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## THE UNCONSTITUTIONALITY OF THE PROTECTING ACCESS TO CARE ACT OF 2017'S CAP ON NONECONOMIC DAMAGES IN MEDICAL MALPRACTICE CASES

*Kaeleigh P. Christie*<sup>†</sup>

### INTRODUCTION

With the support of the Trump Administration,<sup>1</sup> the Protecting Access to Care Act of 2017 (PACA) passed the House of Representatives by a vote of 218-210 on July 28, 2017. This legislation, proposed by Representative Steve King (R-IA-4), “establishes provisions governing health care lawsuits where coverage for the care was provided or subsidized by the federal government, including through a subsidy or tax benefit.”<sup>2</sup> Those whose health plans fall under Medicare and Medicaid will be affected by this legislation.<sup>3</sup> Likewise, veterans, servicemen, and their families will also be affected.<sup>4</sup> Further, those who have received their health care under an Affordable Care Act Exchange will be subjected to the provisions of this healthcare reform, as well as those with “any insurance plan – including any employer-sponsored plan – that receives any tax credits from the federal government.”<sup>5</sup>

The provisions of the Protecting Access to Care Act include a three-year statute of limitations on medical malpractice cases, constraints on plaintiff’s attorney fees, and joint-and-several liability with a fair share rule where a defendant in a lawsuit would only be liable for damages equal to his percentage of responsibility in the negligence.<sup>6</sup> However, the most controversial provision in the bill is that which places a cap on a plaintiff’s noneconomic damages at \$250,000 in medical malpractice suits.<sup>7</sup> Whether the patient harmed by the negligence of a medical professional or

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<sup>1</sup> Rep. Steve King, et al., *H.R. 1215 – Protecting Access to Care Act of 2017*, THE WHITE HOUSE (June 13, 2017), <https://www.whitehouse.gov/the-press-office/2017/06/14/hr-1215-%E2%80%93-protecting-access-care-act-2017>.

<sup>2</sup> Protecting Access to Care Act of 2017, H.R. 1215, 115th Cong. (2017).

<sup>3</sup> Joanne Doroshow, *Congress Moves to Punish Anyone Using the ACA and Medicine*, HUFFINGTON POST (Feb. 26, 2017), [https://www.huffingtonpost.com/entry/congress-moves-to-punish-everyone-using-the-affordable\\_us\\_58b34240e4b0e5fdf6197405](https://www.huffingtonpost.com/entry/congress-moves-to-punish-everyone-using-the-affordable_us_58b34240e4b0e5fdf6197405).

<sup>4</sup> *Id.*

<sup>5</sup> Wendy E. Parmet & Elisabeth J. Ryan, “Not Your Grandfather’s Preemption: Proposed Federal Preemption of State Medical Malpractice Cases,” PUB. HEALTH LAW WATCH (Aug. 23, 2017), <https://www.publichealthlawwatch.org/blog/2017/8/23/not-your-grandfathers-preemption-the-imposition-of-federal-limits-on-state-court-medical-malpractice-cases>.

<sup>6</sup> H.R. 1215, *supra* note 2.

<sup>7</sup> Bill Corriher, *The Other Terrible Health Care Bill Pending in Congress*, CTR. FOR AM. PROGRESS

institution is a child, single-mother, Wall Street executive, or senior citizen, this legislation places the value of human life at \$250,000 for noneconomic damages.<sup>8</sup>

The Protecting Access to Care Act of 2017 was introduced by House Republicans as part of their effort to repeal and replace aspects of the Affordable Care Act. Representative King contends PACA is “a necessary move to rein[] in healthcare spending.”<sup>9</sup> Those in support of the legislation argue PACA will “limit unnecessary medical tests and procedures,” and therefore will drive healthcare costs down.<sup>10</sup> This argument rests on the Congressional Budget Office’s projection that PACA will “reduce deficits by \$50 billion by 2027 by lowering premiums for medical liability insurance and by reducing the use of healthcare services prescribed by providers when faced with less pressure from potential malpractice suits.”<sup>11</sup> Proponents of PACA believe doctors will limit their practicing of defensive medicine as a result of the legislation. In turn, it is said this will lower the cost of medical liability insurance, since plaintiffs will only be able to recover a limited award from these medical professionals and hospitals.<sup>12</sup>

House Democrats staunchly oppose the legislation, maintaining the Republican’s reduction of healthcare spending explanation for the bill is a front for its true objective of giving tax breaks to health insurance companies.<sup>13</sup> Further, those opposed to PACA fear it will “shield negligent doctors from liability.”<sup>14</sup> Medical errors are the third leading cause of death in the United States, with up to 440,000 Americans dying annually from preventable hospital errors.<sup>15</sup> These statistics underscore the importance of holding medical professionals liable for their negligence in an effort to provoke them to practice with the utmost care when people’s lives are on the line. Representative Sheila Jackson Lee (D-TX) states, “additional tests may frankly be just good medicine,” implying that defensive medicine is not the horrible, costly practice those in favor of PACA make it out to be;<sup>16</sup> instead, defensive medicine is a practice that saves lives.<sup>17</sup> Others opposing the Protecting Access to Care Act argue it is unfair for the government to put a value on human life with the noneconomic damages cap and that the provisions of the bill are particularly harmful for the most vulnerable.<sup>18</sup>

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(July 20, 2017), <https://www.americanprogress.org/issues/courts/reports/2017/07/20/436343/terrible-health-care-bill-pending-congress/> (citing H.R. 1215, *supra* note 2). The noneconomic damages cap comes with a “state flexibility” provision, which declares whether states with pre-existing caps greater or lesser than \$250,000, are able to keep that capped limit in place.

<sup>8</sup> Doroshov, *supra* note 3.

<sup>9</sup> Kimberly Leonard, *House Passes Medical Malpractice Bill*, WASH. EXAMINER (June 28, 2017), <http://www.washingtonexaminer.com/house-passes-medical-malpractice-bill/article/2627374>.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> John T. James, *A New, Evidence-based Estimate of Patient Harms Associated with Hospital Care*, J. PATIENT SAFETY, 9(3): 122–28 (Sept. 2013).

<sup>16</sup> Leonard, *supra* note 9.

<sup>17</sup> *Id.*

<sup>18</sup> Seth Moulton, *Vote Explanation for H.R. 1215—Protecting Access to Care Act of 2017*, MEDIUM (June 30, 2017), <https://medium.com/@teammoulton/vote-explanation-for-h-r-1215-protecting-access-to->

Further, those opposed to the bill assert that this legislation impedes on states' rights.<sup>19</sup> According to this argument, the Protecting Access to Care Act would "tak[e] power away from local juries to decide individual cases, and consolidat[e] that power in the hands of D.C. politicians."<sup>20</sup> Eighteen House Republicans voted against PACA,<sup>21</sup> contending the bill diminishes state authority to the will of an expanding federal government.<sup>22</sup> Former U.S. Attorney General Edwin Meese, stated the bill was a "sweeping effort to federalize tort law with our system of federalism, which reserves that province solely to the states."<sup>23</sup>

Part I of this Note will discuss the Protecting Access to Care Act's provision capping noneconomic damages in malpractice suits. In Part II, this Note will briefly examine the unsuccessful history of federal medical liability reform regarding caps on noneconomic damages. Part III will argue why PACA's provision capping noneconomic damages is unconstitutional on the grounds of equal protection, due process, right to trial by jury, separation of powers, and unlawful federal preemption of state's rights. Finally, Part IV is a conclusion, summarizing the complete analysis, and providing recommendations of how the legislation should properly go about tort reform and combatting the high cost of health care in the United States.

## I. PACA'S NONECONOMIC DAMAGES PROVISION

Where economic damages refer to monetary losses such as lost wages and medical expenses, noneconomic damages are "subjective losses that are more difficult to quantify."<sup>24</sup> Noneconomic damages include pain and suffering; emotional distress; loss of enjoyment of life; and life chances, such as loss of consortium.<sup>25</sup> Pain and suffering compensates victims for injuries such as paralysis, physical trauma, and the inability to reproduce. When noneconomic damages are capped, the type and severity of a victim's pain and suffering is irrelevant to the limited award they are able to

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care-act-of-2017-2fcb440af340. The provisions of PACA which cap noneconomic damages and limit the amount of attorney's fees the plaintiff's attorney can collect raises the argument that minorities, women, and children will be dramatically harmed by this legislation as their economic damages are likely to be insignificant. As a result, plaintiffs' attorneys may not jump to take these types of cases as there will not be an enormous financial incentive to do so, prohibiting these groups of people from collecting the restitution they are rightfully owed as the result of a hospital or doctor's negligence.

<sup>19</sup> Leonard, *supra* note 9.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> Kimberly Kindy, *House Republicans Pass Tort Bill by Slim Margin*, WASH. POST (June 28, 2017), [https://www.washingtonpost.com/powerpost/house-republicans-pass-tort-bill-by-slim-margin/2017/06/28/4615938a-5c28-11e7-9fc6-c7ef4bc58d13\\_story.html?utm\\_term=.c03f9078a0e2](https://www.washingtonpost.com/powerpost/house-republicans-pass-tort-bill-by-slim-margin/2017/06/28/4615938a-5c28-11e7-9fc6-c7ef4bc58d13_story.html?utm_term=.c03f9078a0e2). (Representative John J. Duncan Jr. (R-Tenn.) states, "[PACA] represents a massive expansion of federal authority."). It is also interesting to note the hypocrisy in that the vast majority of Republicans are pushing forward legislation that federalizes tort law, while they have spent a significant time the past few years trying to repeal and replace the Affordable Care Act for exceeding the government's authority by federalizing healthcare. Corriher, *supra* note 7.

<sup>23</sup> *Id.*

<sup>24</sup> Michael Morgenstern, *Medical Malpractice Damages Caps: A State by State Comparison*, THE EXPERT INST. (Sept. 9, 2015), <https://www.theexpertinstitute.com/medical-malpractice-damages-caps-a-state-by-state-comparison/>.

<sup>25</sup> *Id.*

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The provision in the Protecting Access to Care Act that caps malpractice noneconomic damages reads:

Noneconomic damages are limited to \$250,000, before accounting for reductions in damages required by law. Juries may not be informed of this limitation. Parties are liable for the amount of damages directly proportional to their responsibility. These provisions do not preempt state laws that specify a particular monetary amount of damages.<sup>26</sup>

Under this provision, it would not matter whether the injured patient was a family's breadwinner killed during a botched surgery, a child given defective medicine, an elderly man with bedsores in a nursing home, or a star athlete whose leg was amputated due to a doctor's negligence.<sup>27</sup> Each type of person in each different of scenario could only receive a maximum of \$250,000 for noneconomic damages like pain and suffering, even when that athlete will have to deal with phantom pain and the child a severe brain injury for the next decades of their lives. Irrespective of the situation, the compensation award for noneconomic damages can never go higher than the \$250,000 cap set by PACA.<sup>28</sup>

To put this into perspective, "[a] New Jersey jury handed down a \$17 million verdict to parents who sued a hospital, a doctor and his practice for prematurely removing their teenage daughter from a ventilator, resulting in permanent brain injuries."<sup>29</sup> The jury decided to award the plaintiffs "\$5 million for pain and suffering, \$2 million for potential future lost earnings and \$10 million to be used to pay for medical care for the rest of her life."<sup>30</sup> The \$5 million for pain and suffering is the noneconomic damages award. New Jersey currently has no cap on noneconomic damages. However, if the Protecting Access to Care Act had been in effect when this suit was filed, and the family's health care plan was subsidized by the federal government, the teenage girl's \$5 million for pain and suffering would have been reduced to \$250,000. This award's reduction would occur irrespective of the fact that a jury decided the appropriate amount of noneconomic compensation was twenty times higher than the limited award, leaving the total award at \$12.25 million. Although that award seems significant, it is not at all. Ten million dollars of that money has been calculated to cover the teen's medical expenses, meaning that money has been awarded so the family can pay the cost of the girl's medical bills arising as the result of the malpractice incident. Moreover, plaintiff's attorneys typically get one-third of their client's award. Accordingly, the brain-damaged teen girl and her parents would only be receiving about \$8 million. If the girl goes on to live a long life, that \$8

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26 Protecting Access to Care Act of 2017, H.R. 1215, 115th Cong. § 3 (2017).

27 Jordan Puckett, *HR 1215: Congress Attempting to Set a Price on Your Loved One's Life*, DOLMAN L. (June 15, 2017), <https://www.dolmanlaw.com/hr1215/>.

28 *Id.* This is the case unless the lawsuit occurs in a state whose cap is grandfathered in via PACA's "Flexibility" provision.

29 Jeff Goldman, *\$17M Awarded to Teen Left Brain Damaged After Hospital Stay*, NJ.COM (Oct. 27, 2017), [http://www.nj.com/monmouth/index.ssf/2017/10/girl\\_left\\_with\\_brain\\_damage\\_gets\\_17m\\_awarded\\_17m\\_b.html](http://www.nj.com/monmouth/index.ssf/2017/10/girl_left_with_brain_damage_gets_17m_awarded_17m_b.html).

30 *Id.*

million might not even cover all of her future medical expenses, let alone provide her with a substitute for an income when she is older and unable to work due to her condition or offset the physical pain she has to endure for the rest of her life. This scenario highlights how PACA can significantly alter the awards malpractice patients receive, and in turn, significantly affect the future of these victims who rely on those awards to take care of them for the rest of their lives.

## II. HISTORY OF FEDERAL MEDICAL LIABILITY REFORM REGARDING CAPS ON NONECONOMIC DAMAGES

Republican support for medical liability reform is not a new idea. Since 2004, House Republicans have been pushing for legislation to create federal caps on noneconomic damages and additional reforms. However, Republicans have been unsuccessful in their efforts thus far, as their proposed legislations throughout the years have passed through the House only to get lost on the Senate's docket.

Republicans' first big push for medical liability reform fell under the second Bush Administration. In 2005, "Senate Majority Leader Bill Frist proclaimed he would seek medical malpractice tort reform with a cap on noneconomic damages."<sup>31</sup> Accordingly, House Bill 534 and Senate Bill 354 were proposed in an effort to combat doctors' increasing insurance premiums.<sup>32</sup> Both bills sought to "shorten the statute of limitations for filing a claim, place limitations on access to punitive damages, repeal the collateral source rule, restructure settlement by requiring periodic payment for future damages, cap contingency fees, abolish joint liability, and cap noneconomic damages at \$250,000."<sup>33</sup> Further, House Bill 534 limits the liability of those manufacturers, suppliers, and distributors whose medical products comply with FDA standards.<sup>34</sup> The House's bill was referred to several committees, including the Committee on Energy and Commerce's Subcommittee on Health, never reaching a vote.<sup>35</sup> After its introduction, Senate Bill 354 was referred to the Committee on Health, Education, Labor, and Pensions, also with no action taken since.<sup>36</sup>

The second big effort to reform medical malpractice tort liability came in 2011, when Representative Phil Gingrey (R-Ga.) introduced House Bill 5, Protecting Access to Healthcare Act, on January 24, 2011.<sup>37</sup> Gingrey's bill was a replica of 2005's House Bill 534, which failed to gain any momentum six years prior.<sup>38</sup> House Bill 5, on the other hand, quickly moved through the House of Representatives, passing with

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31 Amanda Edwards, *Medical Malpractice Non-Economic Damages Caps*, 43 HARV. J. ON LEGIS. 213 (2006).

32 *Id.*

33 *Id.* (citing H.R. 534, 109th Cong. (2005)); S. 354, 109th Cong. (2005).

34 *Id.*

35 *All Actions H.R.534 — 109th Congress (2005–2006)*, CONGRESS.GOV (2005), <https://www.congress.gov/bill/109th-congress/house-bill/534/all-info#actionsOverview-content>.

36 *All Actions S.354 — 109th Congress (2005–2006)*, CONGRESS.GOV (2005), <https://www.congress.gov/bill/109th-congress/senate-bill/354/all-actions>.

37 *Actions Overview H.R.5 — 112th Congress (2011–2012)*, CONGRESS.GOV (2012), <https://www.congress.gov/bill/112th-congress/house-bill/5/cosponsors>.

38 *Id.*

a vote of 223-181.<sup>39</sup> Similar to the 2005 bills and the 2017 Protecting Access to Care Act, this bill capped noneconomic damages in medical malpractice at \$250,000, restricted contingency fees, required periodic payment of future medical damage awards, and set a statute of limitations relating to discovery and manifestation of injury.<sup>40</sup> However, the 2011 effort ultimately also fell flat and never became law.

The present Protecting Access to Care Act directly resembles the bills of past medical malpractice liability reform efforts.<sup>41</sup> The main difference between PACA and prior bills is the fact that PACA exists in the era of Obamacare. As a result, the legislation, if enacted, would have a much further reach than the prior bills, as the government inserted itself into doctors' offices across the country when it created a federal mandate on insurance. Accordingly, the present legislation could reach the insurance plans of those covered by Medicare, Medicaid, the Veteran's Administration, and any person who received their plan through an Obamacare Exchange or whose plan receives any tax credit from the federal government. Therefore, the legislation would obstruct the states' ability to govern tort law for millions of Americans in its jurisdiction. To make matters more chaotic, if Republicans are able to successfully repeal and replace Obamacare, individuals' insurance plans are likely to experience significant shifts before their cases even reach the trial or settlement stage. Therefore, it is important that the Protecting to Access to Health Care Act does not pass the Senate, not only because of the chaos it is bound to bring upon those insured through Obamacare Exchanges, but also because of its unconstitutional provision capping noneconomic damages.<sup>42</sup>

### III. UNCONSTITUTIONALITY OF THE PACA CAP ON NONECONOMIC DAMAGES

There are a number of theories plaintiffs adopt to challenge noneconomic damage caps.<sup>43</sup> This Note argues that the Protecting Access to Care Act's provision capping noneconomic damages is unconstitutional on the grounds of equal protection, right to trial by jury, separation of powers, and wrongful federal preemption of states' rights.

#### A. PACA VIOLATES EQUAL PROTECTION

The equal protection argument against damages caps is that they "violate [] constitutional rights to equal protection, by dividing tort victims into unequal classes."<sup>44</sup>

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<sup>39</sup> *Id.*

<sup>40</sup> *Protecting Access to Healthcare Act*, H.R. 5, 109th Cong. (2005).

<sup>41</sup> H.R. 1215, *supra* note 2.

<sup>42</sup> Wendy E. Parmet & Elisabeth J. Ryan, *Not Your Grandfather's Preemption: Proposed Federal Preemption of State Medical Malpractice Cases*, PUB. HEALTH LAW WATCH (Aug. 23, 2017), <https://www.publichealthlawwatch.org/blog/2017/8/23/not-your-grandfathers-preemption-the-imposition-of-federal-limits-on-state-court-medical-malpractice-cases>.

<sup>43</sup> Carol J. Miller & Joseph Weidhaas, *Medical Malpractice Noneconomic Caps Unconstitutional*, 69 J. MO. B. 344, 345 (2013) (The primary grounds in which the constitutionality of caps on noneconomic damages have been challenged include: "(1) access to courts, (2) right to trial by jury, (3) due process, (4) separation of powers, (5) privileges and immunities, and (6) equal rights and opportunities.").

<sup>44</sup> Robert S. Peck & Ned Miltenberg, § 29:21. *Caps on Damages, Generally—Equal Protection Challenges*, 3 LITIGATING TORT CASES § 29:21 (2017).

Equal protection is guaranteed in the Fourteenth Amendment of the United States Constitution. The Fourteenth Amendment declares that no state shall “deny to any person within its jurisdiction the equal protections of the law.”<sup>45</sup>

A number of states have struck down similar statutes as unconstitutional violations of equal protection. Typically, “[c]ourts overturning caps on equal protection grounds find there is no rational basis for placing the greatest burden on the most severely injured patients, especially when, at best, the caps have only a small impact on health care costs.”<sup>46</sup> For example, in *Ferdon ex rel. Petrucelli v. Wisconsin Patients Compensation Fund*, the Wisconsin Supreme Court overturned the state’s noneconomic damages cap for medical malpractice cases as the statute violated the guarantee of equal protection.<sup>47</sup> There, the victim suffered an injury during his birth when the doctor pulled him out by his head, resulting in a form of palsy.<sup>48</sup> After finding the doctor negligent, the jury “awarded [the victim] \$403,000 in future medical expenses and \$700,000 in noneconomic damages (approximately \$10,000 a year for the rest of his life expectancy).”<sup>49</sup> The defense moved to reduce the \$700,000 in noneconomic damages to \$350,000 to conform to the state’s cap, which prompted the plaintiff to challenge the cap’s constitutionality on several grounds, including equal protection.<sup>50</sup> The Wisconsin Supreme Court applied a rational basis review, conducting “an inquiry to determine whether the legislation has more than a speculative tendency as the means for furthering a valid legislative purpose.”<sup>51</sup> The court found that the cap created a classification of victims, as it divided victims who suffer more than \$350,000 in damages from those who suffer less than \$350,000.<sup>52</sup> Accordingly, the less severely injured victims would be able to receive full compensation from a medical professional or institution’s negligence, while the more severely injured victims would only receive partial compensation. Further, the cap generated another division, as it only applied to a single occurrence, which “created issues between a single claimant with a claim exceeding the cap and claimants arising out of a single incident.”<sup>53</sup> Although the legislature’s purpose for enacting the cap was to improve the quality of health care,<sup>54</sup> the court held that no rational relationship existed between that purpose and “shift[ing] the economic burden of medical malpractice from insurance companies and negligent health care providers to a small group of vulnerable, injured patients,” since the most severely injured patients were the most affected

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45 U.S. CONST. amend. XIV, § 1.

46 Allyson Fish, *Noneconomic Damage Caps in Medical Malpractice Litigation: Finding a Solution that Satisfies All Affected Parties*, 17 NEXUS: CHAP. J. L. & POL’Y 135, 149 (2012).

47 701 N.W.2d 440 (2005).

48 Peck & Miltenberg, *supra* note 44.

49 *Id.*

50 *Id.*

51 *Id.*

52 Fish, *supra* note 46, at 150.

53 Peck & Miltenberg, *supra* note 44 (citing *Ferdon*, 701 N.W.2d at 462). “The cap created a classification that separated “a single injured plaintiff versus patients with children, spouses, and parents. A single injured patient receives far more than a patient whose family is also affected.” Fish, *supra* note 46, at 150 (citing *Ferdon*, 701 N.W.2d at 617-618).

54 Fish, *supra* note 46, at 150-51 (This purpose includes the legislatures goals to “regulate insurance rates, discourage the practice of defensive medicine, encourage young physicians to practice in the state, dissuade malpractice insurers from the leaving the state, and provide quality health care to the public.”).



by the statute.<sup>55</sup> Therefore, the court determined the cap created an “undue hardship on [this] small unfortunate group of plaintiffs,”<sup>56</sup> and “no rational basis exists for forcing the most severely injured patients to provide monetary relief to health care providers and their insurers.”<sup>57</sup>

In addition, in *Estate of McCall v. United States*, the Florida Supreme Court held the statutory cap on noneconomic damages recoverable in a wrongful death medical malpractice action violated the Equal Protection Clause of the Florida Constitution.<sup>58</sup> This case involved a maternal death situation, where a patient with preeclampsia died shortly after giving birth in a hospital on an air force base in Florida.<sup>59</sup> The patient’s family sued the United States for medical malpractice under the Federal Torts Claims Act and was awarded \$980,462.40 in economic damages and \$2 million in noneconomic damages.<sup>60</sup> However, the \$2 million award was limited to \$1 million, as Florida had a \$1 million statutory cap on medical malpractice wrongful death noneconomic damages.<sup>61</sup> The Florida Supreme Court reinstated the initial award, holding that Florida’s statute violated the state’s Equal Protection Clause under the rational basis test, as the statutory cap “imposes unfair and illogical burdens on injured parties when an act of medical negligence gives rise to multiple claimants. . . [and] does not bear a rational relationship to the stated purpose that the cap is purported to address, the alleged medical malpractice insurance crisis in Florida.”<sup>62</sup>

Likewise, the Alabama Supreme Court determined the state’s cap on noneconomic damages violated the plaintiff’s right to equal protection.<sup>63</sup> In *Moore v. Mobile Infirmary Association*, the court held the cap “creates a favored class of tortfeasors and precluded full recovery for only the most severely injured plaintiffs.”<sup>64</sup> Further, the court observed that there is only a remote connection between health care costs and noneconomic damages, holding “the burden on severely injured patients outweighed any ‘indirect and speculative benefit that may be conferred on society.’”<sup>65</sup> The Supreme Court of New Hampshire similarly held the medical malpractice reform at issue violates equal protection, as “it is simply unfair and unreasonable to impose the burden of supporting the medical care industry solely upon those persons who are most severely injured and therefore most in need of compensation.”<sup>66</sup>

Most recently, on January 9, 2018, a judge in North Dakota ruled the state’s law limiting noneconomic damages to \$500,000 as an unconstitutional equal protection

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55 *Id.* at 151.

56 *Id.*

57 Peck & Miltenberg, *supra* note 44 (citing *Ferdon*, 701 N.W.2d at 466).

58 134 So.3d 894, 898 (Fla. 1999).

59 *Id.*

60 *Id.*

61 *Id.*

62 *Id.* at 901 (“To satisfy the rational basis test, a statute must bear a rational and reasonable relationship to a legitimate state objective, and it cannot be arbitrary or capriciously imposed.”).

63 Fish, *supra* note 46, at 151 (citing *Moore v. Mobile Infirmary Ass'n*, 592 So. 2d 156, 160-165 (Ala. 1991)).

64 *Id.*

65 *Id.*

66 Peck & Miltenberg, *supra* note 44 (citing *Carson v. Maurer*, 120 N.H. 925 (1980)).

violation.<sup>67</sup> There, a jury awarded the plaintiff, a woman disabled as the result of a surgery, \$1.5 million for noneconomic damages, “including pain, suffering, physical impairment and emotional distress.”<sup>68</sup> The hospital moved to reduce the award to the \$500,000 limit on noneconomic damages declared in a 1995 state law.<sup>69</sup> The judge ruled the law capping noneconomic damages was unconstitutional, “violating equal protection guaranteed by the North Dakota constitution and by arbitrarily reducing damages for people who suffer the most severe injuries.”<sup>70</sup> In reaching this decision, the judge determined the legislative record of the law “provided no explanation about how the \$500,000 figure was chosen or how it would accomplish the Legislature’s health care reform goals of increasing access, controlling costs and maintaining or increasing quality.”<sup>71</sup> Instead, the judge found that the cap “lets negligent doctors off the hook in cases where they are responsible for causing great harm,” and “fell the hardest on stay-at-home moms, the young and those who couldn’t prove large economic loss.”<sup>72</sup>

Accordingly, the Protecting Access to Care Act’s cap on noneconomic damages violates equal protection. While the Equal Protection Clause only applies to the states, the Supreme Court has held that the Fifth Amendment’s Due Process Clause imposes equal protection requirements on the federal government.<sup>73</sup> The Protecting Access to Care Act caps noneconomic damage rewards at \$250,000 for injured patients and severely injured patients, alike. Like *Ferdon*, where the Wisconsin Supreme Court held the state statute capping noneconomic damages at \$350,000 violates equal protection because it creates classifications based on severity of the injury, PACA similarly creates such a classification. Here, the bill distinguishes the plaintiffs who suffer less than \$250,000 in damages from those who suffer more than \$250,000 in damages. Where plaintiffs in the first class are fully compensated under PACA, the most severely injured plaintiffs will only be partly compensated. As the court reasoned in *Ferdon*, there is no rational relationship between shifting the economic burden of malpractice insurance rates onto the small class of victims who are severely injured from the negligence of a healthcare professional.<sup>74</sup> Not only does this reward doctors who negligently injured their patients, but it places an undue hardship on the most severely injured victims, as the bill essentially forces them to provide monetary relief to the negligent professional and their insurers.

In addition, the Protecting Access to Care Act creates another class of division between malpractice plaintiffs and other tort plaintiffs. Providing a remedy for tort is “one of the most basic and traditional of state functions.”<sup>75</sup> There are currently no

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67 Amy Dalrymple, *N.D. Law Limiting Damages in Malpractice Cases Ruled Unconstitutional*, THE BISMARCK TRIBUNE (2018), [http://bismarcktribune.com/news/local/bismarck/n-d-law-limiting-damages-in-malpractice-cases-ruled-unconstitutional/article\\_d9be1b4a-f753-56c6-8775-7f8d1c317c9c.html](http://bismarcktribune.com/news/local/bismarck/n-d-law-limiting-damages-in-malpractice-cases-ruled-unconstitutional/article_d9be1b4a-f753-56c6-8775-7f8d1c317c9c.html).

68 *Id.*

69 *Id.*

70 *Id.*

71 *Id.*

72 *Id.*

73 *Bolling v. Sharpe*, 347 U.S. 497 (1954).

74 Fish, *supra* note 46, at 151.

75 *Fact Sheet: Federal Preemption of Tort Law*, CTR. FOR JUST. & DEMOCRACY (Feb. 9, 2015), <https://centerjd.org/content/fact-sheet-federal-preemption-tort-law>.

federal laws imposing a cap on noneconomic damages for general tort awards, as the states have traditionally used their own discretion in determining to impose a limitation on noneconomic damages for tort cases.<sup>76</sup> If PACA becomes law, it will be the first federal law capping noneconomic damages for a tort claim. However, its passage would mean that only medical malpractice plaintiffs will be restricted by the damage caps, whereas other negligence victims (e.g. personal injury or products liability plaintiffs) will be able to continue to recover unlimited amount of noneconomic damages (subject to the laws of each state). Therefore, under PACA, those injured by the negligence of healthcare professionals will not have the equal opportunity to receive full compensation for the negligent act as other tort plaintiffs. PACA creates a class of disadvantaged plaintiffs and stands for the idea that providing full compensation for a medical malpractice victim's injury is not as important as doing so for other tort victims.

Further, PACA's damages cap violates equal protection as the bill will have "a particularly adverse impact on women, children, the poor, and other vulnerable members of society."<sup>77</sup> These groups have a more difficult time establishing lost wages and economic losses, and are more likely to receive noneconomic damages.<sup>78</sup> The ABA's research on federal and state initiatives to impose caps on noneconomic damages has shown that "caps diminish[] access to the courts for low-wage earners, like the elderly, children and women."<sup>79</sup> For example, "[d]amages awarded to females are consistently lower than those awarded to males in the same group."<sup>80</sup>

Income plays a large role in this disparity. On average, a woman earns seventy-nine cents on the dollar that a man earns and "annual earnings are less than men's."<sup>81</sup> Likewise, women are more likely to suffer noneconomic loss, like emotional injury<sup>82</sup> and loss of fertility, and therefore noneconomic damages hurts them disproportionately, especially when they are being paid at a lower rate than men.<sup>83</sup> This same analysis applies to immigrants as well. For example, the median household income for Mexican immigrants in 2014 was \$37,390, compared to \$54,565 for the native-

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<sup>76</sup> *Fact Sheet: Caps on Compensatory Damages: A State Law Summary*, CTR. FOR JUST. & DEMOCRACY (June 22, 2017), <https://centerjd.org/content/fact-sheet-caps-compensatory-damages-state-law-summary>. A number of states impose noneconomic damage caps on tort awards such as medical malpractice, products liability, and general personal injury cases. Likewise, other states impose no limit on the amount a plaintiff can recover for noneconomic damages in a tort award.

<sup>77</sup> John Conyers, Jr., *Statement of the Honorable John Conyers, Jr. In Opposition to H.R. 1215, the So-Called "Protecting Access to Care Act of 2017"*, U.S. H. COMM. ON THE JUDICIARY (Feb. 28, 2017), <https://democrats-judiciary.house.gov/news/press-releases/statement-honorable-john-conyers-jr-opposition-hr-1215-so-called-protecting>.

<sup>78</sup> *Id.*

<sup>79</sup> Letter from Thomas M. Susman, Director, ABA Governmental Affairs Office, to Bob Goodlatte, Chairman, House Committee on the Judiciary, & John Conyers, Jr., Ranking Member, House Committee on the Judiciary (Mar. 21, 2016) (on file with the American Bar Association).

<sup>80</sup> Lisa M. Ruda, *Caps on Noneconomic Damages and the Female Plaintiff: Heeding the Warning Signs*, 44 CASE W. RES. L. REC. 197, 231 (1993).

<sup>81</sup> Sonam Sheth & Skye Gold, *5 Charts Show How Much More Men Make than Women*, BUS. INSIDER (Mar. 8, 2017), <http://www.businessinsider.com/gender-wage-pay-gap-charts-2017-3>.

<sup>82</sup> Ruda, *supra* note 80, at 216.

<sup>83</sup> Conyers, *supra* note 77.

born population.<sup>84</sup> Therefore, noneconomic damages may be a greater source of recovery for immigrants whose incomes are significantly less than natives, and therefore would not be able to recover much in terms of loss of wages. If noneconomic damages are capped and the economic wages are lower, attorneys are less likely to represent potential plaintiffs belonging to these vulnerable groups.<sup>85</sup> Instead, attorneys, who receive about one-third of each client's award, will be more likely to take clients who are likely to recover high economic damages that are not capped.

Thus, the Protecting Access to Care Act is unconstitutional as it impedes equal opportunity for the vulnerable classes of society to recover, as caps on noneconomic damages disproportionately hurt these people more than others who are more likely to recover greater economic losses.

### B. PACA VIOLATES THE DUE PROCESS CLAUSE

The Fifth Amendment of the United States Constitution declares, “[no person shall] be deprived of life, liberty or property, without due process of law.”<sup>86</sup> Due process is “a fundamental principle of fairness in all legal matters, both civil and criminal, especially in the courts.”<sup>87</sup> Due process requires the government to respect all of a person's legal rights. The Fourteenth Amendment incorporates this principle to the states, asserting, “nor shall any State deprive any person of life, liberty, or property, without due process of law.”<sup>88</sup> The issue of due process typically arises in two forms: procedural and substantive. Substantive due process asks “whether the government's deprivation of a person's life, liberty or property is justified by a sufficient purpose.”<sup>89</sup> In contrast, procedural due process “asks whether the government has followed the proper procedures when it takes away life, liberty or property.”<sup>90</sup>

Noneconomic damage caps may be attacked on two grounds under the due process theory of its unconstitutionality.<sup>91</sup> First, a plaintiff may argue that “the cap is a violation of procedural due process, meaning the plaintiff has been unlawfully divested of a property interest in the damages without being given an opportunity to be heard.”<sup>92</sup> Second, it can be argued that caps on noneconomic damages violate substantive due process, which entails an assessment of “whether the cap is relationally related to a legitimate legislative purpose.”<sup>93</sup> It should be noted that the analysis of

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84 Jie Zong & Jeanne Batalova, *Mexican Immigrants in the United States*, MIGRATION POLICY INSTITUTE (Mar. 17, 2016), <https://www.migrationpolicy.org/article/mexican-immigrants-united-states#Income and Poverty>.

85 Letter from Thomas M. Susman to Bob Goodlatte & John Conyers, Jr., *supra* note 79.

86 U.S. CONST. amend. V.

87 *Due Process of Law*, LAW.COM, <https://dictionary.law.com/Default.aspx?selected=595> (last visited Jan. 30, 2018).

88 U.S. CONST. amend. XIV, § 1.

89 Erwin Chemerinsky, *Substantive Due Process*, 15 *TOURO L. REV.* 1501, 1501 (1999) (“Substantive due process looks to whether there is a sufficient substantive justification, a good enough reason for such a deprivation.”).

90 *Id.*

91 Fish, *supra* 46, at 151–52.

92 *Id.* (citing Carly N. Kelly & Michelle M. Mello, *Are Medical Malpractice Damages Caps Constitutional? An Overview of State Litigation*, 33 *J.L. MED. & ETHICS* 515, 523 (2005)).

93 *Id.* (citing Kelly & Mello, at 523–24).

a due process challenge to noneconomic damage caps is similar to the equal protection challenges, as the two go hand in hand.

The Supreme Court of Ohio overturned medical malpractice damage caps on due process grounds. In *Morris v. Savoy*, the Ohio Supreme Court held the state statute capping general damages awards at \$200,000 in medical malpractice cases not involving death, was unconstitutional.<sup>94</sup> There, the jury awarded plaintiffs \$216,000 in total damages, which was reduced to \$200,000 due to the cap.<sup>95</sup> The court applied a substantive due process analysis to determine whether the legislation “bears a ‘real and substantial relationship’ to public health or welfare or whether it is ‘unreasonable or arbitrary.’”<sup>96</sup> The court looked at the purpose of the act, which it determined was “aimed at malpractice insurance rates, which had been rising rapidly in the years previous.”<sup>97</sup> The court stated, “we are unable to find. . . evidence to buttress the proposition that there is a rational connection between awards over \$200,000 and malpractice insurance rates.” Instead, the court found there was evidence to the contrary, citing *Lucas v. United States*, where the Texas Supreme Court asserted no rational relationship existed between the cap and insurance rates as an independent study showed that less than 0.6% of all claims brought were for more than \$100,000.<sup>98</sup> Accordingly, the Ohio Supreme Court held the statute limiting damages to \$200,000 violated due process, and was therefore unconstitutional, as there was no “real and substantial relation to public health or welfare.”<sup>99</sup>

It is important to note that *Morris v. Savoy* has been distinguished by the Ohio Supreme Court in *Arbino v. Johnson & Johnson*.<sup>100</sup> There, the court “found a connection between the size of awards and malpractice insurance rates.”<sup>101</sup> Unlike *Morris*, the statute at issue in *Arbino* allowed for limitless damages for the most severely injured plaintiffs.<sup>102</sup> Therefore, “the existence of a rational relationship between the cap and the reasons for enacting it, along with issues of fundamental fairness, is decisive in determin[ing] whether a damage cap violates due process.”<sup>103</sup>

The default standard of review that the courts apply when considering constitutional questions, like due process, is rational basis review. Under rational basis review, the courts test whether the government’s action is rationally related to a legitimate government purpose.<sup>104</sup> In *Ferdon*, the Wisconsin Supreme Court held “no rational relationship existed between the legitimate legislative objective of lowering

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94 61 Ohio St. 3d 684, 686 (1991). The statute in question was R.C. § 2307.43 which limited general damages in medical claims not involving death to \$200,000. This bill had no exceptions for those suffering severe injuries. R.C. § 2307.43

95 *Id.* at 685.

96 *Id.* at 689.

97 *Id.* at 690.

98 *Id.* (citing *Lucas v. United States*, 757 S.W.2d 687, 691 (Tex.1988)). It is important to note that this independent study was published in 1979 and, therefore, may not be reflective of medical malpractice litigation today.

99 *Id.* at 691.

100 Fish, *supra* note 46, at 153.

101 *Id.*

102 *Id.* (citing *Arbino v. Johnson & Johnson*, 116 Ohio St.3d 468, 482 (2010)).

103 *Id.* at 153-54.

104 Celena R. Mayo, *The Road Not Take: Able v. United States, Equal Protection, Due Deference, and Rational Basis Review*, 16 N.Y.L. SCH. J. HUM. RTS. 407 (1999).

health care costs and capping noneconomic damages.”<sup>105</sup> Further, the court declared, “even assuming that a \$350,000 cap affects medical malpractice insurance premiums..., medical malpractice insurance premiums are an exceedingly small portion of overall health care costs.”<sup>106</sup> The court recognized “U.S. health care costs exceed \$1 trillion annually and may reach \$2 trillion by 2006. The direct cost of medical malpractice insurance, however, is less than 1% of that total.”<sup>107</sup> Therefore, the court determined the statute capping damages “would have no effect on a consumer’s health care costs.”<sup>108</sup>

The Protecting Access to Care Act is unconstitutional under the due process theory, as it violates substantive due process. PACA’s intended purpose is “to improve patient access to health care services and provide improved medical care by reducing the excessive burden the liability system places on the health care delivery system.”<sup>109</sup> The legislature’s idea is that PACA’s caps will cause doctors to limit their practicing of defensive medicine, which will lower the costs of medical liability insurance.<sup>110</sup> Like *Ferdon*, where the court held there was no rational relationship between capping malpractice damages at \$350,000 and malpractice insurance rates, there is similarly no rational relationship between PACA’s \$250,000 cap on noneconomic damages in malpractice cases and the quality of medical care. In *Ferdon*, in determining no rational relationship existed, the Wisconsin Supreme Court reasoned capping damages would not have an effect on health care costs, as the cost of medical malpractice insurance was only 1% of the total cost of health care in 2006. Here, the substantive due process argument should be viewed under the same analysis. Presently, “payouts for medical malpractice lawsuits amount to less than 1% of total healthcare costs.”<sup>111</sup> Medical malpractice claims and defensive medicine, together, only amount to “about 3% of the \$3.2 trillion healthcare costs” in the United States.<sup>112</sup> PACA would only decrease “national health spending by 0.4%.”<sup>113</sup> As the Wisconsin Supreme Court concluded in *Morris*, PACA’s capping of noneconomic damages in malpractice suits will have virtually no effect on combatting the health care crisis, in which proponents of the act are so adamant about fighting.

Similarly, in *Morris*, the Ohio Supreme Court determined no rational relationship existed between awards over the \$200,000 capped limit and malpractice insurance rates, since malpractice costs were less than 1% of the total cost of healthcare in the country. Although *Morris* was later distinguished by *Arbino*, the Ohio Supreme Court’s analysis should likewise be applied when determining the constitutionality of PACA. In *Arbino*, the Ohio Supreme Court held the damages cap did not violate due process. However, there, the statute at issue allowed the most severely

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105 Peck & Miltenberg, *supra* note 44 (citing *Ferdon*, 701 N.W.2d at 462).

106 *Id.*

107 *Id.*

108 *Id.*

109 H.R. 1215, *supra* note 2.

110 *Id.*

111 *How Much Does Medical Malpractice Insurance Cost?*, GALLAGHER HEALTHCARE (Dec. 12, 2017), <https://www.gallaghermalpractice.com/blog/post/how-much-does-medical-malpractice-insurance-cost>.

112 *Id.*

113 Robert Lowes, *House Passes Bill to Cap Malpractice Noneconomic Damages*, MEDSCAPE (June 28, 2017), [https://www.medscape.com/viewarticle/882263#vp\\_1](https://www.medscape.com/viewarticle/882263#vp_1).

injured plaintiffs to recover limitless damages in spite of the cap. Neither the statute at issue in *Morris* nor the Protecting Access to Care Act provide for limitless damages for the most severely injured plaintiffs, which is why this analysis should follow that of *Morris* as opposed to *Arbino*. That said, PACA violates substantive due process, as there is no rational relationship between reducing the costs of healthcare and capping malpractice victim's noneconomic damages at an arbitrary figure of \$250,000.

### C. PACA VIOLATES THE SEVENTH AMENDMENT RIGHT TO TRIAL BY JURY

In addition, the Protecting Access to Care Act is unconstitutional, because it violates the right to trial by jury. Several states have used this argument to hold caps on noneconomic damages as unconstitutional. For example, the Georgia Supreme Court held noneconomic damage caps on medical malpractice awards are unconstitutional, as they violate the state constitution's right to jury trial guarantee.<sup>114</sup> Georgia's constitution states, "[t]he right to trial by jury shall remain inviolate."<sup>115</sup> In *Atlanta Oculoplastic Surgery, P.C. v. Nestlehutt*, the Georgia Supreme Court concluded (1) the state constitution guarantees the right to jury trial, because the right to jury trial existed at common law; (2) the jury trial guarantee encompasses medical malpractice cases, because malpractice actions existed in early American common law; (3) the jury's responsibility to determine damages is included in the right to trial by jury; and (4) the state statute that caps noneconomic damages violates the right to jury trial by requiring the jury to reduce the reward.<sup>116</sup> Accordingly, the Georgia Supreme Court concluded noneconomic damages cap unconstitutionally violated the right to trial by jury.<sup>117</sup>

As PACA is a proposed federal law, the U.S. Constitution is the basis for determining its constitutionality. The Seventh Amendment of the U.S. Constitution asserts that:

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.<sup>118</sup>

Medical malpractice law in the United States has its origins in English common law.<sup>119</sup> For example, one early English medical malpractice case from 1615 "held that both a servant and his master could sue for damages against a doctor who had

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114 Jennifer W. Terry, *Caps Off to Juries: Noneconomic Damage Caps in Medical Malpractice Cases Ruled Unconstitutional*, 62 MERCER L. REV. 1315, 1324 (2010) (citing *Atlanta Oculoplastic Surgery, P.C. v. Nestlehutt*, 286 Ga. 731, (2010)).

115 *Id.* (citing GA. CONST. art I, § 1, para. 11(a)).

116 *Id.* at 1324-26.

117 *Id.* at 1326 (citing *Nestlehutt*, 286 Ga. at 736).

118 U.S. CONST. amend. VII.

119 B. Sonny Bal, *An Introduction to Medical Malpractice in the United States*, NCBI (2009), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2628513/>.

treated the servant and made him more ill by employing ‘unwholesome medicine.’”<sup>120</sup> Current medical malpractice law in the United States “is based on common law, modified by state legislative actions that vary from state to state.”<sup>121</sup> The Supreme Court has also held “the Seventh Amendment jury guarantee extends to statutory claims unknown to the common law, so long as the claims can be said to ‘sound basically in tort,’ and seek legal relief.”<sup>122</sup> Therefore, the right to trial by jury extends to medical malpractice law in the United States.

In addition, the determination of damages falls within the jury’s province to decide. In *Feltner v. Columbia Pictures Television, Inc.*, the U.S. Supreme Court held that the “right to a jury trial includes the right to have a jury determine the amount of . . . damages.”<sup>123</sup> A cap on noneconomic damages in malpractice cases violates the *Feltner* principle, as “it overrides a jury’s verdict, which includes a determination of the proper amount of noneconomic damages needed to compensate a plaintiff based on the evidence presented at trial.”<sup>124</sup> A cap “render[s] the jury’s verdict advisory, rather than constitutionally secured.”<sup>125</sup> Accordingly, the Protecting Access to Care Act would violate the Seventh Amendment’s right to trial by jury by impeding the jury’s prerogative to determine damages.

#### D. PACA BREACHES THE DOCTRINE OF SEPARATION OF POWERS

Further, the Protecting Access to Care Act of 2017 is unconstitutional as it violates the principle of separation of powers. The principle of separation of powers is a pillar of American government. This principle divides the government into three branches: legislative, executive, and judicial.<sup>126</sup> When the Founders wrote the United States Constitution, they feared too much centralized power and created these branches.<sup>127</sup> Each of these three branches were given distinct, as well as shared, powers in order to create a system of checks and balances to ensure the branches did

<sup>120</sup> *Id.* (citing *Everad v. Hopkins*, 80 English Reports 1164 (1615)).

<sup>121</sup> *Id.*

<sup>122</sup> *Curtis v. Loether*, 415 US 189, 195-96 (1974).

<sup>123</sup> *Peck & Miltenberg*, *supra* note 44, at 325 (citing *Feltner*, 523 U.S. at 355 (1998)).

<sup>124</sup> *Id.*

<sup>125</sup> *Id.* The Georgia Supreme Court went on to distinguish noneconomic damages from punitive damages as caps on punitive damages are permissible.; *See Terry supra* note 114, at 1327 (The court explained “punitive damages . . . are not part within the scope of the right to jury trial because they are generally not a part of fact finding,” where noneconomic damages are. Unlike noneconomic damages, the purpose of noneconomic damages is to punish or deter a wrongdoer, not to compensate a plaintiff. Likewise, the court distinguished caps on noneconomic damages from judicial remittitur as “judicial remittitur is ‘carefully circumscribed’ and is applied only when the damages are so “excessive as to any party to be inconsistent with the preponderance of the evidence,” and don’t automatically go into effect as a plaintiff can either have a new trial or accept the award. Conversely, a cap on noneconomic damages would automatically take mandatory effort in any circumstance where the jury awards a plaintiff noneconomic damages exceeding the designated capped limit.)

<sup>126</sup> U.S. CONST. art. I, § 1, cl. 1.; art. II, § 1, cl. 1.; art. III, § 1, cl. 1. (Article I vests all legislative powers to Congress, which consists of the House of Representatives and the Senate. Article II vests the executive power in the President. Article III establishes the judicial branch, which is composed of the Supreme Court and federal courts.)

<sup>127</sup> Linda Monk, *Separation of Powers*, PBS, <http://www.pbs.org/tpt/constitution-usa-peter-sagal/we-the-people/separation-of-powers/>.



not abuse their authority. The purpose of the doctrine of separation of powers is to ensure that “no one department may interfere with or encroach upon either of the other departments.”<sup>128</sup> Many state constitutions contain identical language vesting judicial power exclusively with the courts, just as Article III does in the United States Constitution.<sup>129</sup> Caps on damages can be challenged as unconstitutional under the theory that “the legislature is encroaching upon the judiciary by enacting laws that change or affect court and jury procedures.”<sup>130</sup>

In *Lebron v. Gottlieb Memorial Hospital*, the Illinois Supreme Court used a separation of powers analysis to conclude the state’s statute imposing a cap on non-economic damages in medical malpractice cases was unconstitutional.<sup>131</sup> There, a mother and daughter sued the hospital, doctor, and nurse involved in the mother’s Caesarean section, which led to the daughter’s many permanent injuries, including cerebral palsy, cognitive mental impairment, and reliance on a gastrostomy tube for feeding.<sup>132</sup> The Illinois statute was passed to combat the “health-care crisis,” in which the availability of medical care in parts of Illinois was reduced as a consequence of “the rising cost of medical liability insurance increas[ing] the financial burdens on physicians and hospitals.”<sup>133</sup> The statute capped plaintiff’s noneconomic damages awards at \$1 million against a hospital and its affiliates and \$500,000 against a physician and his business.<sup>134</sup> The Illinois Supreme Court ultimately concluded the statute was unconstitutional as it violated the principle of separation of powers. The Illinois Supreme Court explained the statute effected a legislative remittitur, in which “the court is required to override the jury’s deliberative process and reduce any noneconomic damages in excess of the statutory cap, irrespective of the particular facts and circumstances, and without the plaintiff’s consent.”<sup>135</sup> Further, the Illinois Supreme Court deduced the legislature was “unduly encroaching upon the fundamentally judicial prerogative of determining whether a jury’s assessment of damages is excessive within the meaning of the law.”<sup>136</sup> Accordingly, the Illinois Supreme Court ruled the statute was facially invalid as it violated the separation of powers clause in the state’s constitution by exercising powers that belonged to the judiciary.<sup>137</sup>

When applying the Illinois Supreme Court’s analysis to the Protecting Access to Care Act of 2017, it is evident that the Protecting Access to Care Act of 2017 violates the principle of separation of powers. Article III of the Constitution states, “The judicial Power of the United States, shall be vested in one supreme Court, and

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128 Fish, *supra* note 46, at 146.

129 *Id.* (citing Kelly & Mello, *supra* note 92, at 525).

130 *Id.* at 146–47.

131 930 N.E.2d 895 (Ill. 2010)

132 *Id.* at 899.

133 *Id.* at 902–03.

134 *Id.* at 902.

135 *Id.* at 908.

136 Fish, *supra* note 46, at 148 (citing *Lebron*, 237 Ill. 2d at 224 (quoting *Best v. Taylor Mach. Works*, 179 Ill. 2d 367, 414 (1997))).

137 *Id.* (“The court ultimately found the legislature stripped the court of its power to determine whether the jury’s award was appropriate, thereby encroaching upon the judiciary’s intrinsic authority over such matters” (citing *Lebron*, 237 Ill. 2d at 238)).

in such inferior Courts as the Congress may from time to time ordain and establish.”<sup>138</sup> Under the Protecting Access to Care Act of 2017, the jury’s award of non-economic damages to a malpractice plaintiff is automatically reduced to \$250,000, irrespective of the facts or plaintiff’s consent, if the award exceeds \$250,000. For example, the jury could award a plaintiff \$1,000,000 in noneconomic damages, however, the plaintiff would only receive \$250,000 because that is the limit in which the law caps these damages. This action unduly infringes on the inherent power of the judiciary as it is a fundamental judicial privilege to determine whether a jury’s calculation of damages is excessive.<sup>139</sup> Just as the Illinois Supreme Court ruled in *Lebron* that the Illinois statute “stripped the court of its power to determine whether the jury’s award was appropriate,” the Protecting Access to Care Act of 2017 likewise breaches the doctrine of separation of powers by exercising powers belonging to the judicial branch.<sup>140</sup> As the result of this breach, the Protecting Access to Care Act of 2017 is unconstitutional and, therefore, should not be passed by the Senate.

#### E. PACA’S UNCONSTITUTIONAL PREEMPTION OF STATE TORT LAW

If passed, through the Protecting Access of Care Act of 2017, the federal government will insert itself into malpractice litigation, which has traditionally been governed by the law of the states. For medical malpractice cases, twenty-six states currently have noneconomic damages caps, including California, Massachusetts, Maryland, Utah, and Oregon.<sup>141</sup> These caps are not the same for each of these states. For example, Massachusetts caps noneconomic damages at \$500,000, Utah at \$450,000,<sup>142</sup> and Maryland at \$800,000 as of 2018, to increase \$15,000 annually.<sup>143</sup> Oregon only caps noneconomic damages in wrongful death cases, while other malpractice patients are not limited in their recovery.<sup>144</sup> These differences highlight how state legislatures have used their own prerogative to diversify their adoption of malpractice caps. Conversely, nineteen states, including Delaware, New Jersey, and New York, as well as the District of Columbia do not have caps on noneconomic damages either because the legislature never passed such legislation or prior legislation has been ruled unconstitutional.<sup>145</sup> The different approaches of the states in terms of caps on noneconomic damages in medical malpractice cases highlights the beauty of

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138 U.S. CONST. art. III, § 1.

139 Fish, *supra* note 46, at 147.

140 *Id.* at 148.

141 *Fact Sheet: Caps on Compensatory Damages: A State Law Summary*, C & DEMOCRACY (June 22, 2017), <https://centerjd.org/content/fact-sheet-caps-compensatory-damages-state-law-summary>. (*hereinafter* “FACT SHEET”). (Several other states not listed in this category cap the total reward a malpractice plaintiff can receive, encompassing both economic and noneconomic damages).

142 David Goguen, *State-by-State Medical Malpractice Damages Caps*, NOLO (2018), <https://www.nolo.com/legal-encyclopedia/state-state-medical-malpractice-damages-caps.html>.

143 *Maryland Caps on Damages in Medical Malpractice Lawsuits*, MILLER & ZOIS, LLC (2018), <https://www.millerandzois.com/maryland-medical-malpractice-cap.html>.

144 See *Greist v. Phillips*, 906 P.2d 789, (Or. 1995); *Vasquez v. Double Press Mfg., Inc.*, 406 P.3d 225, (Or. Ct. App. 2017)

145 FACT SHEET, *supra* note 141. (This number accounts for the 2017 ruling in *Mayo v. Wisconsin*

state tort law—that states have the ability to choose what rules will prevail in their civil systems.

Federalism is the core underpinning of the United States government. Under the United States' federal system, the government divides power between the national government and the states. The Tenth Amendment outlines the basic principle of the American federal system, declaring, “[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”<sup>146</sup> Tort law is primarily state-based, therefore it should be presumed that tort awards fall under the jurisdictions of the states.<sup>147</sup> However, House Republicans efforts to transform medical malpractice litigation is rooted in Congress' power to regulate interstate commerce via the Commerce Clause.<sup>148</sup> The Commerce Power stems from two constitutional provision: the Commerce Clause and the Necessary and Proper Clause.<sup>149</sup> The Commerce Clause declares Congress has the authority “to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.”<sup>150</sup> The Necessary and Proper Clause grants Congress the power to take action incidental to the valid exercise of an enumerated power.<sup>151</sup> The theory is that these clauses provide the federal government with the ability to reign in malpractice lawsuits where insurance falls under a federal program such as Medicare or Medicaid.<sup>152</sup>

However, the Protecting Access to Care Act's one-size-fits-all plan to reform medical malpractice is an example of the federal government imposing their will on the states. Granted, PACA allows those states that already impose noneconomic damages to keep those damage amounts,<sup>153</sup> but it will force nineteen other states plus D.C. to adopt damage caps, seven of which ruled caps on noneconomic damages in malpractice cases were unconstitutional.<sup>154</sup> Ultimately, this “State Flexibility” provision is

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Injured Patients and Families Compensation Fund, 377 Wis.2d 566 (Wis. Ct. App. 2007) that the Wisconsin statute capping noneconomic damages in malpractice cases was unconstitutional. However, in 2018, the Wisconsin Supreme Court reversed that decision, holding that a statutory cap on noneconomic damages was in fact constitutional. *Mayo v. Wisconsin Injured Patients and Families Compensation Fund*, 383 Wis.2d 1 (Wis. 2018)).

146 U.S. CONST. amend. X.

147 *See, e.g.*, DAN B. DOBBS, *THE LAW OF TORTS* 39 (“The common law of torts is almost exclusively state law.”)

148 Mark A. Behrens, *The Constitutional Foundation for Federal Medical Liability Reform*, AM. TORT REFORM ASS'N. (May 2011), <https://www.ama-assn.org/sites/ama-assn.org/files/corp/media-browser/atra-medical-liability-reform-paper.pdf>.

149 Rob Natelson, *Federal “Tort-Reform” Bill Unconstitutional*, TENTH AMEND. CTR. (Oct. 22, 2013), [tenthamentmentcenter.com/2013/10/22/federal-tort-reform-bill-unconstitutional/](http://tenthamentmentcenter.com/2013/10/22/federal-tort-reform-bill-unconstitutional/).

150 U.S. CONST. art. I, § 8, cl. 3.

151 U.S. CONST. art. I, § 8, cl. 18.

152 Behrens, *supra* note 148, at 3.

153 H.R. 1215, *supra* note 2.

154 FACT SHEET, *supra* note 141. (This figure includes Wisconsin which ruled the economic damages cap was unconstitutional after this source was published. Since then, the Wisconsin Supreme Court in *Mayo*, 383 Wis.2d 1 reversed that decision, holding a statutory cap on noneconomic damages is constitutional).

not about state flexibility, but instead federal supremacy as it is forcing states opposed to malpractice noneconomic damages cap to adopt the will of the federal government. In the United States, “our constitutional system of federalism demands that Congress respect that states, not the federal government are responsible for state tort law” and “federally mandated reform of state tort law is simply not constitutional.”<sup>155</sup>

To address proponent’s commerce clause argument, Congress’ push to federalize tort law through PACA exceeds its Commerce Power. First, “by ‘Commerce’, the Founders did not mean everything economic.”<sup>156</sup> “They meant trade among merchants, transportation, commercial paper, and a few associated activities.”<sup>157</sup> The Founders did not intend “[f]ederal control over state judges, state juries, and state tort law.”<sup>158</sup> Instead, the Founders wanted local control of the courts and structured the Constitution to reflect such.<sup>159</sup> For example, in *A Full Vindication of the Measures of Congress*, Alexander Hamilton stated *Federalist* No. 17 implies that “exclusive state authority included the ‘administration of private justice between the citizens of the same State’.”<sup>160</sup> The federal judiciary was enumerated jurisdiction over specific laws, not including torts. With the exception of federal territories or enclaves, “state governments retained exclusive and plenary authority over [] subjects [such] as torts.”<sup>161</sup> Accordingly, the Protecting Access to Care Act violates the Founder’s design.

In spite of this, over the years, America has been transformed into a fair-weather federalism system, one in which politicians are “respecting limits on federal power only when politically convenient.”<sup>162</sup> Congress has increased the power of federalism through the Commerce Clause, having seen the clause to authorize Congress to regulate about anything it chooses.<sup>163</sup> However, Chief Justice Roberts’ decision in *National Federation of Independent Business v. Sebelius* affirms that “Congress [can] not

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<sup>155</sup> Frontiers of Freedom, *Federal Tort Reform Amounts to Constitutional Malpractice*, FRONTIERS OF FREEDOM (June 28, 2017), <https://www.ff.org/federal-tort-reform-amounts-to-constitutional-malpractice/>.

<sup>156</sup> Natelson, *supra* note 149.

<sup>157</sup> *Id.*

<sup>158</sup> *Id.*

<sup>159</sup> *Id.*

<sup>160</sup> Robert G. Natelson, *The Roots of American Judicial Federalism*, (2006), [https://i2i.org/wp-content/uploads/Roots\\_Am\\_Federalism.pdf](https://i2i.org/wp-content/uploads/Roots_Am_Federalism.pdf).

<sup>161</sup> *Id.*

<sup>162</sup> Ilya Somin, *No More Fair-Weather Federalism*, CATO INST. (Aug. 18, 2017), <https://www.cato.org/publications/commentary/no-more-fair-weather-federalism>. This seems to be particularly true for the Republicans who support PACA as Republicans hold themselves out to be the guardians of limited government and champions of states’ rights.

<sup>163</sup> *Fair-Weather Federalism?*, FOX NEWS (Mar. 25, 2015), [www.foxnews.com/story/2002/04/22/fair-weather-federalism.html](http://www.foxnews.com/story/2002/04/22/fair-weather-federalism.html). (At its core, this argument arises from *Wickard v. Filburn*, 317 U.S. 111 (1942), the fundamental Supreme Court case outlining Congress’ power under the Commerce Clause. In *Wickard v. Filburn*, the Court held, “The commerce power is not confined in its exercise to the regulation of commerce among the states. It extends to those activities intrastate which so affect interstate commerce, or the exertion of the power of Congress over it, as to make regulation of them appropriate means to the attainment of a legitimate end, the effective execution of the granted power to regulate interstate commerce.”).

invade certain core state powers,” in holding Obamacare’s individual mandate exceeded the Commerce Clause.<sup>164</sup> There, the Court found “[a] mandate that someone buy insurance is not ‘commerce’ as the Constitution uses the term.”<sup>165</sup> The individual mandate did not regulate commerce activity, but instead forced people to participate in commerce. Likewise, the Chief Justice declared the Necessary and Proper Clause did not justify the individual mandate as it is not a ‘necessary and proper’ component of insurance reform.<sup>166</sup>

Similar to *Sebelius*, where the Court determined mandating individuals to purchase insurance was not commerce, neither is a health care lawsuit. Where the purchasing of health care itself may be commerce, a lawsuit is not as it is not something that can be purchased or traded. Further, damage caps in malpractice cases are not a “necessary and proper” component of health insurance reform, as we’ve learned the cost of malpractice claims are less than 1% of America’s \$3.2 trillion in healthcare costs. Just as the Court determined Congress could not force people to purchase insurance on the basis of the Commerce Clause, Congress likewise cannot impose strict malpractice award limitations on state legislatures, judges, and juries. Doing so would pronounce a federal value on human life.

#### IV. CONCLUSION

In sum, the United States Senate should reject the Protecting Access to Care Act of 2017 as its provision providing for caps limiting the recovery of noneconomic damages in medical malpractice suits to \$250,000 violates the Constitution. A federal cap on noneconomic damages threatens one’s right to equal protection, due process, and to a jury trial. Further, these caps violate the principle of separation of powers and encroach on the rights of states to regulate tort law.

The Protecting Access to Care Act’s noneconomic damages cap breaches one’s equal protecting and due process rights. A federal cap will allow lesser-injured plaintiffs to receive full compensation, while the most severely injured plaintiffs are only partially compensated for their injuries. In addition, these caps create further classifications. First, these caps adversely impact vulnerable members of society like women, children, and the poor who are more likely to receive noneconomic damages. Second, federal caps on noneconomic damages estrange malpractice victims from other tort victims as PACA, if passed, would be the only federal tort law establishing a noneconomic damages cap for tort victims. Consequently, a federal cap will result in the economic burden of medical malpractice shifting from negligent doctors and insurance companies to a small distinct group of vulnerable injured victims of that negligence. Further, the purpose of the act is to combat the United States’ health care costs, especially in regard to insurance rates. However, there is no rational relationship between the proposed federal cap and insurance rates as medical malpractice

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164 Natelson, *supra* note 149.

165 *Id.*

166 National Federation of Independent Business v. Sebelius, 567 U.S. 519, 560 (2012).

claims only amount to less than 1% of health care spending and the combination of malpractice claims and defensive medicine amount to less than 3% of the country's health care spending. Accordingly, the proposed statute capping damages would have virtually no effect on a consumer's health care costs, nor would it play any substantial role in reducing insurance costs. Therefore, this provision capping noneconomic damages is unconstitutional.

In addition, the proposed cap infringes upon one's right to trial by jury. The Supreme Court has held the determination of damages is within the jury's province to determine and a cap on noneconomic damages renders a jury verdict as advisory as opposed to constitutionally procured. Also, PACA's noneconomic damages cap violates the doctrine of separation of powers as it essentially is a legislative remittitur which encroaches on a judge's entitlement to determine whether the jury's assessment of damages is excessive. Further, this provision calls for the wrongful preemption of state tort law, an area of law that has historically been left to the states, as it allows the federal government to wrongfully impose its will on the states.

Therefore, the Senate must reject the Protecting Access to Care Act of 2017 in its entirety. Even if this provision is taken out of the bill, other provisions including those on statute of limitations and limitation attorney fees pose constitutional questions. If Congress is adamant about reforming medical malpractice lawsuits, it should introduce its insurance company lobbying friends to local state representatives as the tort reform should be left to the states to regulate under their police powers. Further, if the cost of health insurance is as important to the members of Congress who favor the Protecting Access to Care Act as they say, they should target their efforts towards combatting bigger, more expensive problems. For example, the government can begin fighting the diabetes epidemic as the total cost of diabetes and prediabetes in the U.S. reached \$327 billion in 2017.<sup>167</sup> Similarly, the government can begin targeting the high cost of prescription drugs, as "the price tag last year in the United States was \$425 billion, one out of every 10 health care dollars spent, and rising."<sup>168</sup> However, the government must not shift the costs of medical malpractice from negligent doctors and their insurance companies to severely injured victims of their negligence because this poses several concerning threats to constitutional protections. Therefore, the Senate should not pass the Protecting Access to Care Act of 2017.

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167 *The Cost of Diabetes*, AM. DIABETES ASS'N. (Mar. 2018), <http://www.diabetes.org/advocacy/news-events/cost-of-diabetes.html>.

168 Sudip Bose, MD, *The High Cost of Prescription Drugs in the United States*, HUFFINGTON POST (Aug. 29, 2017), [https://www.huffingtonpost.com/entry/the-high-cost-of-prescription-drugs-in-the-united-states\\_us\\_59a606aae4b0d81379a81c1f](https://www.huffingtonpost.com/entry/the-high-cost-of-prescription-drugs-in-the-united-states_us_59a606aae4b0d81379a81c1f). ("The price tag last year in the United States was \$425 billion, one out of every 10 health care dollars spent, and rising").