A CHALLENGE TOO EARLY: THE LAWSUIT TO INVALIDATE TEXAS DAMAGE CAPS TEN YEARS AGO AND ITS LIKELY FUTURE VINDICATION

Robert S. Peck[*] *and Hartley Hampton*[**]

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Timing is everything, we are told, and the wisdom of that adage richly abounds. In business, many tales exist of companies that passed on products that later became ubiquitous successes.[1] Lottery winners understand this phenomenon when they win the time *before* the prize grew exponentially. And perhaps the greatest, recent example of timing being everything in the law is the unfortunate alignment of the stars when Judge Merrick Garland was nominated to the Supreme Court, but a Senate majority was able to stonewall the selection of a lame-duck president and run out the clock.[2]

The 2008 federal challenge to the Texas medical malpractice caps may also turn out to be another victim of bad timing—a challenge made too early.

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* Founder and President of the Center for Constitutional Litigation, Washington, D.C. L.L.M., Yale Law School, J.D., Cleveland-Marshall School of Law and New York University College of Law; B.A., George Washington University.

** Attorney at Hampton & King, Houston, Texas. J.D., University of Houston Law Center; University of Texas at Austin. The authors are grateful to Jim Perdue Jr. for his wisdom and perspective. His editorial advice and analysis was crucial to this effort.

1. *See, e.g.*, Adam Mossoff, *Patents as Commercial Assets in Political, Legal and Social Contexts*, 51 TULSA L. REV. 455, 461 (2016) (explaining that Western Union deemed its successful telegraph business the height of technological advancement so that it turned down Alexander Graham Bell's offer of the patent on the telephone in 1876 because it did not see much commercial value in such a "novelty"); James Estrin, *Kodak's First Digital Moment*, N.Y. TIMES (Aug. 12, 2015), https://lens.blogs.nytimes.com/2015/08/12/kodaks-first-digital-moment/ (explaining that Kodak developed the first digital camera in 1975 but chose not to pursue it, fearing that its development would harm its film business, which enjoyed a 90% share of the United States market).

2. *See* Carl Tobias, *Confirming Supreme Court Justices in a Presidential Election Year*, 94 WASH. U. L. REV. 1089, 1099 (2017).

Relying heavily on an argument that it was time to apply the incorporation doctrine[3] to the Seventh Amendment, the challengers brought a unique lawsuit asking the courts to invalidate the caps as a violation of the federal right to trial by jury.[4] What made the lawsuit so challenging is that the Supreme Court had never applied the Seventh Amendment's jury-trial right to the States, having determined the opposite more than a century earlier.[5] Yet, since that decision in the 1800s, most of the Bill of Rights have been applied to the states.[6] The circumstances presented a long-overdue opportunity to correct that error.

I. TEXAS AMENDS ITS CONSTITUTION TO PERMIT DAMAGE CAPS

By the narrowest of approval margins,[7] Texas voters amended the state constitution in 2003 to permit the legislature to cap noneconomic damages. The amendment gave plenary authority to the legislature to institute the caps "[n]otwithstanding any other provision of this constitution."[8] The legislature had already enacted the Medical Malpractice and Tort Reform Act of 2003 (H.B. 4), whose centerpiece was a statutory limitation on noneconomic damages.[9]

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3. Originally, the Bill of Rights was regarded as a restriction on federal constitutional authority. *See* McDonald v. City of Chicago, 561 U.S. 742, 754 (2010). Beginning with *Gitlow v. New York*, the Supreme Court of the United States undertook, first with freedom of speech and the press, to "incorporate" Bill of Rights protections through the Due Process Clause as applicable to the states. Gitlow v. New York, 268 U.S. 652, 666 (1925). The process has been called one of "selective" incorporation, as the Court has considered each Bill of Rights' guarantee on its own merits. *See McDonald*, 561 U.S. at 758.

4. *See generally* Watson v. Hortman, 844 F. Supp. 2d 795 (E.D. Tex. 2012).

5. Walker v. Sauvinet, 92 U.S. 90, 92 (1875).

6. *See supra* note 3 (discussing "selective" incorporation).

7. The amendment was approved by voters by a margin of 51.13% to 48.87%. OFFICE OF THE SEC'Y OF STATE, RACE SUMMARY REPORT: 2003 CONSTITUTIONAL AMENDMENT ELECTION (2003), https://elections.sos.state.tx.us/elchist103_state.htm. The battle over the amendment was the most expensive battle over a proposition Texas had ever experienced, with $17.1 million spent by the two sides. Terry Maxon, *Prop. 12 Battle Was Costliest Yet*, DALL. MORNING NEWS, Jan. 19, 2004, at 2D.

8. TEX. CONST. art. III, § 66.

9. TEX. CIV. PRAC. & REM. CODE ANN. § 74.301 (West 2017) provides:

> Limitation on Noneconomic Damages.
>
> (a) In an action on a health care liability claim where final judgment is rendered against a physician or health care provider other than a health care institution, the limit of civil liability for noneconomic damages of the physician or health care provider other than a health care institution, inclusive of all persons and entities for which vicarious liability theories may apply, shall be limited to an amount not to exceed $250,000 for each claimant, regardless of the number of defendant physicians or health care providers other than a health care institution against whom the claim is asserted or the number of separate causes of action on which the claim is based.
>
> (b) In an action on a health care liability claim where final judgment is rendered against a single health care institution, the limit of civil liability for noneconomic damages inclusive of all persons and entities for which vicarious liability theories may apply, shall be limited to an amount not to exceed $250,000 for each claimant.
>
> (c) In an action on a health care liability claim where final judgment is rendered against more than one health care institution, the limit of civil liability for noneconomic damages for each

When H.B. 4 was approved, the legislature had good reason to believe its handiwork was unconstitutional. The Texas Supreme Court held a similar cap, passed in 1986,[10] unconstitutional as a violation of the Open Courts Provision of the Texas Constitution[11] in *Lucas v. United States*.[12] Adopting a widely used formulation of the Open Courts Provision[13] that was already part of Texas precedent,[14] the Court held that a common law cause of action, like medical malpractice, cannot be restricted without provision of an "adequate substitute to obtain redress for [any] injuries."[15] A second rationale found the caps conflicted with "meaningful access to the courts" and may have impinged on judicial authority over judgments because it was "unreasonable and arbitrary for the legislature to conclude that arbitrary damages caps, applicable to all claimants no matter how seriously injured, would help assure a rational relationship between actual damages and amounts awarded."[16]

To avoid a similar fate for its new caps, the legislature proposed and, some three months after H.B. 4's enactment, voters approved Proposition 12, which amended the Texas Constitution to permit the legislature to limit noneconomic damages against health care providers and then, after five years, to do so in all other cases by a super majority of 100 votes.[17] Passage of Proposition 12 foreclosed any challenge to H.B. 4's caps based on the Texas Constitution, as the amendment now retroactively authorized legislated damage limits.

Yet caps have a profoundly improper impact on the appropriate compensation of legitimate claims, as the *Lucas* Court pointed out in approvingly quoting a Florida Supreme Court decision:

> health care institution, inclusive of all persons and entities for which vicarious liability theories may apply, shall be limited to an amount not to exceed $250,000 for each claimant and the limit of civil liability for noneconomic damages for all health care institutions, inclusive of all persons and entities for which vicarious liability theories may apply, shall be limited to an amount not to exceed $500,000 for each claimant.

10. Act of May 5, 1995, 74th Leg., R.S., ch. 140, § 1, sec. 13.01, 1995 Tex. Gen. Laws 985, 985–87, *repealed by* Act of June 2, 2003, 78th Leg., R.S., ch. 204, § 10.09, 2003 Tex. Gen. Laws 847, 884.

11. TEX. CONST. art. I, § 13.

12. Lucas v. United States, 757 S.W.2d 687, 687 (Tex. 1988).

13. Similar provisions, variously referred to as right to remedy, Open Courts, or access to courts clauses, are found in the constitutions of at least thirty-seven states. JENNIFER FRIESEN, STATE CONSTITUTIONAL LAW: LITIGATING INDIVIDUAL RIGHTS, CLAIMS, AND DEFENSES 347 n.11 (2d ed. 1996). Others counting the number of provisions concluded that the number may be as high as thirty-nine or forty states. *See* Hon. Thomas R. Phillips, The Constitutional Right to a Remedy, *in* 78 N.Y.U. L. REV. 1309, 1310 (2003); David Schuman, *The Right to a Remedy*, 65 TEMP. L. REV. 1197, 1201 n.25 (1992). Courts generally agree that Open Courts Provisions require an adequate substitute remedy when one that existed under the common law is impaired. *See* Hon. William C. Koch, Jr., *Reopening Tennessee's Open Courts Clause: A Historical Reconsideration of Article I, Section 17 of the Tennessee Constitution*, 27 U. MEM. L. REV. 333, 439 (1997).

14. *Lucas*, 757 S.W.2d at 690 (citing Sax v. Votteler, 648 S.W.2d 661, 666 (Tex. 1983)).

15. *Id.*

16. *Id.* at 691.

17. TEX. CONST. art. III, § 66(b)–(c).

> Access to the court is granted for the purpose of redressing injuries. A plaintiff who receives a jury verdict for, e.g., $1,000,000, has not received a constitutional redress of injuries if the legislature statutorily, and arbitrarily, caps the recovery. Nor, we add, because the jury verdict is being arbitrarily capped, is the plaintiff receiving the constitutional benefit of a jury trial as we have understood that right. Further, if the legislature may constitutionally cap recovery at $450,000, there is no discernible reason why it could not cap the recovery at some other figure, perhaps $50,000, or $1,000, or even $1.[18]

While the amendment insulated statutory caps from a Texas constitutional challenge, it did not affect any available *federal* constitutional arguments about H.B. 4's validity. The most frequent basis that damage caps are invalidated is that they constitute an invasion of the jury's authority to determine damages, opening the door to a Seventh Amendment argument.[19]

II. THE 2008 CONSTITUTIONAL CHALLENGE

On February 25, 2008, Emma Watson launched a challenge to the statute based on the United States Constitution.[20] She and more than a dozen other individuals who had filed state court actions alleging devastating injury from medical negligence filed suit in Unites States District Court for the Eastern District of Texas, Marshall Division, seeking class certification and a declaratory judgment that the damage restriction violated the Seventh Amendment,[21] constitutional guarantees of due process, equal protection,[22] access to the courts,[23] and the Takings Clause of the Fifth Amendment.[24] From the outset, counsel in the case believed that the dispositive issue would

18. *Lucas*, 757 S.W.2d at 692 (quoting Smith v. Dep't of Ins., 507 So. 2d 1080, 1089 (Fla. 1987)).

19. Robert S. Peck, *Violating the Inviolate: Caps on Damages and the Right to Trial by Jury*, 31 U. DAYTON L. REV. 307, 311 (2006).

20. *See generally* Watson v. Hortman, 844 F. Supp. 2d 795 (E.D. Tex. 2012).

21. Amendment VII of the United States Constitution provides in pertinent part: "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved . . . ." U.S. CONST. amend. VII.

22. Amendment XIV of the United States Constitution provides in pertinent part: "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." U.S. CONST. amend. XIV.

23. Although the United States Constitution has no textual clause that speaks to access to the courts, the Supreme Court has acknowledged that precedent has grounded this fundamental guarantee in various parts of the Constitution. *See* Christopher v. Harbury, 536 U.S. 403, 415 n.12 (2002) (citing the Article IV Privileges and Immunities Clause, the First Amendment Petition Clause, the Fifth Amendment Due Process Clause, and the Fourteenth Amendment Equal Protection and Due Process Clauses).

24. Amendment V of the United States Constitution provides in pertinent part: "[N]or shall private property be taken for public use, without just compensation." U.S. CONST. amend. V.

be whether Seventh Amendment rights would be protected from state interference by the Fourteenth Amendment.[25]

With two exceptions,[26] all of the underlying medical malpractice cases had been resolved by settlement. Defendants were the various health care entities and physicians sued in the underlying medical malpractice cases.[27] Also sued were the two judges who presided over the two pending actions and who were named as representatives of a proposed class of Texas judges who were duty-bound to impose the cap on any damage awards exceeding the statutory limit.[28]

The case was assigned to Magistrate Judge Charles Everingham IV for pretrial motions, which included motions to dismiss and competing dispositive motions.[29] In March 2009, Judge Everingham issued a recommendation that plaintiffs' equal protection and due process claims be dismissed pursuant to Federal Rule of Civil Procedure 12(b)(6), and that the access to courts and Takings Clause issues be dealt with by competing motions for summary judgment.[30] On September 13, 2010, Judge Everingham issued a recommendation that summary judgment be granted against plaintiffs on their remaining claims,[31] and on March 27, 2012, the court overruled plaintiffs' objections to the report, adopted the magistrate's recommendation without further comment, and dismissed plaintiffs' action with prejudice.[32]

By this time, all of the plaintiffs had settled their medical malpractice cases, and no appeal to the Fifth Circuit was taken.

III. THE SEVENTH AMENDMENT AND INCORPORATION

In rejecting plaintiffs' argument that the damage caps violated the Seventh Amendment,[33] Judge Everingham cited *Palko v. Connecticut*, in which the Supreme Court upheld a statute permitting the state to appeal a murder conviction that resulted in a life sentence and obtain a death sentence

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25. *See, e.g.*, Plaintiffs' Motion, and Supporting Memorandum, for Reconsideration of this Court's Dismissal of Their Seventh Amendment Claim, Watson v. Hortman, 844 F. Supp. 2d 795 (E.D. Tex. 2012) (No. 2:08-CV-81 (TJW-CE)), 2010 WL 4784294.

26. Order Granting Defendants' Motion to Dismiss at 3182–83, Watson v. Hortman, 844 F. Supp. 2d 795 (E.D. Tex. 2012) (No. 2:08-CV-00081-JRG-RSP), 2012 WL 1038764.

27. Proposed Second Amended Complaint for Declaratory Judgment Under 28 U.S.C. § 2201 at 1, Watson v. Hortman, 844 F. Supp. 2d 795 (E.D. Tex. 2012) (No. 2:08-CV-00081-TJW-CE), 2009 WL 8591608.

28. *Id.* The court dismissed the two judges sua sponte. Order at 480, Watson v. Hortman, 844 F. Supp. 2d 795 (E.D. Tex. 2012) (No. 2:08-CV-00081).

29. *See* Plaintiffs' Motion, and Supporting Memorandum, for Reconsideration of this Court's Dismissal of Their Seventh Amendment Claim, *supra* note 25.

30. Report and Recommendations at 1474, Watson v. Hortman, 844 F. Supp. 2d 795 (E.D. Tex. 2012) (No. 2:08-CV-00081-JRG-RSP).

31. *Watson*, 844 F. Supp. 2d at 799–804.

32. *Id.* at 797.

33. Watson v. Hortman, No. 2:08-CV-81, 2009 WL 10676569, at *6 (E.D. Tex. Mar. 12, 2009).

on retrial.[34] The opinion, which rejected an argument that the Fifth Amendment's prohibition against double jeopardy applied to the states through the Fourteenth Amendment, reflected an approach that conditioned incorporation on rights being so fundamental "that a fair and enlightened system of justice would be impossible without them."[35] Dicta in the opinion included the Seventh Amendment in a list of rights that did not make that cut.[36]

Judge Everingham noted[37] that *Palko* was reversed on other grounds by *Benton v. Maryland*.[38] That was an understatement. *Benton* completely repudiated the jurisprudential underpinnings of *Palko.* Justice Marshall wrote for the majority:

> Our recent cases have thoroughly rejected the *Palko* notion that basic constitutional rights can be denied by the States as long as the totality of the circumstances does not disclose a denial of "fundamental fairness." Once it is decided that a particular Bill of Rights guarantee is "fundamental to the American scheme of justice," the same constitutional standards apply against both the State and Federal Governments. *Palko*'s roots had thus been cut away years ago.[39]

Benton overturned *Palko* by applying the federal constitutional bar on double jeopardy to the states.[40] Similarly, *Palko* had listed as unincorporated the Fourth Amendment's protection against unreasonable searches and seizures, a holding overruled by *Wolf v. Colorado*[41] and *Mapp v. Ohio*.[42] In fact, the Supreme Court has now taken the stance that incorporation of Bill of Rights provisions under the Fourteenth Amendment's Due Process Clause applies to all rights regarded as fundamental, without respect to *Palko*'s impossibility standard.[43] Instead, the inquiry focuses on "principles of liberty and justice"[44] "implicit in the concept of ordered liberty,"[45] "so rooted in the traditions and conscience of our people as to be ranked as fundamental"[46] and

34. Palko v. Connecticut, 302 U.S. 319, 328 (1937), *overruled by* Benton v. Maryland, 395 U.S. 784 (1969).
35. *Id.* at 326.
36. *Id.* at 324. In so holding, the *Palko* Court was relying on the determination in *Walker v. Sauvinet*, where the Supreme Court held that the Privileges and Immunities Clause of the Fourteenth Amendment did not require states to provide jury trials. *Id.* (citing Walker v. Sauvinet, 92 U.S. 90, 92 (1875)).
37. *Watson*, 2009 WL 10676569, at *6.
38. *Benton*, 395 U.S. at 813; Report and Recommendations, *supra* note 30, at 1474.
39. *Benton*, 395 U.S. at 795 (citation omitted).
40. *Id.* at 796.
41. Wolf v. Colorado, 338 U.S. 25, 27–28 (1949), *overruled by* Mapp v. Ohio, 367 U.S. 643 (1961).
42. *Mapp*, 367 U.S. at 655.
43. *Benton*, 395 U.S. at 795; *see* Duncan v. Louisiana, 391 U.S. 145, 148 (1968).
44. Hurtado v. California, 110 U.S. 516, 535 (1884).
45. Palko v. Connecticut, 302 U.S. 319, 325 (1937), *overruled by Benton*, 395 U.S. 784. This phrase from *Palko* was retained in modern incorporation analysis. *Id.*
46. Snyder v. Massachusetts, 291 U.S. 97, 105 (1934).

"lie at the base of all our civil and political institutions."[47] While these phrases derive from earlier caselaw, the Supreme Court has explained the difference between modern incorporation analysis and the erroneous route taken by *Palko*:

> [T]he governing standard is not whether any "civilized system [can] be imagined that would not accord the particular protection." Instead, the Court inquire[s] whether a particular Bill of Rights guarantee is fundamental to our scheme of ordered liberty and system of justice.[48]

As an alternative test, the Court considers "whether this right is 'deeply rooted in this Nation's history and tradition.'"[49]

Many of the cases incorporating the provisions of the Bill of Rights were children of the Warren Court in the 1960s.[50] In addition to the Seventh Amendment, those cases left the Second Amendment and the Excessive Fines Clause of the Eighth Amendment orphaned.[51] When the Seventh Amendment challenge in *Watson* was decided, the Supreme Court had not tackled incorporation for decades. That streak ended when the Court took up incorporation of the Second Amendment in its 2010 decision in *McDonald v. City of Chicago*.[52]

McDonald applied the modern incorporation criteria with gusto, concluding that it was error to leave the right to bear arms outside the scope of nationally guaranteed, fundamental rights.[53] In fact, in *District of Columbia v. Heller*, a predecessor case from the District of Columbia that did not require incorporation through the Fourteenth Amendment, the Court chided the lower courts for adhering to a repudiated, older jurisprudence and failing to employ "the sort of Fourteenth Amendment inquiry required by our later cases."[54]

Applying the *McDonald* criteria employed by the Supreme Court to the Seventh Amendment, the case for incorporation of the civil jury trial right is even more compelling than the one that moved the Court to incorporate the

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47. *Hurtado*, 110 U.S. at 535.

48. McDonald v. City of Chicago, 561 U.S. 742, 764 (2010) (quoting *Duncan*, 391 U.S. at 149 n.14). *Duncan* held the right to a jury trial in criminal cases to be fundamental and thus applicable to the states through incorporation. *Duncan*, 391 U.S. at 148–49.

49. *McDonald*, 561 U.S. at 767 (quoting Washington v. Glucksberg, 521 U.S. 702, 721 (1997)).

50. *See, e.g.*, Justin F. Marceau, *Un-Incorporating the Bill of Rights: The Tension Between the Fourteenth Amendment and the Federalism Concerns that Underlie Modern Criminal Procedural Reforms*, 98 J. CRIM. L. & CRIMINOLOGY 1231, 1243 (2008).

51. *See id. But see McDonald*, 561 U.S. at 791.

52. *McDonald*, 561 U.S. at 742.

53. *Id.* at 768.

54. District of Columbia v. Heller, 554 U.S. 570, 620 n.23 (2008).

right to bear arms.[55] Like the Second Amendment,[56] the Seventh Amendment guarantee is "fundamental."[57] Moreover, it is essential to a fair trial.[58]

It is likewise, as in *McDonald*,[59] "of ancient origin."[60] Often traced to the *Magna Carta*,[61] the civil jury was a hallmark of British common law. It was so much a part of the fabric of justice, Blackstone proclaimed it "the glory of the English law," and "the most transcendent privilege which any subject can enjoy."[62]

As Justice Story recognized: "The trial by jury in all cases, civil and criminal, was as firmly, and as universally established in the colonies, as in the mother country."[63] Indeed, efforts by the British to restrict the role of the jury in the colonies (in order to exercise greater control over the colonists) played an important role in the decision to seek independence.[64] It was the only right universally secured by all thirteen original American state constitutions.[65] Only after the Bill of Rights, including the Seventh Amendment, was proposed was the Constitution ratified.[66] Without that jury-trial guarantee, the Constitution would have never been ratified.[67]

At the time the Fourteenth Amendment was adopted, the constitutions of "[t]hirty-six states out of thirty-seven . . . guaranteed the right to jury trials in all civil or common law cases."[68] By comparison, as noted in *McDonald*, only "22 of the 37 States in the Union had state constitutional provisions explicitly protecting the right to keep and bear arms."[69] Yet even this smaller majority of states was sufficient for the Supreme Court to declare the right to keep and bear arms one of the "foundational rights necessary to our system

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55. *McDonald*, 561 U.S. at 768.

56. *Id.* at 769.

57. *See, e.g.*, Jacob v. City of New York, 315 U.S. 752, 752–53 (1942); Hodges v. Easton, 106 U.S. 408, 412 (1882); *see also* Parklane Hosiery Co. v. Shore, 439 U.S. 322, 337–38 (1979) (Rehnquist, J., dissenting) (discussing how the Seventh Amendment is "fundamental to our history and jurisprudence").

58. *See, e.g.*, Simler v. Conner, 372 U.S. 221, 222 (1963); Byrd v. Blue Ridge Rural Elec. Coop., Inc., 356 U.S. 525, 537–38 (1958).

59. *See McDonald*, 561 U.S. at 767.

60. Dimick v. Schiedt, 293 U.S. 474, 485 (1935).

61. 3 WILLIAM BLACKSTONE, BLACKSTONE'S COMMENTARIES ON THE LAWS OF ENGLAND 275 (Wayne Morrison ed., 3d ed. 2001) (1765) ("In magna carta [trial by jury] is more than once insisted on as the principal bulwark of our liberties . . . .") (emphasis in original omitted).

62. *Id.* at 297.

63. 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 111 (1858).

64. *See* Parklane Hosiery Co. v. Shore, 439 U.S. 322, 340 (1979) (Rehnquist, J., dissenting).

65. *Id.* at 341 (footnotes omitted).

66. *See* Parsons v. Bedford, 28 U.S. 433, 446 (1830).

67. *Id.*

68. Steven G. Calabresi & Sarah E. Agudo, *Individual Rights Under State Constitutions When the Fourteenth Amendment Was Ratified in 1868: What Rights Are Deeply Rooted in American History and Tradition?*, 87 TEX. L. REV. 7, 77 (2008).

69. McDonald v. City of Chicago, 561 U.S. 742, 777 (2010) (citing Calabresi & Agudo, *supra* note 68, at 50).

of Government" and "among those fundamental rights necessary to our system of ordered liberty."[70]

Moreover, if a medical malpractice case were in federal court on the basis of diversity jurisdiction, perhaps an out-of-state patient suing a Texas health provider, it would be subject to the Seventh Amendment.[71] The Seventh Amendment right to trial by jury applies in federal courts in diversity cases, where the federal system for administering justice "assigns the decisions of disputed questions of fact to the jury."[72] It would be absurd to permit foreign plaintiffs to have the full benefit of their jury's verdict based on the evidence of necessary compensation because the case was brought in federal court, while denying citizens of the state the same right because they have sued an in-state defendant and proceed in state court.

Thus, under modern selective incorporation doctrine, there can be no question that the Seventh Amendment guarantee meets the requirements for incorporation against the states through the Fourteenth Amendment. It is both "fundamental to *our* scheme of ordered liberty" and system of justice[73] and "deeply rooted in this Nation's history and tradition."[74] As in *McDonald*, the argument against incorporation of the Seventh Amendment "is nothing less than a plea to disregard 50 years of incorporation precedent and return . . . to a bygone era."[75] Unfortunately, the *Watson* court chose to stick in that bygone era.

Judge Everingham's report recommending that plaintiffs' Seventh Amendment challenge be dismissed was issued on March 12, 2009, and adopted by Judge T. John Ward on March 27, 2009.[76] *McDonald* was decided June 28, 2010.[77] On September 27, 2010, plaintiffs filed a Motion to Reconsider the court's decision on their Seventh Amendment claims, arguing that it could not be squared with *McDonald*.[78] Four days later, on October 1, 2010, Judge Ward retired and Judge Rodney Gilstrap was assigned the case.[79] Judge Gilstrap denied the Motion to Reconsider and dismissed the case on March 27, 2012.[80]

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70. *Id.* at 777–78.

71. *See* Byrd v. Blue Ridge Rural Elec. Coop., Inc. 356 U.S. 525, 537 (1958).

72. *Id.*; *see* Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415, 432 (1996) (discussing how the Seventh Amendment's Reexamination Clause applies in diversity cases); Simler v. Conner, 372 U.S. 221, 222 (1963).

73. *McDonald*, 561 U.S. at 764 (citing Duncan v. Louisiana, 391 U.S. 145, 149 (1968)).

74. *Id.* at 767 (citations omitted) (quoting Washington v. Glucksberg, 521 U.S. 702, 721 (1997)).

75. *Id.* at 780.

76. Report and Recommendations at 12–13, Watson v. Hortman, 844 F. Supp. 2d 795 (E.D. Tex. 2012) (No. 2:08-CV-00081-JRG-RSP).

77. *See McDonald*, 561 U.S. at 742.

78. Plaintiffs' Motion, and Supporting Memorandum, for Reconsideration of this Court's Dismissal of Their Seventh Amendment Claim, *supra* note 25, at 1.

79. Order Granting Defendants' Motion to Dismiss, *supra* note 26.

80. Order Denying Motion for Reconsideration at 1–2, Watson v. Hortman, 844 F. Supp. 2d 795 (E.D. Tex. 2012) (No. 2:08-CV-00081-JRG-RSP).

He disposed of *McDonald* by citing a footnote listing the right to a jury trial in civil cases as one of the "handful" of Bill of Rights provisions that had not been incorporated.[81] However, he ignored the context provided by the sentence with which Justice Alito concluded that footnote: "Our governing decisions regarding the . . . Seventh Amendment's civil jury [trial] requirement long predate the era of selective incorporation."[82] Nor did Judge Gilstrap acknowledge that just two years earlier, presaging the decision in *McDonald*, the Supreme Court instructed that issues of incorporation must be examined by "the sort of Fourteenth Amendment inquiry *required* by our later cases."[83] There were no further hearings in the case.

Perhaps Judge Gilstrap was not inclined to reverse his retired predecessor. Perhaps he was not impressed by the intervening precedent of *McDonald* and its directives regarding the necessary analysis of an incorporation argument just then beginning to percolate through the constitutional jurisprudence. Or perhaps he did not believe that incorporation decisions should be made by a district court, *Heller's* admonition notwithstanding. For whatever reason, he did not undertake the required Fourteenth Amendment inquiry.[84] Thus, the challenge brought in 2008 seemingly had its die cast by the state of the law in 2009, and the intervention of *McDonald*'s controlling guidance in 2010 did nothing to change the roll.

IV. CAPS VIOLATE THE RIGHT TO TRIAL BY JURY

Yet, even assuming that incorporation of the jury-trial right was warranted, that decision does not end the inquiry. A court must still determine that capping damages in a preexisting common law cause of action violates the jury-trial right. Here, federal caselaw strongly favors invalidation.

The Seventh Amendment consists of two clauses: the Preservation and Reexamination Clauses.[85] The first preserves the jury-trial right as it existed at common law.[86] The second prohibits courts from reexamining a fact found by the jury.[87] Because the Texas damage caps were the product of legislative, rather than judicial, action, only the Preservation Clause was implicated.[88]

To determine the application of the Seventh Amendment's jury-trial right in any particular instance, federal courts employ a historical test, consisting of two questions: (1) "whether we are dealing with a cause of

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81. *See McDonald*, 561 U.S. at 944 n.13.
82. *Id.*
83. District of Columbia v. Heller, 554 U.S. 570, 723 n.23 (2008) (emphasis added).
84. *See id.*
85. *See* Renée Lettow Lerner & Suja A. Thomas, *Common Interpretation: The Seventh Amendment*, NAT'L CONST. CTR., https://constitutioncenter.org/interactive-constitution/amendments/amendment-vii (last visited Apr. 10, 2019).
86. *See* City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687, 720 (1999).
87. *See* Hetzel v. Prince William County, 523 U.S. 208, 211–12 (1998).
88. *See* Lerner & Thomas, *supra* note 85.

action that either was tried at law at the time of the founding or is at least analogous to one that was"; and (2) whether the particular trial decision must fall to the jury in order to preserve the substance of the common-law right as it existed in 1791.[89]

Both questions can be answered affirmatively. Medical malpractice cases were recognized at common law long before the nation was founded and were tried before juries.[90] No decision has ever suggested otherwise. "The second question is equally well settled by the historic record. One of the jury's indisputable responsibilities, as judges of the facts, is the assessment of damages."[91] Longstanding precedent establishes that the determination of compensatory damages "involves only a question of fact."[92]

A jury's incontrovertible authority to set—and not merely suggest—damages was settled at least as far back as the time of Sir Edward Coke.[93] Coke defined tort damages as "the recompense that is given by the jury to the [plaintiff] . . . for the wrong the defendant hath done unto him."[94] If any English scholar rivaled Coke as an authority on the common law in the eyes of the founding generation, it was Blackstone, who stressed that it was the jury's province to "assess the damages . . . sustained by the plaintiff, in consequence of the injury."[95] Thus, if "damages are to be recovered, a jury must . . . assess them."[96]

Summarizing this history, the United States Supreme Court recognized juries have always served as the "judges of . . . damages."[97] Because jurors have the preeminent role in assessing damages, their determination cannot be overridden without impinging on the jury-trial guarantee. Thus, in *Dimick v. Scheidt*, the Court stated that "the common-law rule as it existed at the time

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89. Markman v. Westview Instruments, Inc., 517 U.S. 370, 376 (1996) (citations omitted).

90. *See, e.g.*, Weidrick v. Arnold, 835 S.W.2d 843, 846 (Ark. 1992) (explaining that medical malpractice "had its origins at common law" with the first recorded case in 1374) (citing WILLIAM L. PROSSER, LAW OF TORTS § 32, at 161 n.32 (4th ed. 1971)); Wright v. Cent. Du Page Hosp. Ass'n, 347 N.E.2d 736, 742 (Ill. 1976); *see also* Allan H. McCoid, *The Care Required of Medical Practitioners*, 12 VAND. L. REV. 549, 550 (1959) (detailing an instance where jurors were asked to compare the degree of care used by a medical professional against the industry custom to determine liability).

91. Robert S. Peck & Erwin Chemerinsky, *The Right to Trial by Jury as a Fundamental and Substantive Right and Other Civil-Trial Constitutional Protections*, 96 OR. L. REV. 489, 551 (2018).

92. St. Louis, Iron Mountain & S. Ry. v. Craft, 237 U.S. 648, 661 (1915); *accord* Cooper Indus., Inc. v. Leatherman Tool Grp., Inc., 532 U.S. 424, 437 (2001) (explaining that the calculation of actual damages is a jury question); *see also* Kennon v. Gilmer, 131 U.S. 22, 29–30 (1889) (explaining that a "court has no authority . . . in a case in which damages for a tort have been assessed by a jury at an entire sum, . . . to enter an absolute judgment for any other sum than that assessed by the jury . . . [unless] the plaintiff elected to remit the rest of the damages").

93. *See* Austin Scott, *Trial by Jury and the Reform of Civil Procedure*, 31 HARV. L. REV. 669, 675 (1918).

94. 2 EDWARD COKE, THE FIRST PART OF THE INSTITUTES OF THE LAWS OF ENGLAND § 257a (18th ed. 1823) (1628).

95. BLACKSTONE, *supra* note 61, at 378.

96. *Id.* at 389.

97. Feltner v. Columbia Pictures Television, Inc., 523 U.S. 340, 353 (1998) (quoting Lord Townsend v. Hughes, 86 Eng. Rep. 994, 994–95 (C.P. 1676)).

of the adoption of the Constitution" was that "in cases where the amount of damages was uncertain[,] their assessment was a matter so peculiarly within the province of the jury that the Court should not alter it."[98]

Dimick considered the ability of a federal court to condition the grant of a new trial on the defendant's decision to agree to an increase in the amount of damages awarded by a jury in a personal injury case.[99] The Court held that such a practice would violate the historical role of a jury in making factual determinations that was enshrined in the Seventh Amendment and that it "should be scrutinized with the utmost care."[100]

> [W]e are dealing with a constitutional provision which has in effect adopted the rules of the common law in respect of trial by jury as these rules existed in 1791. To effectuate any change in these rules is not to deal with the common law, *qua* common law, but to alter the Constitution.[101]

In *Feltner v. Columbia Pictures Television*, the Supreme Court emphatically rejected a defendant's argument that the jury's job is completed when it reaches its verdict and that the constitutional jury-trial guarantee "does not provide a right to a jury determination of the amount of the award."[102]

Instead, the *Feltner* Court held that any other approach to finalizing the award of damages would fail "to preserve 'the substance of the common-law right of trial by jury,'" as required by the Constitution.[103] As the Court concluded, "if a party so demands, a jury must determine the actual amount of . . . damages."[104] As if that was not crystalline enough, the Court straightforwardly held that the right established by the Seventh Amendment "includes the right to have a jury determine the *amount* of . . . damages."[105]

Texas's damages cap improperly takes that constitutionally consecrated authority away, substituting a legislative one-size-fits-all determination divorced from the record established in the case from the jury's binding determination. The cap violates the right to trial by jury.

V. *WATSON* ALSO RAISED A VIABLE DUE PROCESS CHALLENGE

The *Watson* plaintiffs also argued that H.B. 4 violated substantive and procedural due process by abrogating a state common law remedy without

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98. Dimick v. Schiedt, 293 U.S. 474, 480 (1935).
99. *Id.* at 475.
100. *Id.* at 486.
101. *Id.* at 487 (emphasis added).
102. *Feltner*, 523 U.S. at 354. The *Feltner* opinion was written by Justice Thomas, and it was joined by the other remaining members of the Court, Justices Ginsburg and Breyer. *Id.* at 341. Now-Chief Justice Roberts successfully argued the case. *Id.*
103. *Id.* at 355.
104. *Id.* at 354–55.
105. *Id.* at 353 (emphasis in original).

providing a reasonable substitute.[106] Judge Everingham found that *Lucas v. United States*,[107] which had rejected a due process challenge to H.B. 4's predecessor cap,[108] was binding.[109] That case had found dispositive the following statement from *Duke Power Co. v. Carolina Environmental Study Group*:

> Our cases have clearly established that, "[a] person has no property, no vested interest, in any rule of the common law." The "Constitution does not forbid the creation of new rights, or the abolition of old ones recognized by the common law, to attain a permissible legislative object," despite the fact that "otherwise settled expectations" may be upset thereby. Indeed, statutes limiting liability are relatively commonplace and have consistently been enforced by the courts.[110]

The quoted section of the *Duke Power* decision said little of relevance to the question presented by *Watson*. *Duke Power* upheld the constitutionality of the Price-Anderson Act, which capped the liability of operators of nuclear power plants.[111] The plaintiff brought a substantive due process challenge that posited that the Act failed to "provide a reasonably just substitute for the common-law or state tort law remedies it replaces."[112] In doing so, the Court did not definitively decide the question of whether such a quid pro quo was required, but found that it nonetheless existed.[113] That determination was based on provisions in the Act that required that the nuclear industry waive all defenses and instead accept strict liability, while Congress also established itself as a guarantor against any liability in excess of the $560 million ceiling, thereby assuring full compensation of each injured claimant.[114] Judge Everingham's decision did not undertake that analysis, but the *Duke Power* Court's acknowledgement of the question fairly established that the lack of a vested interest in any rule of the common law, by itself, was insufficient to uphold changes that impair a person's compensation for the negligent acts of another.[115]

Much earlier than the 1978 decision in *Duke Power*, the Court rejected a challenge to workers' compensation that it analyzed in similar terms to the quid pro quo standard.[116] There, the Court stated that government may not,

106. *See* Watson v. Hortman, 844 F. Supp. 2d 795, 799–801 (E.D. Tex. 2012).
107. Lucas v. United States, 807 F.2d 414 (5th Cir. 1986).
108. Act of May 5, 1995, 74th Leg., R.S., ch. 140, § 1, sec. 13.01, 1995 Tex. Gen. Laws 985, 985–87 (repealed 2003).
109. Report and Recommendations, *supra* note 76, at 13.
110. Duke Power Co. v. Carolina Envtl. Study Grp., 438 U.S. 59, 88 n.32 (1978) (citations omitted).
111. 42 U.S.C.A § 2210 (West 2019); *Duke Power*, 438 U.S. at 86–87.
112. *Duke Power*, 438 U.S. at 88.
113. *Id.*
114. *Id.* at 93.
115. *See id.* at 88–89.
116. *See generally* N.Y. Cent. R.R. v. White, 243 U.S. 188 (1917).

"without violence to the constitutional guaranty of 'due process of law,' suddenly set aside all common-law rules respecting liability . . . without providing a reasonably just substitute."[117] At the time of this 1917 decision, the vested-right framework discussed in *Duke Power* was already established.[118] In *Munn v. Illinois*, the Supreme Court first expressed the concept and was cited as such in *Duke Power*.[119] The *Munn* Court stated that a "person has no property, no vested interest, in any rule of the common law."[120] Yet, its application to the damage-cap question stretches the *Munn* rule beyond the breaking point, as the sentences before and after the quoted phrase make plain. *Munn* developed the concept with respect to "a mere common-law regulation of trade or business."[121] Those common law rules, it said, "may be changed at the will, or even at the whim, of the legislature, unless prevented by constitutional limitations."[122] As an example of a constitutional limitation, the Court stated that "[r]ights of property which have been created by the common law cannot be taken away without due process."[123]

There remains a serious unanswered constitutional question about whether due process requires an adequate alternative remedy as a limitation on legislative authority to change the law governing compensation determined to be due by a jury. It was no answer to say that no one has a vested interest in any common law rule, as the jury's authority to determine damages is a matter of constitutional imperative derived from the common law and placed beyond legislative competence to change.

VI. *WATSON* RAISED A TWO-PRONGED FEDERAL ACCESS-TO-COURTS ARGUMENT

The *Watson* plaintiffs made two access-to-courts arguments: that the limitations on damages deprived them of a full "'adequate, effective, and meaningful' remedy at law," and that they imposed a financial barrier that made some cases impossible to pursue.[124]

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117. *Id.* at 201; *cf.* PruneYard Shopping Ctr. v. Robins, 447 U.S. 74, 94 (1980) (Marshall, J., concurring) ("[T]here are limits on governmental authority to abolish 'core' common-law rights, . . . at least without a compelling showing of necessity or a provision for a reasonable alternative remedy.") (footnote omitted); Kluger v. White, 281 So. 2d 1, 4 (Fla. 1973) (permitting the legislature to affect common law remedies if it provides an adequate alternative remedy or demonstrates an "overpowering public necessity" for the restriction and a lack of alternatives); Berry *ex rel.* Berry v. Beech Aircraft Corp., 717 P.2d 670, 680 (Utah 1985) (requiring that any displacement of a common law remedy provide "an injured person an effective and reasonable alternative remedy").

118. *See generally* Munn v. Illinois, 94 U.S. 113 (1876).

119. *See generally id.*

120. *Id.* at 134.

121. *Id.*

122. *Id.*

123. *Id.*

124. Watson v. Hortman, 844 F. Supp. 2d 795, 799 (E.D. Tex. 2012).

Judge Everingham summarily rejected the first argument, characterizing the cases cited by plaintiffs as "distinguishable," and noting that plaintiffs had presented no authority suggesting that a limitation on recoverable damages impermissibly restricted access to courts.[125] The cases he abjured were *Bounds v. Smith*,[126] holding that prisons must provide inmates with free legal services for appeals and habeas corpus petitions, and *Bayou Fleet, Inc. v. Alexander*,[127] recognizing that "[a]ccess to the courts is a constitutionally protected fundamental right and one of the privileges and immunities awarded citizens under Article IV and the Fourteenth Amendment."[128] These cases and plaintiffs' briefs also cited *Chambers v. Baltimore & Ohio Railroad Co.*[129] and *Ryland v. Shapiro*,[130] holding that "[a] mere formal right of access to the courts does not pass constitutional muster."[131] Instead, *Bounds* distilled the existing precedents to require that access to the courts be "adequate, effective, and meaningful."[132] Judge Everingham, however, observed that the Supreme Court had stated that "statutes limiting liability are relatively commonplace and have consistently been enforced by the courts," again citing *Duke Power*.[133]

Judge Everingham also turned to Louisiana for authority that medical malpractice lawsuits do not involve fundamental rights. He cited an unpublished Fifth Circuit opinion about a lawsuit brought by a pro se inmate at Angola Prison for the proposition that the "right to recover for medical malpractice does not fall within the fundamental interests recognized by the Supreme Court."[134] He also referenced *Seoane v. Ortho Pharmaceuticals, Inc.*, which upheld the constitutionality of the Louisiana medical malpractice review panel established by Louisiana Statutes Annotated § 40:1299.41–.47.[135]

Those statutes require health care providers to opt in to the plan.[136] As to participating defendants, plaintiffs must submit their complaints to a

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125. *Id.*

126. Bounds v. Smith, 430 U.S. 817, 822 (1977).

127. Bayou Fleet, Inc. v. Alexander, 234 F.3d 852 (5th Cir. 2000).

128. *Id.* at 857.

129. Chambers v. Balt. & Ohio R.R., 207 U.S. 142, 148 (1907). *Chambers* called the "right to sue and defend in the courts . . . the alternative of force," a "right conservative of all other rights," and "one of the highest and most essential privileges of citizenship." *Id.* It demands "[e]quality of treatment." *Id.*

130. Ryland v. Shapiro, 708 F.2d 967 (5th Cir. 1983).

131. *Id.* at 972.

132. Bounds v. Smith, 430 U.S. 817, 822 (1977).

133. Duke Power Co. v. Carolina Envtl. Study Grp., 438 U.S. 59, 88 n.32 (1978). Of course, *Duke Power* expressly reserved the Due Process Clause question of meaningful access because the liability limitation "does, in our view, provide a reasonably just substitute for the common-law or state tort law remedies it replaces." *Id.* at 88.

134. Clifford v. Louisiana, 347 F. App'x 21, 23 (5th Cir. 2009) (per curiam).

135. Seoane v. Ortho Pharm., Inc., 660 F.2d 146, 151 (5th Cir. 1981); *see* LA. STAT. ANN. § 40:1299.41–.47 (1979) (redesignated as LA. STAT. ANN. § 40.1231.1–.8 (2018)).

136. *See* LA. STAT. § 40:1231.6.

review panel before filing suit.[137] The panel, comprised of three physicians and an attorney, reviews written submissions by both sides and issues an opinion as to whether the standard of care has been violated.[138] That opinion is admissible in subsequent litigation.[139] It is not conclusive and, as the Fifth Circuit noted, constitutes no more than expert opinion that a jury may disregard.[140]

Seoane and *Clifford* descend from *Everett v. Goldman*,[141] a 1978 Louisiana Supreme Court opinion, which, without citing any authority, held that the right to sue for damages caused by medical professionals does not involve a fundamental constitutional right.[142]

Finding no fundamental right at issue, Judge Everingham rejected plaintiffs' evidence challenging the rationale and effect of the legislation and held instead that it was "rationally related to a legitimate government purpose."[143] Accordingly, in his view, the statute did not violate plaintiffs' access to courts.[144]

Plaintiffs supported their second argument, that the damage caps imposed a practical obstacle to many medical malpractice plaintiffs because it rendered them uneconomical to pursue, with survey data indicating that fewer Texas lawyers were accepting medical malpractice cases after passage of H.B. 4, thereby cutting off meritorious claims from the courts.[145] The Supreme Court has recognized that empirical evidence can make a powerful case that restricting access to lawyers through a statutory scheme constitutes a denial of access to the courts.[146]

Judge Everingham accepted that the damages limitations "may present a financial barrier to the prosecution of at least some medical malpractice claims," but he analyzed the effect of that obstacle as if it were a simple filing fee.[147] Accepting the possibility that the damage caps erected a financial barrier in some cases, he followed Supreme Court precedent dealing with filing fees or court costs that operated disproportionately against indigent plaintiffs.[148] He wrote that the standard by which those filing fees are evaluated is commensurate with the importance of the underlying right being

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137. *See id.* § 40:1231.8.

138. *See id.*

139. *See id.*

140. *Seoane*, 660 F.2d at 148.

141. Everett v. Goldman, 359 So. 2d 1256 (La. 1978).

142. *Id.* at 1268–69.

143. Watson v. Hortman, 844 F. Supp. 2d 795, 801 (E.D. Tex. 2012) (quoting Hodel v. Indiana, 452 U.S. 314, 331 (1981)).

144. *Id.*

145. *See* Stephen Daniels & Joanne Martin, *Texas Plaintiffs' Practice in the Age of Tort Reform: Survival of the Fittest—It's Even More True Now*, 51 N.Y. L. SCH. L. REV. 285, 312–13 (2006–2007).

146. U.S. Dep't of Labor v. Triplett, 494 U.S. 715, 724 (1990). *See generally* Walters v. Nat'l Ass'n of Radiation Survivors, 473 U.S. 305 (1985).

147. *Watson*, 844 F. Supp. 2d at 800.

148. *See id.* at 800–01.

litigated.[149] For him, "[i]n the civil context, the test is whether the litigant has a 'fundamental interest at stake.'"[150]

Judge Everingham's analysis thus returned to the same outcome-determinative crossroad: if seeking money damages in civil litigation was a fundamental right, then the damage caps would be reviewed under a strict scrutiny standard; otherwise, they would be judged under the rational basis test. He overlooked precedent that access to the courts is a fundamental right protected by multiple provisions of the Constitution.[151] He further ignored the fact that the Supreme Court had applied intermediate scrutiny in a number of instances when no fundamental right was at stake.[152] Instead, Judge Everingham limited the fundamental interests in the resolution of disputes in the courts sufficient to trigger strict scrutiny to divorce cases[153] and actions for termination of parental rights,[154] as opposed to bankruptcy filings[155] or welfare benefit determinations.[156] Thus, the right of a medical malpractice victim to recover a full measure of damages was relegated to the same stack of interests as that of a bankruptcy applicant required to pay court costs.[157]

Judge Everingham's approach also ignored the enormous expense that a medical malpractice case entails,[158] which distinguishes it from most other litigation, let alone filing fees. Preparing a medical malpractice case for filing is an arduous task. Often, "[i]njury in medical malpractice cases can be difficult to detect."[159] Once an injury resulting from malpractice is established to counsel's satisfaction, it is often still not clear which medical personnel might have been negligent.[160] Even when the concern that negligence has occurred should be obvious, the basis of the negligence may still be a mystery.[161] It is also often impossible to obtain complete medical records without the assistance of compulsory discovery, even when the tools of discovery are available.[162]

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149. *Id.* at 800.

150. *Id.* (quoting Carson v. Johnson, 112 F.3d 818, 821 (5th Cir. 1997)).

151. *See* Christopher v. Harbury, 536 U.S. 403, 415 n.12 (2002).

152. *See* Mathews v. Lucas, 427 U.S. 495, 505–06 (1976) (applying "intermediate scrutiny" to a Social Security classification based on a child's illegitimacy).

153. Boddie v. Connecticut, 401 U.S. 371, 376–77 (1971).

154. M.L.B. v. S.L.J., 519 U.S. 102, 124–25 (1996).

155. United States v. Kras, 409 U.S. 434, 444–48 (1973).

156. Ortwein v. Schwab, 410 U.S. 656, 658–59 (1973).

157. Watson v. Hortman, 844 F. Supp. 2d 795, 800–01 (E.D. Tex. 2012).

158. *See generally* THOMAS H. COHEN, BUREAU JUST. STAT., NCJ 203098, MEDICAL MALPRACTICE TRIALS AND VERDICTS IN LARGE COUNTIES, 2001 (2004), https://bjs.gov/content/pub/pdf/mmtvlc01.pdf.

159. Deen v. Egleston, 597 F.3d 1223, 1235 (11th Cir. 2010); *see* Owens v. White, 380 F.2d 310, 316 (9th Cir. 1967) ("[N]ot even the fact of injury can always be clear.").

160. *See, e.g.*, Free v. Carnesale, 110 F.3d 1227 (6th Cir. 1997).

161. *See* Sanchez v. United States, 740 F.3d 47, 52 (1st Cir. 2014) ("The death of a generally healthy woman in childbirth is sufficiently rare in this country today so as to make most reasonable people ask why it happened.").

162. *E.g.*, Truth v. Eskioglu, 781 F. Supp. 2d 630, 634 (M.D. Tenn. 2011); *see* T.L. *ex rel.* Ingram v.

The task of counsel is then to muster proof of what the specific and local standard of care that should have governed the physician's actions was, and how it was not met.[163] Malpractice cases cannot be filed without prior consultation with a medical expert qualified in the precise field of the dispute.[164] Texas, like many states, requires that a plaintiff demonstrate the merits of his claim by filing a report prepared by a qualified expert addressing the standard of care, breach, and causation—on penalty of dismissal.[165] As two American Bar Foundation researchers found, medical malpractice lawyers must "invest thousands of dollars in deciding whether to take a case, and that expenditure does not include the internalized costs of having nurses, nurse-lawyers, or physician-lawyers on staff."[166]

Because discovery is not yet available prior to filing the complaint, counsel must also find experts willing to opine on the likely cause of the injury and the likely departure from the standard of care on the basis of an incomplete record at the pre-filing stage, which is frequently a herculean task.[167] The experts required, often more than one, are tremendously expensive and become more expensive at trial.[168]

After interviewing Texas medical malpractice lawyers, the American Bar Foundation researchers concluded:

> The reason for not taking low-value cases even though there may be malpractice involved is simple. There must be enough potential for recovery to pay for the costs of screening the case, the costs of preparing the case, the costs of actually litigating the case, the cost of the lawyer's time, and possibly the cost of a referral fee to the lawyer who brought the case to the specialist. On top of this, there must be enough financial recovery to help pay for the costs of screening all of the cases ultimately rejected by the lawyer, as well as other parts of the lawyer's overhead. The amount of damage potential varied among the lawyers interviewed, but few are willing to take anything much below $100,000, and some will take nothing below

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United States, 443 F.3d 956, 964–65 (8th Cir. 2006).

163. *See, e.g.*, Conn v. United States, 880 F. Supp. 2d 741, 743 (S.D. Miss. 2012) (describing Mississippi law and its standard of care, and confirming the district court's decision to not toll the statute of limitations in a Federal Tort Claims Act suit where the defendant provided incomplete and illegible medical records, among other things).

164. *See* Am. Transitional Care Ctrs. of Tex., Inc. v. Palacios, 46 S.W.3d 873, 876 (Tex. 2001).

165. *See id.*

166. Stephen Daniels & Joanne Martin, *Plaintiffs' Lawyers, Specialization, and Medical Malpractice*, 59 VAND. L. REV. 1051, 1063 (2006).

167. *See* Gabriel H. Teninbaum & Benjamin R. Zimmermann, *A Tale of Two Lawsuits*, 8 J. HEALTH & BIOMEDICAL L. 443, 446–47 (2013) (indicating that it is an expensive process, often involving retired doctors or doctors from another region of the country because colleagues generally will not agree to testify against each other).

168. *See id.*

> $1 million. Trying a case, of course, is even more expensive, and that money comes out of the lawyer's pocket as well.[169]

Moreover, medical malpractice cases have a success rate that is about half of other plaintiff personal injury actions, or only 27%.[170] When a state then adds an artificial cap on the compensatory damages a successful plaintiff will receive, it has the effect of nailing the courthouse door shut to a large range of legitimate cases, forcing plaintiffs to seek state assistance to cover their medical and other expenses caused by the negligence of another.

VII. THE *WATSON* PLAINTIFFS ALSO MADE AN INNOVATIVE TAKINGS CLAUSE ARGUMENT

Plaintiffs' property arguments channeled the constitutional Framers, whose idea of property and its relationship to constitutional rights derived from the work of John Locke, who in his most influential work wrote that preservation of property was the "great and chief end" of government and expressed the widely accepted view that a person "has a 'property' in his own 'person.'"[171] Thus, the constitutional Framers, who read and supported their views by citing Locke, used the term "property" in a sense that embraced injuries to person, as well as injuries to real property and chattels.[172]

A second argument was premised on a tort plaintiff having a private property interest in his or her common law cause of action.[173] That interest has the monetary value a jury places upon it after due deliberation on the evidence, as reviewed by the trial court. The damages cap interferes with this property interest by arbitrarily assigning the cause of action a lesser value and, as such, is a taking of private property without just compensation within the meaning of the Takings Clause.

When setting a damages cap, a legislature either improperly displaces the fact-finding role of the jury or imposes a limitation, not because the limitation is a fair estimate of damages, but because it is supposedly pursuing a public policy purpose.[174]

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169. Daniels & Martin, *supra* note 166, at 1064–65 (footnotes omitted).

170. *Id.* A United States Department of Justice survey showed that medical malpractice plaintiffs prevail 27% of the time, compared to the personal injury plaintiffs rate of 52%. COHEN, *supra* note 158.

171. JOHN LOCKE, SECOND TREATISE OF GOVERNMENT 17, 71 (Barnes & Noble ed., 2004); *see id.* at 98 (stating that property means the "property which men have in their persons as well as goods").

172. LAURENCE H. TRIBE & MICHAEL C. DORF, ON READING THE CONSTITUTION 70–72 (1991) (discussing that Locke's theories on natural rights provided a basis for the Framers' views on private property).

173. *See* Logan v. Zimmerman Brush Co., 455 U.S. 422, 428 (1982) ("[A] cause of action is a species of property protected by the Fourteenth Amendment's Due Process Clause."); *In re* Aircrash in Bali, Indon. April 22, 1974, 684 F.2d 1301, 1312 (9th Cir. 1982) ("There is no question that claims for compensation are property interests that cannot be taken for public use without [just] compensation.").

174. *Cf.* Salgado v. County of Los Angeles, 967 P.2d 585, 591 (Cal. 1998) (noting that the California cap on noneconomic damages "is not a legislative attempt to estimate the true damages suffered by

Yet, these arguments had no traction with the judge.

Judge Everingham's analysis of the Takings Clause argument began with the proposition that an unconstitutional taking must involve a "vested" property right,[175] and he rejected the notion that anyone injured after the effective date of H.B. 4 could qualify. He noted that *Ruckelshaus v. Monsanto Co.*[176] had instructed that, since the Constitution does not create property rights, they must stem from an independent source "such as state law."[177] He therefore turned again to Texas law and the Fifth Circuit's statement in *Lucas* that "[a] person has no property, no vested interest, in any rule of the common law."[178]

Because one of the plaintiffs was injured prior to H.B. 4's effective date, Judge Everingham examined Texas law to determine whether a tort plaintiff's interest in a cause of action is vested prior to the claim being reduced to judgment.[179] After discussing several cases that would compel a negative holding, he cited a contrary 1887 opinion of the Texas Supreme Court[180] and concluded that the lone plaintiff's interest was "arguably" vested.[181]

Then, Judge Everingham analyzed the claim according to the so-called *Penn Central* test,[182] which utilizes three factors to evaluate traditional Takings Clause cases: "(1) the economic impact on the claimant; (2) the extent to which the regulation has interfered with distinct investment-backed expectations; and (3) the character of the governmental action."[183] He noted that only a portion of a malpractice victim's cause of action was affected by the caps and thus rejected the simpler analytical framework of *Lucas v. South Carolina Coastal Council*, which regards any deprivation of all economically beneficial interest in property as a taking.[184]

Selection of this methodology doomed plaintiffs' clearly non-traditional Takings Clause case. Because none of the plaintiffs had obtained a jury verdict, this being a declaratory judgment action, Judge Everingham held that the impact of the caps was speculative and that plaintiffs did not have "any distinct investment-backed expectations to recover uncapped noneconomic

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plaintiffs, but rather an attempt to control and reduce medical malpractice insurance costs by placing a predictable, uniform limit on the defendant's liability for noneconomic damages").

175. Watson v. Hortman, 844 F. Supp. 2d 795, 800–01 (E.D. Tex. 2012) (citing Landgraf v. USI Film Prods., 511 U.S. 244, 266 (1994)).

176. Ruckelshaus v. Monsanto Co., 467 U.S. 986 (1984).

177. *Id.* at 1001 (quotations omitted).

178. Lucas v. United States, 807 F.2d 414, 422 (5th Cir. 1986) (alteration in original) (quoting Duke Power Co. v. Carolina Envtl. Study Grp., Inc., 438 U.S. 59, 88 n.32 (1978)).

179. *Watson*, 844 F. Supp. 2d at 801.

180. Mellinger v. City of Houston, 3 S.W. 249 (1887).

181. *Watson*, 844 F. Supp. 2d at 803.

182. Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104 (1978).

183. *Watson*, 844 F. Supp. 2d at 803.

184. Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1015 (1992).

damages."[185] Finally, he characterized the legislation as an effort to "adjust[] the benefits and burdens of economic life to promote the common good," citing *Connolly v. Pension Benefit Guaranty Corp.*[186] Application of the *Penn Central* factors, Judge Everingham held, compelled rejection of plaintiffs' Takings Clause case.[187] As an afterword, Judge Everingham noted that the Supreme Court had observed that it would be "surprising" to find a statute violating the Takings Clause that did not also infringe upon due process rights.[188]

VIII. THE FUTURE OF CONSTITUTIONAL CHALLENGES TO H.B. 4

Justice Hugo Black argued for total incorporation of the Bill of Rights through the Fourteenth Amendment, rather than the slow step-by-step process that selective incorporation has entailed.[189] In the end, the Supreme Court, through that slow process, appears to be headed where Justice Black asked them to go in 1947.

Just as *McDonald* incorporated the Second Amendment, the Court faced another Incorporation Doctrine issue as this Article was being written. In *Timbs v. Indiana*,[190] the Court held unanimously that the Eighth Amendment's Excessive Fines Clause is applicable to the States.[191] Justice

185. *Watson*, 844 F. Supp. 2d at 803.

186. *Id.* at 804 (quoting Connolly v. Pension Benefit Guar. Corp., 475 U.S. 211, 225 (1986)).

187. *Id.*

188. Concrete Pipe & Prods. of Cal., Inc. v. Constr. Laborers Pension Tr. for S. Cal., 508 U.S. 602, 641 (1993) (quoting *Connolly*, 475 U.S. at 223).

189. Adamson v. California, 332 U.S. 46, 86 (1947) (Black, J., dissenting), *overruled in part by* Malloy v. Hogan, 378 U.S. 1, 14 (1964).

190. Timbs v. Indiana, 139 S. Ct. 682 (2019).

191. U.S. CONST. amend. VIII. During oral argument in *Timbs*, raising the incorporation question of the Eighth Amendment's Excessive Fines Clause, the United States Supreme Court's newest Justices made clear that, under the modern incorporation doctrine, all of the Bill of Rights apply to the states. Transcript of Oral Argument at 32–40, Timbs v. Indiana, 139 S. Ct. 682 (2019) (No. 17-1091), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2018/17-1091_4h25.pdf. When Indiana's Solicitor General attempted to argue against incorporation, he was pilloried by Justice Gorsuch, who said: "And here we are in 2018 . . . still litigating incorporation of the Bill of Rights. Really? Come on, General." *Id.* As counsel for Indiana pleaded that history supports him, Justice Kavanaugh chimed in with "why do you have to take into account all of the history, to pick up on Justice Gorsuch's question? Isn't it just too late in the day to argue that any of the Bill of Rights is not incorporated?" *Id.* at 33. As Indiana's counsel continued to protest, Justice Kavanaugh added: "But aren't — but aren't all — all the Bill of Rights at this point in our conception of what they stand for, the history of each of them, incorporated?" *Id.* No Justice questioned the concept that the Bill of Rights in its entirety is incorporated at this time, and Justice Alito suggested that it was too late to return to the jurisprudence that approached each amendment of the Bill of Rights separately and selectively. *Id.* at 39–40. The exchange strongly suggests that, as *Heller* stated, it is error to rely upon an older jurisprudence on incorporation and may mark the realization of Justice Black's original bid to seek "total incorporation" of the Bill of Rights. *See Adamson*, 332 U.S. at 71 (Black, J., dissenting); *accord* District of Columbia v. Heller, 554 U.S. 570, 620 n.23 (2008). The theory of total incorporation was first articulated within a Supreme Court opinion by Justice Bradley in the *Slaughter-House Cases*. Slaughter-House Cases, 83 U.S. 36, 118–19 (1872) (Bradley, J., dissenting).

Ginsburg's opinion observed that but for only a handful of exceptions, the rights guaranteed by the Bill of Rights have all been incorporated.[192] The Court applied the *McDonald* analysis and reduced that handful by one, concluding that the excessive fines ban was both "fundamental to our scheme of ordered liberty," and "deeply rooted in this Nation's history and tradition."[193]

Under the criteria the Court has utilized, there can be little doubt that incorporation will occur, as no right has a stronger claim on fundamental importance under a historic test than the jury-trial right. When it does, it will be time to again challenge H.B. 4. It will be time for the Court's unanimous view expressed in *Feltner*, that "the jury are judges of the damages," to be put to the test: can the factual determination of the jury in a case within the cognizance of the Seventh Amendment be altered by legislative fiat?[194] We submit that H.B. 4 and similar damage caps will fail that test.[195]

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[192] *Timbs*, 139 S. Ct. at 689. Justice Ginsburg cited *McDonald*'s footnote 13, which Judge Gilstrap had used to dismiss Watson's Motion for Reconsideration. *Id.* That footnote listed the only Bill of Rights exceptions to incorporation: (1) the Third Amendment's protection against quartering of soldiers; (2) the Fifth Amendment's grand jury indictment requirement; (3) the Seventh Amendment's right to a jury trial in civil cases; and (4) the Eighth Amendment's prohibition on excessive fines. McDonald v. City of Chicago, 561 U.S. 742, 944 n.13 (2010).

[193] *Timbs*, 139 S. Ct. at 689, 693. Justice Thomas wrote a concurring opinion in which he reiterated his view that incorporation should be accomplished through the Privileges and Immunities Clause of the Fourteenth Amendment. *Id.* at 691–98 (Thomas, J., concurring). Justice Gorsuch concurred separately, noting that Justice Thomas's approach may be the appropriate vehicle. *Id.* at 691 (Gorsuch, J., concurring).

194. Feltner v. Columbia Pictures Television, Inc., 523 U.S. 340, 353 (1998) (quoting Lord Townsend v. Hughes, 86 Eng. Rep. 994, 994–95 (C.P. 1676)).

[195] As this Article was undergoing final editing, the Supreme Court granted certiorari in *Ramos v. Louisiana* in order to decide whether the Sixth Amendment's requirement of unanimous verdicts in criminal cases applies to the states. State v. Ramos, 231 So. 3d 44 (La. Ct. App. 2017), *cert. granted*, Ramos v. Louisiana, 2019 WL 1231752 (U.S. Mar. 18, 2019) (No. 18-5924).

APPENDIX

CONSTITUTIONAL PROVISIONS EXPLICITLY BARRING DAMAGE CAPS AND DECISIONS HOLDING DAMAGE LIMITATIONS UNCONSTITUTIONAL

December 9, 2017

Ala. – *Moore v. Mobile Infirmary Ass'n*, 592 So. 2d 156, 158 (Ala. 1991) ($400,000 noneconomic damage cap in medical malpractice cases violates jury trial and equal protection guarantees); *Clark v. Container Corp. of Am., Inc.*, 589 So. 2d 184, 197–98 (Ala. 1991) (statute permitting periodic payments of personal injury damage awards greater than $150,000 violates the jury trial right).
Ariz. – ARIZ. CONST. art. 2, § 31 ("No law shall be enacted in this state limiting the amount of damages to be recovered for causing the death or injury of any person . . . ."); *Boswell v. Phx. Newspapers, Inc.*, 730 P.2d 186, 194–95 (Ariz. 1986) (retraction in lieu of damages in defamation actions violates the state Open Courts Provision).
Ark. – ARK. CONST. art. 5, § 32 ("[N]o law shall be enacted limiting the amount to be recovered for injuries resulting in death or for injuries to persons or property; and in case of death from such injuries the right of action shall survive . . . .").
Fla. – *N. Broward Hosp. Dist. v. Kalitan*, 219 So. 3d 49, 59 (Fla. 2017) (per curiam) (striking down noneconomic damage cap on equal protection grounds); *Estate of McCall v. United States*, 134 So. 3d 894, 916 (Fla. 2014) (aggregate cap on damages violates equal protection in wrongful death case); *Smith v. Dep't of Ins.*, 507 So. 2d 1080, 1089–90 (Fla. 1987) (per curiam) ($450,000 cap on noneconomic damages recoverable in actions for personal injury violates Open Courts and jury-trial provision).
Ga. – *Atlanta Oculoplastic Surgery, P.C. v. Nestlehutt*, 691 S.E.2d 218, 224 (Ga. 2010) ($350,000 medical malpractice cap on noneconomic damages violated state constitutional right to trial by jury).
Ill. – *Lebron v. Gottlieb Mem'l Hosp.*, 930 N.E.2d 895, 914 (Ill. 2010) (noneconomic damage caps of $500,000 and $1 million violated separation of powers); *Best v. Taylor Mach. Works*, 689 N.E.2d 1057, 1080–81 (Ill. 1997) ($500,000 cap on noneconomic damages was a legislative remittitur in violation of the separation of powers doctrine and constituted impermissible special legislation); *Wright v. Cent. Du Page Hosp. Ass'n*, 347 N.E.2d 736, 744 (Ill. 1976) ($500,000 cap unconstitutional as denial of equal protection).
Ky. – KY. CONST. § 54 ("The General Assembly shall have no power to limit the amount to be recovered for injuries resulting in death, or for injuries to person or property."); *Williams v. Wilson*, 972 S.W.2d 260, 269 (Ky. 1998) (changes to standards governing availability of punitive damages violates

right to jury, right to remedy, prohibition on damage caps, and wrongful death rights guarantee); *O'Bryan v. Hedgespeth*, 892 S.W.2d 571, 578 (Ky. 1995) (statute admitting evidence of collateral source payments in personal injury cases violates separation of powers and exercises judicial powers to set rules of practice); *Waldon v. Hous. Auth. of Paducah*, 854 S.W.2d 777, 778 (Ky. Ct. App. 1991) (immunity from damages when injury results from intervening criminal act violates right to a remedy).
La. – *Chamberlain v. State*, 624 So. 2d 874, 888 (La. 1993), *superseded by constitutional amendment*, LA. CONST. art. XII, § 10(C) ($500,000 ceiling on general damages recoverable in a personal injury suit against the state violates right to remedy where sovereign immunity has been waived).
Mo. – *Lewellen v. Franklin,* 441 S.W.3d 136, 150 (Mo. 2014) (striking punitive damage cap as a violation of jury-trial right); *Watts v. Lester E. Cox Med. Ctrs.*, 376 S.W.3d 633, 648 (Mo. 2012) (noneconomic damage cap in medical malpractice cases violated right to jury trial); *Klotz v. St. Anthony's Med. Ctr.*, 311 S.W.3d 752, 759–60 (Mo. 2010) (per curiam) (reduced cap cannot be applied retroactively).
N.H. – *Trovato v. DeVeau*, 736 A.2d 1212, 1217 (N.H. 1999) ($50,000 cap on wrongful death claims where no dependent relative survives violates the right to a remedy and equal protection); *Brannigan v. Usitalo*, 587 A.2d 1232, 1236–37 (N.H. 1991) ($875,000 limitation on noneconomic damages recoverable in actions for personal injury violates equal protection); *Carson v. Maurer*, 424 A.2d 825, 836–38 (N.H. 1980) (per curiam) (abrogation of collateral source rule and $250,000 noneconomic damage cap in medical malpractice cases violate equal protection).
N.M. – *Richardson v. Carnegie Library Rest., Inc.*, 763 P.2d 1153, 1164 (N.M. 1988) (damage cap in Dramshop Act unconstitutional on equal protection grounds), *overruled by* Trujillo v. City of Albuquerque, 965 P.2d 305 (N.M. 1998).
N.Y. – N.Y. CONST. art. 1, § 16 ("The right of action now existing to recover damages for injuries resulting in death, shall never be abrogated; and the amount recoverable shall not be subject to any statutory limitation.").
N.C. – *Rhyne v. K-Mart Corp.*, 594 S.E.2d 1, 12 (N.C. 2004) (upheld the punitive damages cap but indicated that the same analysis would not justify a cap on "compensatory damages, which represent a type of property interest vesting in plaintiffs" at the time the tort is committed).
N.D. – *Arneson v. Olson*, 270 N.W.2d 125, 135–36 (N.D. 1978) (statute imposing $300,000 limit on damages recoverable in medical malpractice action and abrogating collateral source rule violated state and federal equal protection and due process guarantees).
Ohio – OHIO CONST. art. I, § 19a ("The amount of damages recoverable by civil action in the courts for death caused by the wrongful act, neglect, or default of another, shall not be limited by law.").

Okla. – OKLA. CONST. art. 23, § 7 ("The right of action to recover damages for injuries resulting in death shall never be abrogated, and the amount recoverable shall not be subject to any statutory limitation . . . ."); *Reynolds v. Porter*, 760 P.2d 816, 825 (Okla. 1988) (holding cap based on claim being more than three years old invalid as special legislation).
Or. – *Halbasch v. Med-Data, Inc.*, 192 F.R.D. 641, 655–56 (D. Or. 2000) (state statute permitting reduction of punitive damages based on defendant's remedial actions violated Oregon Constitution's civil jury guarantee). *But see Horton v. Or. Health & Sci. Univ.*, 376 P.3d 998, 1046 (Or. 2016) (overturning decisions that struck caps on jury-trial grounds).
Pa. – PA. CONST. art. 3, § 18 ("The General Assembly may enact laws requiring the payment by employers, or employers and employe[e]s jointly, of reasonable compensation for injuries to employe[e]s arising in the course of their employment, and for occupational diseases of employe[e]s, whether or not such injuries or diseases result in death, and regardless of fault of employer or employe[e], and fixing the basis of ascertainment of such compensation and the maximum and minimum limits thereof, and providing special or general remedies for the collection thereof; but in no other cases shall the General Assembly limit the amount to be recovered for injuries resulting in death, or for injuries to persons or property, and in case of death from such injuries, the right of action shall survive, and the General Assembly shall prescribe for whose benefit such actions shall be prosecuted."); *Thirteenth & Fifteenth St. Passenger Ry. v. Boudrou*, 92 Pa. 475, 481–82 (1880) (negligence damage cap violates the right to a remedy by due course of law); *Cent. R.R. of N.J. v. Cook*, 1 W.N.C. 319 (Pa. 1873) (negligence damage cap violates right to a remedy by due course of law) *overruled by* Pa. R.R. Co. v. Langdon, 92 Pa. 21 (1879); *Viadock v Nesbitt Mem'l Hosp.*, 489 A.2d 240, 243 (Pa. Super. Ct. 1985) (collateral source modification was not severable from medical malpractice arbitration statute, which was invalidated as a violation of the right to trial by jury).
R.I. – *Dorias v. Yu*, C.A. No. 90-198, Hearing on Motion in Limine (D.R.I. Oct. 7, 1991) (statute authorizing use of collateral source as an affirmative defense is unconstitutional on federal and state equal protection grounds);
Boucher v. Sayeed, 459 A.2d 87, 94 (R.I. 1983) (holding statute admitting evidence of collateral-source payments in medical malpractice cases discriminated between medical malpractice claimants and tort plaintiffs as a whole, and between certain defined medical tortfeasors and others similarly situated in the field was unconstitutional because it denied litigants federal equal protection rights); *Reilly v. Kerzer*, No. C.A.# PC1999-4098, 2000 WL 1273998, at *6 (R.I. Super. Ct. Aug. 8, 2000) (statute authorizing use of collateral source as an affirmative defense is unconstitutional on federal and state equal protection grounds).

S.D. – *Knowles v. United States*, 544 N.W.2d 183, 191–94 (S.D. 1996) (statute limiting medical malpractice compensatory damages to $1 million violated substantive due process).
Tex. – *Waggoner v. Gibson*, 647 F. Supp. 1102, 1108 (N.D. Tex. 1986) (cap on medical malpractice recoveries violates the equal protection and open courts guarantees); *Lucas v. United States*, 757 S.W.2d 687, 690–92 (Tex. 1988) (statute limiting liability to $500,000 for damages in medical malpractice actions violated the open courts guarantee).
Utah – UTAH CONST. art. XVI, § 5 ("The right of action to recover damages for injuries resulting in death, shall never be abrogated, and the amount recoverable shall not be subject to any statutory limitation, except in cases where compensation for injuries resulting in death is provided for by law."); *Smith v. United States*, 356 P.3d 1249, 1258 (Utah 2015) (statutorily enacted cap held unconstitutional in wrongful death medical malpractice cases).
Wash. – *Sofie v. Fibreboard Corp.*, 771 P.2d 711, 728 (Wash. 1989) (statute imposing a cap on noneconomic damages for personal injury at a rate of 0.43 times average annual wage and life expectancy violated jury-trial guarantee).
Wyo. – WYO. CONST. art. 10, § 4 ("(a) No law shall be enacted limiting the amount of damages to be recovered for causing the injury or death of any person[;] (b) Any section of this constitution to the contrary notwithstanding, for any civil action where a person alleges that a health care provider's act or omission in the provision of health care resulted in death or injury, the legislature may by general law: (i) Mandate alternative dispute resolution or review by a medical review panel before the filing of a civil action against the health care provider.").