding mandatory workers compensation coverage against charge that it impermissibly abolished common law action against employer, on grounds that statute provided adequate substitute remedy).

300. *Bell*, 757 P.2d at 259.

301. *See id.* at 258 ("[T]he legislature can modify the right to a jury trial through its power to change the common law."); *id.* at 264 (finding that legislature has "abolished the right to a remedy"). As discussed above, damage caps in essence abolish the cause of action for damages in excess of the amount of the cap. *See supra* Part II.C.3 (discussing conceptualization of damage caps as abrogating causes of action and explaining that this conceptualization avoids any suggestion that damage caps burden right to jury trial).

Kansas.[302] The *Bell* court explained that the cap was unconstitutional because it involved no quid pro quo; an injured plaintiff received nothing in return for the abolition of the cause of action.[303]

The damage cap at issue in *Bell* applied only to medical malpractice actions.[304] In 1987, before the *Bell* decision, the legislature had passed another damage cap that applied to all personal injury actions.[305] After *Bell*, the United States District Court for the District of Kansas certified to the Kansas Supreme Court the question of the second cap's constitutionality.[306] At the same time, the legislature began to debate an amendment to the state constitution that would grant it the power to enact damage caps.[307]

In this atmosphere, the Kansas Supreme Court issued a two page opinion declaring the second cap constitutional.[308] The court explained that "[b]ecause of the widespread interest and statewide effect of the court's determination of this question, we announce our decision in this brief opinion. A formal opinion expressing the views of the members of the court will be filed when it is prepared."[309]

Nearly a year passed before the court issued its formal opinion on the second statute in *Samsel v. Wheeler Transport Services*.[310] In the second statute, the court found the necessary quid pro quo that it failed to find in the

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302. *See* Murphy v. Edmonds, 601 A.2d 102, 116 (Md. 1992) (upholding damage cap on grounds that legislature had abolished cause of action for damages in excess of cap); Pulliam v. Coastal Emergency Servs. of Richmond, Inc., 509 S.E.2d 307, 314 (Va. 1999) (same). *But see Bell*, 757 P.2d at 264 (striking down cap).

303. *Bell*, 757 P.2d at 264-65.

304. *See id.* at 253 (commenting that reach of cap extends only to medical malpractice actions).

305. *See* KAN. STAT. ANN. § 60-19a01 (1994) (capping damages in actions for personal injury at $250,000). The statute applies only to actions accruing between July 1, 1987, and July 1, 1988. *Id.* A nearly identical statute extended the provisions of the cap to actions accruing after July 1, 1988. KAN. STAT. ANN. § 60-19a02 (1994).

306. *See* Samsel v. Wheeler Trans. Servs., 789 P.2d 541, 543 (Kan. 1990) (reporting certification of question).

307. *See id.* at 559 (Herd, J., dissenting) (commenting that Kansas Legislature debated amendment as court discussed case). Justice Herd accused the majority of acting to forestall the amendment and of leaving the impression that the *Samsel* decision, which upheld the second cap, was politically motivated. *Id.* (Herd, J., dissenting). The Kansas Supreme Court decided that the same language that did not constitute a quid pro quo in *Bell* established a quid pro quo in *Samsel*. *See infra* note 312 (comparing language in two statutes). One wonders why the *Bell* court did not notice the quid pro quo in the first statute.

308. *See* Samsel v. Wheeler Trans. Servs., 771 P.2d 71, 72 (Kan. 1989) (upholding damage cap on March 30, 1989).

309. *Id.* at 72.

310. *See Samsel*, 789 P.2d at 541 (recording date of decision as March 21, 1990).

first statute.[311] Interpreting the same language that appeared in the first statute, the court determined that the second cap required a judge to enter judgment in the amount of the cap when a jury returned a verdict in excess of the cap.[312] The court decided that under the second statute, no remittitur was available.[313] Because a plaintiff no longer had to worry that a judge would find the verdict excessive and reduce it below $250,000, the party losing the common law right gained something in return.[314] Thus, the new statute was constitutional because of the legislative power to change the common law.[315]

The Kansas experience is instructive because it exemplifies a state in which the legislature is "boss."[316] In the struggle over damage caps, the legislature lost the first battle, but won the war.[317] It did so by providing the plaintiff with something at the same time it took away something else.[318] Parties elsewhere should take note of the quid pro quo argument, especially if the relevant jurisdiction imposes a quid pro quo requirement.[319] A court bent on

311. *See id.* at 558 (finding quid pro quo in statute).

312. *See* Samsel v. Wheeler Trans. Servs., 789 P.2d 541, 557-58 (finding quid pro quo in statute because cap forbids court from lowering award to less than $250,000). Compare the first statute, 1996 Kan. Sess. Laws 229 ("If the verdict results in an award for noneconomic loss which exceeds the limit of this section, the court *shall* enter judgment for [the amount of the cap] for all the party's claims for noneconomic loss") (emphasis added), with the second statute, KAN. STAT. ANN. § 60-19a02(d) (1994), which has exactly the same language.

313. *See Samsel*, 789 P.2d at 557-58 (deciding that second damage cap statute did not permit remittitur).

314. *See id.* (articulating existence of quid pro quo in cap).

315. *See id.* at 557 (recognizing legislative power to alter or abolish common law actions when it provides quid pro quo).

316. *See id.* at 558 (upholding statute but questioning its wisdom).

317. *Compare* Kan. Malpractice Victims Coalition v. Bell, 757 P.2d 251, 264-65 (Kan. 1988) (striking down damage cap), *with* Samsel v. Wheeler Trans. Servs., 789 P.2d 541, 558 (Kan. 1990) (upholding revised cap).

318. *See Samsel*, 789 P.2d at 558 (describing quid pro quo in statute).

319. *See generally* Howard Alan Learner, Note, *Restrictive Medical Malpractice Compensation Schemes: A Constitutional "Quid Pro Quo" Analysis to Safeguard Individual Liberties*, 18 HARV. J. ON LEGIS. 143, 200-01 (1981) (arguing that quid pro quo analysis is least intrusive way to review damage cap statutes); *cf.* Duke Power Co. v. Carolina Envtl. Study Group, Inc., 438 U.S. 59, 87-88 (1978) (rejecting Fifth Amendment challenge to damage cap at least in part because Congress provided quid pro quo). At least one other state has mentioned the lack of a quid pro quo when striking down a damage cap statute, suggesting that courts in other states might also look favorably on a Kansas-style statute. *See* Smith v. Dep't of Ins., 507 So. 2d 1080, 1088 (Fla. 1987) (finding that legislature might restrict right of remedy if it provides "reasonable alternative remedy or commensurate benefit"). However, because the majority rule allows free alteration of the common law, many courts will not even consider any quid pro quo argument. *See* 15A AM. JUR. 2D *Common Law* § 15, at 582 (2000) (commenting that state legislature may change common law). Therefore, this argument enjoys only limited applicability.

finding a way to strike down tort reform may very well be undeterred. Nevertheless, in Kansas, providing a "carrot" for the plaintiff made a damage cap possible even though a previous one had failed judicial scrutiny.[320]

B. Legislative Control over Trial Court Jurisdiction

The United States Constitution provides Congress with the power to create lower courts and the power to set the jurisdiction of the United States Supreme Court.[321] On occasion, Congress has removed specific subjects from the jurisdiction of the Supreme Court.[322] Similarly, some state constitutions grant jurisdiction-setting power to state legislatures.[323] The jurisdiction-setting power of legislatures provides yet another avenue by which legislatures might maintain the constitutionality of damage caps.

The Ohio Constitution provides that "the courts of common pleas and divisions thereof shall have such original jurisdiction over all justiciable matters . . . as may be provided by law."[324] In its most recent version of the damage cap statute, the Ohio Legislature attempted to utilize this provision.[325] The statute provided that "[t]he court of common pleas shall not have jurisdiction to award compensatory damages for noneconomic loss that exceed the amounts set forth [in the damage cap]."[326]

The Ohio Supreme Court rejected this provision with a cursory analysis.[327] The *Sheward* court asserted:

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320. *See supra* Part IV.A (discussing how Kansas court ultimately upheld cap).

321. *See* U.S. CONST. art. I, § 8, cl. 9 (granting Congress power to create lower federal courts); *id.* art. III, § 2, cl. 2 (authorizing Congress to make "Exceptions" and "Regulations" regarding Supreme Court jurisdiction). The congressional power to create lower federal courts includes the power to set their jurisdiction. *See* Sheldon v. Sill, 49 U.S. (8 How.) 441, 449 (1849) ("Courts created by statute can have no jurisdiction but such as the statute confers.").

322. *See Ex parte* McCardle, 74 U.S. (7 Wall.) 506, 515 (1868) (upholding statute abrogating Supreme Court jurisdiction to hear habeas corpus appeals of certain ex-Confederates); *cf.* WILLIAM COHEN & JONATHAN D. VARAT, CONSTITUTIONAL LAW 42-43 (1997) (discussing congressional proposals to strip Supreme Court of jurisdiction over abortion and school prayer cases).

323. *See* OHIO CONST. art. IV, § 4(B) authorizing legislature to set jurisdiction of trial courts); VA. CONST. art. VI, § 1 (same).

324. OHIO CONST. art. IV, § 4(B).

325. *See* Act of Sept. 26, 1996, Am. Sub. H.B. 350, 146 Ohio Laws 3567, 4028 (noting legislative jurisdiction-setting power and citing Ohio Constitution's provision providing Ohio legislature with jurisdiction-setting power).

326. OHIO REV. STAT. ANN. § 2305.01 (West Supp. 2000).

327. *See* State *ex rel.* Ohio Acad. of Trial Lawyers v. Sheward, 715 N.E.2d 1062, 1094-95 (Ohio 1999) (rejecting legislative attempt to enact damage cap by setting trial court jurisdiction).

> We have held, as the General Assembly asserts, that "the jurisdiction of the common pleas courts is limited to whatever the legislature may choose to bestow." However, we have never allowed this rubric to be employed in an effort to shield legislation from judicial review or deprive the courts of jurisdiction to enforce a constitutional right. The General Assembly may not gain the authority to take away a constitutional right by the simple expedient of limiting the jurisdiction of the courts to the parameters of its own unconstitutional Act. "What the constitution grants, no statute may take away."[328]

A long line of Ohio cases speaks of the legislature's jurisdiction setting power in sweeping language: The Ohio Supreme Court has deemed "fundamental" the principle that courts can exercise only the jurisdiction the legislature bestows upon them.[329] As recently as 1991, the court declared that "[a]lthough the Court of Common Pleas is a court of general jurisdiction, the jurisdiction it may exercise must be found either expressly or by necessary implication in statutory enactments."[330] Older precedent agree.[331] When the legislature has not granted jurisdiction, a court simply cannot act.[332]

In light of this authority, the Ohio Supreme Court in *Sheward* never explained adequately why the legislature could not divest the trial courts of jurisdiction over causes seeking damages in excess of the cap.[333] Because a party can always obtain review by appealing a final order dismissing an action

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328. *Id.* (citations omitted). For the irrelevant proposition it asserted – "What the constitution grants, no statute may take away" – the *Sheward* court cited only a 1922 case that had nothing to do with jurisdiction. *Id.* (citing State *ex. rel.* Hoel v. Brown, 138 N.E. 230 (Ohio 1922) (reviewing statute providing for removal of board of inspections official)).

329. *See* Humphrys v. Putnam, 178 N.E.2d 506, 509 (Ohio 1961) ("It is fundamental, however, that courts have only such jurisdiction as is conferred upon them by the Constitution or by the Legislature acting within its constitutional authority."); State *ex rel.* Finley v. Pfeiffer, 126 N.E.2d 57, 61 (Ohio 1955) (finding jurisdiction of courts limited to that granted by law).

330. Franklin County Law Enforcement Ass'n v. Fraternal Order of Police Capital City Lodge No. 9, 572 N.E.2d 87, 90 (Ohio 1991) (quoting Fletcher v. Coney Island, Inc., 134 N.E.2d 371, 375 (Ohio 1956)).

331. *See* Mattone v. Argentina, 175 N.E. 603, 605 (Ohio 1931) (commenting that jurisdiction of trial courts is fixed by legislative enactment); Sheldon's Lessee v. Newton, 3 Ohio St. 494, 499 (1854) (Warden & Smith) ("But before [jurisdiction] can be affirmed to exist, it must be made to appear that the law has given the tribunal capacity to entertain the complaint against the person or thing sought to be charged or affected . . ."); State v. Belonski, 153 N.E. 160, 160 (Ohio Ct. App. 1926) (commenting on limited nature of trial court jurisdiction).

332. *See* Dilatush v. Bd. of Review, Bureau of Unemployment Comp., 160 N.E.2d 309, 311 (Ohio Ct. App. 1959) (per curiam) (stating that jurisdiction is basic perquisite to any court action).

333. *Cf.* State *ex rel.* Ohio Acad. of Trial Lawyers v. Sheward, 715 N.E.2d 1062, 1095 (Ohio 1999) (discussing jurisdiction question).

for want of jurisdiction,[334] the jurisdiction-stripping provision would not, as the court suggested, "shield legislation from judicial review."[335] Furthermore, the *Sheward* court failed to specify which "constitutional right" the jurisdiction-stripping law took away.[336] Nothing in the Ohio constitution or case-law grants a right to have jurisdiction over a particular action in a specific court.[337] At first glance, the "right to a remedy" provision of the Ohio Constitution might suggest that jurisdiction over all actions must vest in *some* court.[338] Nevertheless, as the Ohio Court of Appeals explained, the right to a remedy clause

> guarantees a remedy for every *legally cognizable* injury to person, property or reputation. And it must ultimately be up to the legislature to define what injuries are legally cognizable. [The clause] is not a petrifier of every cause of action that existed in this state when the section was adopted. If it were, all statutes in derogation of common-law rights of action would be vulnerable to constitutional attack. That this is not the case could be shown by many examples.[339]

At a minimum, the right to a remedy clause does not prevent the legislature from abolishing tort actions entirely, effectively removing them from the jurisdiction of all Ohio courts.[340] By removing causes of action for damages in excess of the cap from the jurisdiction of Ohio trial courts, the legislature rendered them legally non-cognizable and abolished them.[341] The right to a remedy clause does not prevent this.[342]

The jurisdiction-stripping conceptualization of damage caps provides yet another justification for their constitutionality. When a legislature has the power to bestow or withhold jurisdiction, the legislature can create a damage cap by removing from courts the jurisdiction over actions for damages in

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334. *See* OHIO CONST. art. IV, § 3(b)(2) (granting Ohio Court of Appeals jurisdiction to review final orders of lower courts).

335. *Id.*

336. *Sheward*, 715 N.E.2d at 1094.

337. *See* OHIO CONST. art. IV, § 4 (B) (committing jurisdiction of trial court to legislature); *supra* notes 329-32 (citing cases on legislative power over trial court jurisdiction).

338. *See* OHIO CONST. art I, § 16 ("All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law.").

339. Vrabel v. Vrabel, 459 N.E.2d 1298, 1305-06 (Ohio Ct. App. 1983).

340. *See id.* at 1307 (upholding legislative abolition of tort causes of action).

341. *See* OHIO REV. STAT. ANN. § 2305.01 (West Supp. 2000) (abrogating trial court jurisdiction over causes of action for damages in excess of statutory cap); *cf. Vrabel*, 495 N.E.2d at 1305 (finding that right to remedy clause guarantees remedy only for legally cognizable injuries).

342. *See supra* notes 338-41 and accompanying text (discussing right to remedy clause).

excess of its cap.[343] In *Sheward*, the Ohio Supreme Court never satisfactorily explained why jurisdiction setting power does not apply in the context of a tort reform bill.[344]

V. Conclusion

Damage caps are falling across the country, under challenges based on jury trial guarantees,[345] due process,[346] equal protection,[347] and various other arguments.[348] Often, courts betray both logic and precedent in the course of analyzing damage caps.[349] The cases reflect a struggle between legislatures and courts for control over the civil justice system.[350]

So the struggle continues. Like so many other tort issues, damage caps have been caught in the battle between legislatures and courts. This Note has demonstrated that the better-reasoned decisions uphold the caps from constitutional attack.[351] In most instances, they violate neither the right to a jury trial,[352] nor substantive due process,[353] nor equal protection.[354] Furthermore, inherent legislative power over the common law[355] and court jurisdic-

343. *Cf.* OHIO REV. STAT. ANN. § 2305.01 (West Supp. 2000) (attempting to strip trial court of jurisdiction for actions in excess of cap).

344. *Cf.* State *ex rel.* Ohio Acad. of Trial Lawyers v. Sheward, 715 N.E.2d 1062, 1095 (Ohio 1999) (rejecting jurisdiction-stripping power).

345. *See, e.g.*, Moore v. Mobile Infirmary Ass'n, 592 So. 2d 156, 164 (Ala. 1991) (striking down cap because of jury trial guarantee); Lakin v. Senco Prods., Inc., 987 P.2d 463, 473-75 (Or. 1999) (same); Sofie v. Fibreboard Corp., 771 P.2d 711, 722-23 (Wash. 1989) (same); *supra* Part II (discussing jury trial challenges to damage caps).

346. *See* Morris v. Savoy, 576 N.E.2d 765, 771 (Ohio 1991) (finding that damage cap violates substantive due process).

347. *See, e.g.*, Best v. Taylor Mach. Works, 689 N.E.2d 1057, 1070-78 (Ill. 1997) (striking down damage cap based on equal protection clause);; Carson v. Maurer, 424 A.2d 825, 835-38 (N.H. 1980) (same); Arneson v. Olson, 270 N.W.2d 125, 135-36 (N.D. 1978) (same).

348. *See* Smith v. Dep't of Ins., 507 So. 2d 1080, 1087-89 (Fla. 1987) (striking down cap based on state constitutional clause requiring courts to be open); Lucas v. United States, 757 S.W.2d 687 (Tex. 1988) (same); *supra* note 23 (commenting on takings clause theory of attack).

349. *See supra* Parts II.C, III.C, & IV.B (criticizing state court decisions striking down caps).

350. *See* Werber, *supra* note 10, at 1156 (reporting existence of "struggle" in Ohio).

351. *See supra* Parts II.C, III.C, & IV (arguing that better-reasoned decisions sustain damage caps).

352. *See supra* Part II (analyzing jury trial challenges to damage caps).

353. *See supra* Part III.A (discussing substantive due process challenge to damage caps).

354. *See supra* Part III.B (examining equal protection challenge to damage cap).

355. *See supra* Part IV.A (commenting on legislative power over common law and explaining quid pro quo doctrine).

tion[356] argue strongly in favor of caps' constitutionality. Nevertheless, some courts are unable to resist the temptation to legislate. Indeed, in the words of one state supreme court justice, some courts seem committed to their "attempt to overrule, by judicial fiat, the considered judgment of the legislature."[357] Sadly, in many states true tort reform may require amending the state constitution.[358] Only time will tell who is the ultimate boss of tort law.

356. *See supra* Part IV.B (arguing that legislative power over trial court jurisdiction validates damage caps).

357. Best v. Taylor Mach. Works, 689 N.E.2d 1057, 1113 (Ill. 1997) (Miller, J., concurring in part and dissenting in part).

358. *Cf.* Delashmutt v. Myers, 992 P.2d 442, 442-43 (Or. 1999) (discussing proposed constitutional amendment). In 1999, the Oregon Legislature proposed an amendment to the state constitution to overturn *Lakin v. Senco Products, Inc.*, 987 P.2d 463 (Or. 1999), the case that struck down Oregon's damage cap. *Delashmutt*, 992 P.2d at 442; *see also supra* note 61 (summarizing *Lakin*). The proposed amendment would have provided that "[n]otwithstanding any other provision of this Constitution, the Legislative Assembly by law may impose limitations on the damages that may be recovered in civil actions." *Delashmutt*, 992 P.2d at 443. Voters overwhelmingly defeated the amendment in a referendum in May 2000, after trial lawyers spent $1.6 million on an ad campaign featuring Erin Brockovich. Steve Suo, *Voters Sink Ballot Measures*, THE OREGONIAN, May 17, 2000, at A1. The anti-amendment forces outspent tort reform supporters by a 2-1 margin. *Id.*