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The Damages of Caps in Nebraska

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Comment*

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* Carey D. Collingham, J.D., 2020, University of Nebraska College of Law. I am deeply grateful to my parents, Laurie, and Allen and Linda. I am also forever indebted to my classmates, colleagues (past and present), and friends for the myriad ways they have inspired and educated me about how to be the best version of myself. Special thanks to David Handley, Kris Brenneis, Amy Fischer, Kim Kucera, Anthony Schutz, the *Nebraska Law Review* team, and lastly my beautiful rescue dogs Tortellina and Crispo, who all kept me sane during this journey.

I. INTRODUCTION

Nebraska holds the embarrassing distinction of likely being one of the two harshest states in the country in its treatment of citizens injured at the hands of malpractice. Under current Nebraska law, if you are injured by a medical professional's negligence, you will not recover more than $2.25 million. The Nebraska Hospital Medical Liability Act (NHMLA) imposes insurmountable obstacles to even a modest recovery for a seriously injured person in Nebraska. At a time when unfettered medical costs in America are proliferating egregiously, the possibility for a personal-injury plaintiff to sustain multi-million-dollar special or economic damages is not only conceivable—it is increasingly likely. Because these damages include the ascertainable impact of injury upon a plaintiff, including future medical expenses and lost wages, there are an increasing number of plaintiffs in Nebraska who will inevitably suffer economic losses well in excess of Nebraska's cap on damages. This reality says nothing of general damages that may flow from such an injury.

This Comment will first, in Part II, establish the history and purpose of the damage cap under NHMLA in Nebraska. Part III will then assess the constitutionality of Nebraska's NHMLA damage cap, after looking to how some of Nebraska's sister states have treated their caps. In particular, Part III will flesh out the unique harshness of Nebraska's application of the damage cap to both noneconomic and economic damages. Part IV will propose some practical recommendations

for the courts, legislators, and practitioners. Specifically, Part IV will summarize some of the inconsistencies and flaws in Nebraska law, particularly when compared to other jurisdictions. Lastly, Part V will conclude by reiterating the unfortunate impact Nebraska's NHMLA damage cap will have on many of Nebraska's most misfortunate claimants, while also reminding readers that there is opportunity for change.

II. BACKGROUND ON THE NHMLA DAMAGE CAP

A. General Information on the Nature of Damages in Nebraska

As a brief forward to the discussion of the NHMLA damage cap, one must understand the distinctions between types of damage awards in Nebraska. Nebraska generally recognizes two categories of damages relevant to the discussion herein: economic and noneconomic damages. It is important to recognize the distinction between economic (oftentimes special) damages and noneconomic (or general) damages. Both economic and noneconomic damages may be pleaded as either special or general damages depending on their nature.[1] For example, general damages may include future medical expenses, and special damages may include past medical expenses, both of which are also an economic damage.[2] However, because for pleading purposes special damages are often thought of as those with an objective ascertainable value, some general economic damages are oftentimes erroneously colloquially branded as special damages. Consequently, within the Nebraska courts "the cases do not agree on the standard for classifying damages as general or special."[3]

Because "[t]he distinction between [general and special damages] is unclear,"[4] this Comment will use the terms "economic" and "noneconomic" damages for the sake of clarity. As succinctly captured by Judge Gerrard in a concurrence discussed in more detail herein:[5]

> Economic damages include the cost of medical care, past and future, and related benefits, i.e., lost wages, loss of earning capacity, and other such losses. Noneconomic losses include claims for pain and suffering, mental anguish, injury and disfigurement not affecting earning capacity, and losses which cannot be easily expressed in dollars and cents.[6]

1. *See, e.g.*, 5 JOHN LENICH, NEBRASKA CIVIL PROCEDURE § 9:20 (2019).
2. *Id.*; *see also, e.g.*, Fickle v. State, 274 Neb. 267, 271, 759 N.W.2d 113, 117 (2007) (explaining the treatment of medical damages).
3. LENICH, *supra* note 1.
4. *Id.*
5. *See* discussion *infra* subsection III.B.2.a.
6. Gourley *ex rel.* Gourley v. Neb. Methodist Health Sys., Inc., 265 Neb. 918, 961, 663 N.W.2d 43, 80 (2003) (Gerrard, J., concurring); *see also* 1 Neb. Prac., NJI2d Civ. 4.00 (2019) (providing Nebraska's basic jury instruction defining economic and noneconomic damages).

To the extent any quoted or referenced material herein may confuse the distinction, this Comment will acknowledge and resolve any relevant distinctions.

B. The History of NHMLA

The Nebraska Hospital Medical Liability Act was, in large part, a response to a pair of malpractice cases resolved in the fourteen years preceding the Act's inception. In *Spath v. Morrow*, the Nebraska Supreme Court adopted the Discovery Rule to revive a medical negligence victim's latent injury claim,[7] and in a confidential case represented by one of the NHMLA bill's opponents, a jury issued one of Nebraska's largest awards of $650,000.[8] NHMLA was originally introduced in 1976 as Legislative Bill (LB) 703[9] and later amended into LB 434.[10] LB 703 was conceived in response to the medical lobby's asserted fears of "skyrocketing" insurance rates for medical providers (which would necessarily be passed on to consumers) and was accompanied by grim warnings of a mass retirement or exodus of providers from the state.[11] The bill's statement of purpose provides in part:

> The enacting of this bill into law will reverse the trend toward higher malpractice insurance rates and should assist in holding down the total cost of health care. Failure to enact this type of legislation could result in the loss of professional services that are presently available to the citizens of this state.[12]

At the first hearing on LB 703, the very first question of the bill's sponsor involved the application of the damage cap. Senator Cavanaugh interrupted Senator Schmit's introduction of the bill to ask about § 19, which as originally drafted would have only permitted re-

7. Spath v. Morrow, 174 Neb. 38, 115 N.W.2d 581 (1962).

8. *Hearing on LB 703 Before the Pub. Health & Welfare Comm.*, 84th Leg., 2d Sess. 86–87 (Neb. 1976) (testimony of Warren Schrempf, Esq.) (on file with author). Note that the value of that award in today's dollars is roughly $3 million.

9. LB 703, 84th Leg., 2d Sess. (Neb. 1976) (introduced by Sen. Loran Schmit, 23d district).

10. In a gesture of pure irony, LB 434 was a meatpacking bill. NHMLA became so contentious that it was inserted into a bill designed to regulate the Nebraska meatpacking industry—a bill that was universally accepted. As Senator Chambers eloquently opined in the floor debates: "Everything about it is symbolic of how the public[']s interests are sacrificed and crushed into the ground. A meat packers bill for a doctors bill. The butcher and the doctor are joining hands." *Floor Debate on LB 434, 703*, 84th Leg., 2d Sess. 9446 (Neb. 1976) (statement of Sen. Ernie Chambers).

11. *See, e.g.*, *Hearing on LB 703 Before the Pub. Health & Welfare Comm.*, *supra* note 8, at 7–8 (statement of Sen. Loran Schmit); *id.* at 51–53 (statements of Dr. James Dunlap).

12. *Introducer's Statement of Purpose: LB 703*, 84th Leg., 2d Sess. (Neb. 1976) (Sen. Loran Schmit) (on file with author).

covery of economic damages.[13] Indeed, in recognizing the departure from traditional tort damages that include noneconomic damages such as pain and suffering, Senator Schmit expressed, "The only recovery for pain and suffering would be as to how it refers or relates to actual economic loss."[14] When pressed again, Senator Schmit continued:

> I feel, Senator Cavanaugh, that in order to find some method whereby we can find a reasonable solution to the rates for malpractice, there has to be some kind of limitation, and that is the limitation we provide under the bill, which I believe pretty effectively limits any so-called wild settlements for pain and suffering. It must be related to economic loss, and I feel it's a valid limitation.[15]

Section 19 of the bill was completely stricken from the final draft, demonstrating the Legislature's rejection of a law that would award only economic damages, and instead, favoring the allowance of recovery for pain and suffering, though potentially limited.[16] Testimony in front of the full Legislature, prior to the vote which struck § 19, expressed favor for traditional damages that encompass the panoply of damages otherwise comprising Nebraska law.[17] Considering Senator Schmit's intent to mitigate "wild" awards, in conjunction with the fact that the Legislature rejected the economic-only damages provision, the policy expressed by the final Act was merely to limit "wild" pain and suffering damages. Indeed, even Senator Schmit expressed in the committee hearing: "I believe that the recovery for *pain and suffering* should be limited to the fact the amount would be justified by virtue of his limitation of his occupation and no further than that."[18] In the floor debates following rejection of § 19, Senator Cavanaugh explained the bill's focus on precluding excessive pain and suffering damages, but not other forms of future damages: "I don't think that what you are giving up here is the widow[']s right to compensation for loss of consortium which is now a measure of damage, you are depriving her of any recovery for the pain and suffering that her husband may have undergone."[19]

The committee heard testimony on just one "highly unique" case involving damages beyond what would become the Act's original $500,000 cap.[20] On one hand, it could be argued discussion of that

13. *Hearing on LB 703 Before the Pub. Health & Welfare Comm.*, *supra* note 8, at 9–11.
14. *Id.* at 9.
15. *Id.* at 10.
16. *Floor Debate on LB 434, 703*, *supra* note 10, at 8630–33.
17. *Id.* at 8631.
18. *Hearing on LB 703 Before the Pub. Health & Welfare Comm.*, *supra* note 8, at 11 (emphasis added).
19. *Floor Debate on LB 434, 703*, *supra* note 10, at 8627. The Legislature also approved of testimony on the floor to the applicability of pecuniary damages and future earnings, for example. *Id.* at 8627, 8631.
20. *Hearing on LB 703 Before the Pub. Health & Welfare Comm.*, *supra* note 8, at 92.

case indicates the committee understood there to be a possibility of economic damages exceeding what would come to be the agreed-upon cap because that testimony included discussion of an economist's finding in that case of future special damages exceeding $1 million.[21] On the other hand, the committee's interest seemed to reside in the 40% attorney's fee and the fact that a permanently comatose victim was awarded $400,000.[22] This suggests the committee did not contemplate a scenario where "actual" economic damages could approach the cap.

In fact, when questioned by another senator as to whether the court system had broken down by allowing "skyrocketing" claims, Senator Schmit acknowledged the speculative nature of the malpractice concerns when he conceded, "I would say that it would boil down to one word of explanation, and that is fear—fear of the unknown."[23] Senator Schmit went on to assert that "the recovery situation becomes an emotional one. The individual is injured, and then it becomes a question of what actually occurred, and it is very easy to be carried away."[24] Considered as a whole, the testimony at the hearings centered around the need to limit noneconomic damages, specifically pain and suffering.[25] The original $500,000 cap, in conjunction with the rejection of the "economic-only" damages provision (§ 19 of the original bill), reflected the Legislature's intent that such a value would sufficiently compensate economic losses and mitigate "wild" pain and suffering claims.[26]

Since its inception, the NHMLA cap has been revised every decade or so to adjust for inflation.[27] As will be discussed herein, *infra* section III.B, many challenges to the NHMLA damage cap have arisen in the courts in the intervening decades. Most challenges have focused on the cap's constitutionality, in accord with other states, but Nebraska has held fast (despite no shortage of strong arguments) in maintaining that the Act poses no constitutional concern. At present, Nebraska's medical malpractice cap applies to combined economic *and*

21. *Id.* at 86–90.

22. *Id.*

23. *Id.* at 20.

24. *Id.* at 21.

25. *See generally id.*

26. *See, e.g.*, Gourley *ex rel.* Gourley v. Neb. Methodist Health Sys., Inc., 265 Neb. 918, 963–64, 663 N.W.2d 43, 81–82 (2003) (Gerrard, J., concurring) (noting that the "parliamentary maneuvering" of placing LB 703 into the meatpacking bill is to blame for the Act's defeat of the Legislature's original intent to apply the cap only to general damages).

27. NEB. REV. STAT. § 44-2825(1) (Reissue 2010 & Cum. Supp. 2018). The original 1976 cap at $500,000 roughly inflates to the $2.25 million that has currently been in effect for the past five years, and adjustments are made approximately every decade. *See id.*

noneconomic damages, putting Nebraska at odds with the overwhelming majority of states.[28]

III. ARGUMENT

This Part will explore the numerous ways in which Nebraska has fallen out of conformity with nearly every other state with respect to its application of damage caps.

> It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.[29]

The following argument is broken into two main sections, the first of which looks at the laws and cases of some of Nebraska's sister states, and the second of which looks at Nebraska's precedent on damage caps, by way of comparison. Specifically, section III.A will look at the variety of constitutional rationales other courts have used to declare their caps unconstitutional. Section III.B will compare many of those holdings with Nebraska's position on similar constitutional arguments. Section III.B will also detail how Nebraska's obstinance in defending a position of constitutional validity regarding caps is contrary to the majority of her sister states.

A. Interjurisdictional Precedent

1. Fifty-State Survey of Caps

States have taken a wide variety of approaches to erecting and often dismantling their assorted damage caps. As a preliminary note, it is important to recognize that at the time Nebraska's NHMLA cap was first invoked, it was understood to be among the most liberal in the country.[30] It is also worth noting up front that to draw allusions and distinctions across jurisdictions is a far cry from an apples to apples comparison because of the varied underlying state constitutions and statutory schemes. However, to the extent that they share many common themes and characteristics, much of the analysis below will at least bear some metaphorical fruit.

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28. *See, e.g.*, *Fact Sheet: Caps on Compensatory Damages: A State Law Summary*, CTR. FOR JUST. & DEMOCRACY N.Y. L. SCH. (June 20, 2019), https://centerjd.org/content/fact-sheet-caps-compensatory-damages-state-law-summary [https://perma.unl.edu/6QL2-QSQN] (providing a concise visual overview of Nebraska's minority stance on caps).

29. Oliver Wendell Holmes, Justice of the Supreme Judicial Court of Mass., The Path of the Law, Address at the Dedication of the New Hall of the Boston University School of Law (Jan. 8, 1897), *in* 10 HARV. L. REV. 457, 469 (1897).

30. *Floor Debate on LB 434, 703*, *supra* note 10, at 8796.

The vast majority of states generally disfavor caps.[31] Nine states have constitutional provisions expressly barring caps on damages, either generally, or specifically at least to wrongful death cases.[32] States take a varied approach to assigning caps to specific areas of their law, which can be broken into four general categories relevant to this Comment: (1) punitive damage caps; (2) medical malpractice damage caps; (3) products liability damage caps; and (4) general tort injury damage caps. It is not uncommon for the caps on these different categories to vary within each state that uses them, reflecting states' interests in adopting different policies on damage recovery for different types of claims. The Nebraska Legislature has not adopted a policy barring caps against torts generally, nor against products liability cases.[33] The following synthesis will summarize the interjurisdictional use of medical malpractice damage caps.

a. Interjurisdictional Legislative Caps

In order to compare the apples and oranges that follow, this Comment will address several specific distinctions relevant to the comparison of medical malpractice caps under Nebraska law. First, a relevant factor in the analysis is whether a state's present lack of caps is reflective of its legislature's disinterest in caps in the first instance, or whether such nonexistence of caps reflects judicial intervention by striking any such caps down. Second, the availability of punitive damages in other states deserves attention given the impact of such damages on otherwise limited claims. Third, the most crucial distinction to bear in mind is that there is a sharp difference between caps on noneconomic damages and caps on total damages, including economic damages.

The following series of comparisons will set the tone for Nebraska's current status as an outlier in medical malpractice damage caps. First, however, there is one area where Nebraska has positioned itself with the majority: forty-one states (plus the District of Columbia) have no generally-applicable cap on noneconomic tort damages—Nebraska is among them.[34] Nine states compose a minority which does generally cap noneconomic tort damages.[35] A small majority of twenty-nine states, however, impose *some* cap on *noneconomic* damages in medical malpractice cases.[36] Again, Nebraska is among them. Nine states'

31. *See Fact Sheet: Caps on Compensatory Damages: A State Law Summary*, *supra* note 28. Note that this page contains some errors but serves as a fairly accurate visual aid for the purposes of relevant discussion.
32. *Id.*
33. *Id.*
34. *Id.*
35. *Id.*
36. *Id.*

constitutions prohibit capping damages, either generally, or specifically for wrongful death cases.[37] Nebraska is not among this last minority.

i. Punitive Damage Caps

Where Nebraska drastically parts ways with her sister states begins with her effective bar on punitive damages. "It has been a fundamental rule of law in this state that punitive, vindictive, or exemplary damages will not be allowed . . . . This rule is so well settled that we dispose of it merely by the citation of cases so holding."[38] Accordingly, Nebraska courts consistently hold that punitive damages "contravene Neb. Const. art. VII, § 5, and thus are not allowed in this jurisdiction."[39] Technically, punitive damages do not "contravene" that section of the Nebraska Constitution, which merely provides that penalizing damages "shall be appropriated exclusively to the use and support of the common schools in the respective subdivisions where the same may accrue."[40] Regardless, the Nebraska Supreme Court has found that "[s]ince all penalties must go to the benefit of the common schools of the state, a penalty for the benefit of a private person is violative of the cited constitutional provisions."[41] Consequently, though not technically impermissible or in contravention of the Nebraska constitution, punitive damages are so rarely sought in Nebraska that even the United States Supreme Court has noted their lack of availability: "State regulation of punitive damages varies. A few States award them rarely, or not at all. Nebraska bars punitive damages entirely, on state constitutional grounds."[42]

Nebraska is therefore one of only four states that have erected policies effectively barring punitive damages.[43] Louisiana has a general ban on punitive damages but provides exceptions for cases involving drunk driving, child pornography and molestation, or the applicable laws of other states.[44] Washington also generally bars punitive dam-

37. *Id.* (noting the following states: Arizona, Arkansas, Kentucky, New York, Ohio, Oklahoma, Pennsylvania, Utah, and Wyoming).
38. Abel v. Conover, 170 Neb. 926, 929, 104 N.W.2d 684, 688 (1960).
39. Distinctive Printing & Packaging Co. v. Cox, 232 Neb. 846, 857, 443 N.W.2d 566, 574 (1989).
40. NEB. CONST. art. VII, § 5.
41. *Abel*, 170 Neb. at 932, 104 N.W.2d at 689.
42. Exxon Shipping Co. v. Baker, 554 U.S. 471, 495 (2008).
43. Michael L. Rustad, *The Closing of Punitive Damages' Iron Cage*, 38 LOY. L.A. L. REV. 1297, 1304 (2005). Note that this article misspeaks in saying that Massachusetts bars punitive damages by inadvertently citing to its slander and libel statute in lieu of other tort statutes.
44. LA. CIV. CODE ANN. art. 3546 (2019); Arabie v. CITGO Petroleum Corp., 2010-244 (La. App. 3 Cir. 10/27/10); 49 So. 3d 529, 551, *rev'd in part on other grounds*, 2010-2605 (La. 3/13/12); 89 So. 3d 307.

ages, with few statutory exceptions.[45] New Hampshire, despite a law entitled "Punitive Damages Outlawed,"[46] has embraced a doctrine of "enhanced compensatory damages" which effectively serves the same purpose as punitive damages in some circumstances, including personal injury cases.[47] A handful of other states have similarly rejected "punitive" damages in lieu of functionally identical damage doctrines such as "exemplary" damages.[48] Another twenty-three states do cap punitive damages, and there is a growing trend among those states to tie the punitive damage cap to a multiplier of the actual or compensatory damages, typically by a factor of three times the compensatory damages.[49] The remaining twenty-four punitive-permitting states not only permit punitive damages but provide no express cap.[50]

ii. Medical Malpractice Caps[51]

Nebraska technically joins the modest majority of thirty-one states which have some type of cap on medical malpractice damages. The

45. Maki v. Aluminum Bldg. Prods., 436 P.2d 186, 187 (Wash. 1968) ("From *Spokane Truck and Dray Co. v. Hoefer*, 2 Wash. 45, 25 Pac. 1072, 11 L.R.A. 689 (1891), to the present day, this court has held that the doctrine of punitive damages is unsound in principle and that such damages cannot be recovered in this jurisdiction, absent statutory authorization.").
46. N.H. REV. STAT. ANN. § 507:16 (2020).
47. *See, e.g.*, Vratsenes v. N.H. Auto, Inc., 289 A.2d 66, 67 (N.H. 1972).
48. *See, e.g.*, Gilroy v. Conway, 391 N.W.2d 419, 422 (Mich. Ct. App. 1986) ("In Michigan, however, the purpose of exemplary damages has not been to punish the defendant but to render the plaintiff whole by compensating for mental injury.").
49. *See, e.g.*, David Goguen, *State-by-State Medical Malpractice Damages Caps*, NOLO, https://www.nolo.com/legal-encyclopedia/state-state-medical-malpractice-damages-caps.html [https://perma.unl.edu/5FSZ-CFU7] (last visited May 15, 2020). One note of interest is that the "treble damages" approach being recently embraced by many of these states as a measure of punitive damages was actually considered by the Nebraska Supreme Court nearly a hundred years ago in the case that arguably first concluded such damages must be payable to the school fund under the Nebraska Constitution. *See* Sunderland Bros. Co. v. Chicago, Burlington & Quincy R.R. Co., 104 Neb. 319, 179 N.W. 546 (1920).
50. *See Personal Injury Damages Caps by State*, PENNYGEEKS (Jan. 2, 2020), https://pennygeeks.com/legal-resources/personal-injury-damages-caps/ [https://perma.unl.edu/4GXP-5SCZ]; Goguen, *supra* note 49. Note that the Supreme Court has ruled that a "grossly excessive" punitive damages award, determined on a case-by-case basis, may violate the due process of a defendant. *See, e.g.*, TXO Prod. Corp. v. All. Res. Corp., 509 U.S. 443, 458 (1993) (citing Waters-Pierce Oil Co. v. Texas, 212 U.S. 86, 111 (1909)). However, the Court has consistently found under this test that punitive damages in excess of ten times the other damages did not implicate a Due Process violation. *See, e.g.*, BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 568 (1996) ("Only when an award can fairly be categorized as 'grossly excessive' in relation to these interests does it enter the zone of arbitrariness that violates the Due Process Clause of the Fourteenth Amendment."); *TXO Prod. Corp.*, 509 U.S. at 458.
51. For the following analysis, there is no applicable fifty-state survey, so the easiest way to visualize the interjurisdictional law is by reviewing the fairly accurate

remaining states either have constitutional provisions forbidding damage caps, have found constitutional infirmity with their caps, or have legislatively adopted a policy contrary to limiting recovery from medical malpractice, though several do cap punitive damages. Of the majority which embraces malpractice caps of some type, caps range in value from $250,000 to $2.4 million. Officially, Nebraska has the second-highest cap amount, currently at $2.25 million. However, as will be clarified herein, Nebraska's application of this cap to all forms of recovery places her at dramatic odds with her sister states, and actually makes Nebraska one of the three most limited-recovery states.

Twenty-seven of the thirty-one states with a malpractice cap in place exclude the application of the cap from economic damages, including future medical damages and earnings. Nebraska, by contrast, applies the cap to economic damages as well as noneconomic damages. Nebraska is among the four states that apply the cap to total damages. Of those four, Louisiana specifically excludes future medical damages from the harsh application of the total cap on recovery. The remaining states, Nebraska (capped at $2.25 million),[52] Virginia ($2.4 million),[53] and Indiana ($1.8 million),[54] have the three highest express cap values in the country, which is again deceptive considering that those values cap total damages, oftentimes precluding any recovery for future economic, let alone noneconomic, damages. In a modern economy of inflated healthcare costs, suffice it to say that even an average malpractice claimant's economic damages alone are likely to exceed those values, particularly where there is permanent injury that results in lost earnings, future medical expenses, or other foreseeable losses. This is increasingly true, even after the mandatory reduction to present value.[55] All of this limitation says nothing of the reality that such a claimant is likely to receive no recovery for noneconomic damages. This surely surpasses the limitation on "wild" pain and suffering awards contemplated by the Legislature in enacting NHMLA. In such inevitable and increasingly voluminous cases, Nebraska nevertheless holds the esteemed distinction of providing nearly the lowest recovery

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online compilations. *See, e.g.*, *Fact Sheet: Caps on Compensatory Damages: A State Law Summary*, *supra* note 28; Goguen, *supra* note 49; *Personal Injury Damages Caps by State*, *supra* note 50; W. McDonald Plosser, *United States: Sky's the Limit? A 50-State Survey of Damages Caps and the Collateral Source Rule*, MONDAQ (Dec. 11, 2018), http://www.mondaq.com/unitedstates/x/762574/Insurance/Skys+The+Limit+A+50State+Survey+Of‡amages+Caps+And+The+Collateral+Source+Rule [https://perma.unl.edu/L79X-687Y].

52. NEB. REV. STAT. § 44-2825(1) (Reissue 2010 & Cum. Supp. 2018).

53. VA. CODE ANN. § 8.01-581.15 (2019). As of July 1, 2020, Virginia's cap will be increased to $2.45 million.

54. IND. CODE § 34-18-14-3 (2019).

55. *See, e.g.*, Patras *ex rel.* Patras v. Waldbaum, 170 Neb. 20, 24–25, 101 N.W.2d 465, 468 (1960) (discussing reduction to present value for future damages).

in the country, second only to Indiana whose total bar on recovery is half a million dollars lower.[56]

b. Interjurisdictional Judicial Action on Caps

At least eight of the twenty states without damage caps have found noneconomic damage caps specifically to be unconstitutional, and their legislatures have not re-passed subsequent legislation.[57] Again, despite the varied language in different states' constitutions, comparisons in rationale are largely insightful but must be carefully qualified. However, there are some general themes that are worth exploring, particularly where the constitutional language and analyses mirror Nebraska's. Below are some of the leading rationales relied upon by other states in finding their former caps unconstitutional in whole or in part. It is worth noting up front that the United States Supreme Court has regularly declined to meddle in the states' authority to define and impose their own damage caps, except to suggest that punitive damages awards may face strict constitutional scrutiny if they approach ten times the value of the compensatory damages.[58] Therefore, states are largely left to their own devices in interpreting their caps under their respective constitutions.

i. Right to a Jury

As an early example of judicial intervention in malpractice caps, Washington found its cap on noneconomic damages to be unconstitutional after considering the Right to a Jury provision of its state constitution.[59] The court noted that even by that time several other states had already found similar caps unconstitutional, candidly stating that "[c]ases upholding damage limits either have not analyzed the jury's role in the matter or have not engaged in the historical constitutional analysis used by this court in construing the right to a jury."[60] Notably, the Washington Right to a Jury constitutional provision is nearly identical to Nebraska's.[61]

Two years later, the Alabama Supreme Court engaged in what has become a standard analysis,[62] finding that where its constitution provides that "the right of trial by jury shall remain inviolate," neither

56. *See* IND. CODE § 34-18-14-3 (2019); NEB. REV. STAT. § 44-2825(1) (Reissue 2010 & Cum. Supp. 2018).
57. *See Fact Sheet: Caps on Compensatory Damages: A State Law Summary*, *supra* note 28.
58. *See, e.g.*, Exxon Shipping Co. v. Baker, 554 U.S. 471, 495 (2008); BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 568 (1996).
59. Sofie v. Fibreboard Corp., 771 P.2d 711 (Wash. 1989).
60. *Id.* at 723.
61. *Compare* NEB. CONST. art. I, § 6, *with* WASH. CONST. art. I, § 21.
62. *See, e.g.*, Atlanta Oculoplastic Surgery, P.C. v. Nestlehutt, 691 S.E.2d 218 (Ga. 2010).

the legislature nor the courts may "interfere" with or "impair" a jury's findings of noneconomic damages.[63] Notably, this language is also nearly identical to Nebraska's.[64] The court framed the question over the meaning of "inviolate" as whether a person's right to a jury's unobstructed damage assessment was protected (and thus inviolate), rather than looking to whether the right to damages existed at common law when its constitution was enacted.[65]

Most recently, the Kansas Supreme Court reached an identical conclusion based on constitutional provisions also nearly identical to Nebraska's.[66] In its opinion, the Kansas court expressly rejected Nebraska's finding in *Gourley*, *infra* subsection III.B.1.a, that it was permissible under the constitution's "inviolate" language for the legislature to "substitute" its determinations in lieu of those necessarily reserved for a jury.[67] After analyzing the functional similarity between the Kansas and Nebraska state constitutions with respect to the right to a jury, the Kansas court concluded that "the cap's effect is to disturb the jury's finding of fact on the amount of the award. Allowing this substitutes the Legislature's nonspecific judgment for the jury's specific judgment. The people deprived the Legislature of that power when they made the right to trial by jury inviolate."[68]

Several of the other states that have found caps tacitly unconstitutional have relied on the Supreme Court's decisions in cases such as *Dimick v. Schiedt*, which address the special and reserved role of a jury in determining damages.[69] The Supreme Court's position is consistently that the jury is uniquely positioned and entrusted with assessing damages. This practice in the United States has evolved slightly from the common law tradition in cases where damages are "so unreasonable as to show that the jury has not approached the subject in a proper judicial temper"; in these cases American court judges are given discretion to propose remittitur of the excessive damages.[70] However, this discretion is based on an awardee's option to either consent to remittitur of the excess damages or allow the opposition's request for a new trial.[71] The judges may not interfere with the jury's fact-finding role by inserting their own finding and modifying the damage award.

63. Moore v. Mobile Infirmary Ass'n, 592 So. 2d 156, 161–63 (Ala. 1991).
64. *Compare* NEB. CONST. art. I, § 6, *with* ALA. CONST. art. I, § 11.
65. *Mobile Infirmary*, 592 So. 2d at 161–63. This case discussed both the Virginia and Washington constitutional challenges.
66. Hilburn v. Enerpipe Ltd., 442 P.3d 509, 523 (Kan. 2019).
67. *Id.* at 522–23.
68. *Id.* at 524.
69. Dimick v. Schiedt, 293 U.S. 474 (1935).
70. *Id.* at 482.
71. *Id.*

States that have found their caps unconstitutional under the right to jury trial theory have noted that the right to a jury trial—including the jury's factual findings—is a right that existed at common law when their constitutions took effect.[72] These courts often make findings such as: "The very existence of the caps, in any amount, is violative of the right to trial by jury."[73] In addressing contentions that a legislature may in fact modify the common law, the courts note that the legislature may not, however, "abrogate *constitutional* rights that may inhere in common law causes of action."[74]

ii. Open Courts

Florida was an early state to find that its malpractice damage caps, even for noneconomic damages, were unconstitutional based on its Open Courts article. The court found that the Open Courts article must be read in conjunction with the Right to a Jury section because the redress guaranteed by the Open Courts provision necessarily depends upon the jury's findings, which are precluded when the legislature places a mandate on its findings.[75] Notably, the relevant language in both the Open Courts provision and the Right to a Jury provision of the Florida Constitution is functionally identical to Nebraska's constitution.[76] The Texas Open Courts provision is also nearly identical to Nebraska's,[77] and a year after Florida's decision, Texas relied on the same reasoning to find its medical malpractice cap on damages unconstitutional.[78]

iii. Equal Protection

Alabama was an early example of a successful Equal Protection challenge to malpractice damage caps. In 1991 the Alabama Supreme Court ruled that its legislature had created unreasonable classifications that limited recovery only for the most seriously injured citizens of the state, treating one class differently than another based merely on the severity of an injury.[79] In so finding, the court held that the

72. *See, e.g.*, Atlanta Oculoplastic Surgery, P.C. v. Nestlehutt, 691 S.E.2d 218, 223 (Ga. 2010).
73. *Id.*
74. *Id.* (citing *Dimick*, 293 U.S. at 487).
75. Smith v. Dep't of Ins., 507 So. 2d 1080, 1088–89 (Fla. 1987).
76. *Compare* FLA. CONST. art. I, §§ 21, 22, *with* NEB. CONST. art. I, §§ 6, 13. Also, this may support the rationale Nebraska courts use in their frequent reliance on Florida's construction of the law. *See* Stefanie S. Pearlman, *Persuasive Authority and the Nebraska Supreme Court: Are Certain Jurisdictions or Secondary Resources More Persuasive Than Others?*, NEB. LAW., Mar.–Apr. 2018, at 33.
77. *Compare* TEX. CONST. art. I, § 13, *with* NEB. CONST. art. I, § 13.
78. Lucas v. United States, 757 S.W.2d 687, 692 (Tex. 1988).
79. Moore v. Mobile Infirmary Ass'n, 592 So. 2d 156, 167 (Ala. 1991).

correlation between the state's interest in reducing medical costs and the noneconomic damage cap was "at best, indirect and remote."[80]

That same year New Hampshire also found its cap on personal injury noneconomic damages unconstitutional under its Equal Protection clause, expanding a previous decision that found only the state's malpractice cap to be unconstitutional on these grounds.[81] It is notable that the New Hampshire court reached both of these decisions merely on a rational basis analysis, focusing on an injured plaintiff's important substantive right to recovery.[82] In both states, and several others since, Equal Protection challenges to caps often rest on the finding under either rational basis or intermediate scrutiny that a legislature's classification of more severely injured plaintiffs (who are impacted by the cap) is either arbitrary or lacking a substantial relation to a legislative purpose, respectively.[83]

iv. Separation of Powers

Illinois recently took a unique approach to finding its malpractice damage cap unconstitutional. In an earlier case, the Illinois court had noted favorably Washington's finding that a court and its jury are better positioned than the legislature to make case-by-case findings required by the constitution,[84] vesting the courts with the exclusive authority to reduce verdicts.[85] Under this rationale, the Illinois court ultimately found that the legislative act capping damages "unduly encroaches upon the fundamentally judicial prerogative of determining whether a jury's assessment of damages is excessive within the meaning of the law."[86] The rationales of the Illinois courts are particularly availing considering the Nebraska constitution was modeled expressly after the Illinois constitution.[87]

v. Special Legislation

Illinois also found its malpractice damage caps unconstitutional as violative of its constitution's Special Legislation article.[88] Despite

80. *Id.* at 168.
81. Brannigan v. Usitalo, 587 A.2d 1232 (N.H. 1991).
82. *Id.* at 1234–35; Carson v. Maurer, 424 A.2d 825, 830 (N.H. 1980), *overruled on other grounds by* Cmty. Res. for Justice, Inc. v. City of Manchester, 917 A.2d 707 (N.H. 2007).
83. *Mobile Infirmary*, 592 So. 2d at 167; *Brannigan*, 587 A.2d 1232.
84. Sofie v. Fibreboard Corp., 771 P.2d 711, 723 (Wash. 1989) (declaring Washington's damage caps violative of the state's Right to a Jury provision).
85. Best v. Taylor Mach. Works, 689 N.E.2d 1057, 1081 (Ill. 1997).
86. Lebron v. Gottlieb Mem'l Hosp., 930 N.E.2d 895, 908 (Ill. 2010) (quoting *Best*, 689 N.E.2d at 1080).
87. ROBERT D. MIEWALD, PETER J. LONGO, & ANTHONY B. SCHUTZ, THE NEBRASKA STATE CONSTITUTION: A REFERENCE GUIDE 17 (2d ed. 2009).
88. Wright v. Cent. Du Page Hosp. Ass'n, 347 N.E.2d 736, 743 (Ill. 1976).

some linguistic differences between the Illinois and Nebraska Special Legislation provisions, the courts of the states rely on a functionally identical analysis that asks whether the legislation creates "unreasonable or arbitrary" classifications that confer a benefit or privilege on that class.[89] The Illinois court began its analysis by reviewing a previous holding that a similar damage cap (in the state's Workers' Compensation Act) violated its constitution's Equal Protection clause by creating an arbitrary classification that only restricted recovery for the most seriously injured victims.[90] Analogizing the two cases, the court held that the legislature, with the malpractice cap, had also created an arbitrary classification benefiting medical providers to the exclusion of other tortfeasors, thus violating the Special Legislation provision.[91] Recently, Oklahoma joined the ranks of finding noneconomic tort damage caps violative of its analogous Special Legislation provision on similar grounds.[92]

2. Interjurisdictional Summary

Nebraska is the only state (according to the Supreme Court) that completely (or at least effectively) bars punitive damages, but it also has the second most restrictive recovery on medical malpractice awards in the country. As is evident, a brief survey of some of the states that have rejected caps demonstrates a wide variety of applicable theories under which Nebraska's damage caps are unconstitutional. The selected cases are particularly availing because of the underlying similarities between the challenged constitutional language of the sister states involved.

Even regardless of textual similarities or differences between Nebraska's constitutional provisions and those of her sister states, the states are engaged in a "common interpretive enterprise," whereby every state will benefit from embracing the interpretive themes of its sister states regarding the substance of their constitutions.[93] To the extent there is no true originalism in state constitutions—or at least no originalism that a state's citizens relate to—a unified interpretation of the substantive principles of states' constitutions will encourage, rather than inhibit, productive federalism.[94] Further, many benefits to states arise when they focus on the substance rather than the linguistic dissimilarities of other states' interpretations of their

89. *Compare id.*, *with* Bergan Mercy Health Sys. v. Haven, 260 Neb. 846, 851–52, 620 N.W.2d 339, 345 (2000).
90. *Wright*, 347 N.E.2d at 741–42.
91. *Id.* at 743.
92. Beason v. I.E. Miller Servs., Inc., 441 P.3d 1107, 1111–12 (Okla. 2019).
93. Paul W. Kahn, *Interpretation and Authority in State Constitutionalism*, 106 HARV. L. REV. 1147, 1162–63 (1993).
94. *See id.* at 1162–68.

constitutional principles.[95] States may draw on the experience of other states, and a unified interpretation of the substantive principles underlying state constitutions will provide state courts guidance in future constitutional analyses.[96] Lastly, a unified state interpretive front is more likely to influence the Federal Supreme Court, when necessary, for the protection of constitutional rights that are shared not only among the states but with the Federal Constitution as well.

Considering the frequency and volume of other states' substantive constitutional interpretations that are contrary to Nebraska's, regardless of textual similarities, it is likely time for Nebraska to revisit its holdings from a principled and substantive standpoint. Of note is that none—not one—of the states to find their caps unconstitutional were even faced with considering caps on actual, quantifiable, economic damages. Nebraska is one of only three states that cap actual, ascertainable damages that a plaintiff will have to pay for out of pocket as a result of a professional's negligence. Faced with the vast majority of states that continue to find even noneconomic damage caps unconstitutional, Nebraska's stalwart prevention of plaintiffs being made whole seems even more insulting to her injured citizens.

B. Theories of Unconstitutionality

1. Nebraska Constitution

Nebraska's stubborn support of the NHMLA's total cap on recovery has not been for lack of effort in raising challenges. Notably, many of the states on which the Nebraska Supreme Court has formerly relied in defense of its holdings have since reversed course. Not to mention that those very states and others now cite to Nebraska's cases as examples of what their policy seeks to avoid. Perhaps it bears reminding that at the time Nebraska's cap was implemented, the Nebraska Legislature intended it to be among the highest in the country. Because the policy of most of Nebraska's sister states has reverted to more equitable terms since the tort reform in the 1970s, when Nebraska began its charade into inequity, it is a good time to revisit some of the antiquated arguments on which Nebraska courts rely.

Nebraska's first foray into the fray of constitutional challenges to damage caps began in 1977, one year after the NHMLA's birth. In *Prendergast v. Nelson*, the Nebraska Supreme Court first held that the NHMLA was constitutional on several grounds.[97] In an interesting twist, the plaintiff in the case was a medical professional, and the defendant was the Nebraska Director of Insurance, who was refusing

95. Goodwin Liu, *State Courts and Constitutional Structure*, 128 YALE L.J. 1304, 1330–40 (2019).
96. *Id.* at 1313–14.
97. Prendergast v. Nelson, 199 Neb. 97, 256 N.W.2d 657 (1977).

to implement the Act.[98] Restated for emphasis, the Director of Insurance for Nebraska, charged with administering the Act for the insurance industry, was the first to raise constitutional arguments against that very Act, despite his support role to the lobby that vehemently supported the Act.

Relevant to this Comment, one of his key challenges was to the cap. The court introduced the Director's Special Legislation challenge to the cap thusly: "It is argued that a ceiling on judgments constitutes a special privilege for the health care provider and an undue restriction on the seriously injured patient. In this respect it must be remembered the Nebraska procedure is an elective one."[99] A crucial note about the NHMLA is that, technically, it is elective—a recipient of medical treatment may "elect" to opt out of the Act's operation.[100] To do so, claimant-apparents must file an elect-out with the Director of Insurance and notify their health care provider prior to any medical treatment from which they could possibly develop an actionable injury.[101]

So, suppose you're on a stretcher being wheeled into the hospital for what should ultimately be a routine medical procedure. Under the NHMLA, if you are disinterested in the harsh effects of the damage cap, you must first interrupt the paramedics to demand an opportunity to notify the Director of Insurance, as well as your health care provider. It is certainly reasonable that this should be a patient's first thought. One of the four separate dissents in *Prendergast* captured the problem from a policy perspective, somewhat more delicately:

> The majority opinion's partial reliance on the elective provisions of the act is misplaced. The reality of the freedom to elect by a claimant was not considered and is not easily demonstrable. Such an election provision ignores the inequality of bargaining power. The very nature of a person's status as a patient places him in a position which makes effective bargaining difficult. A right to elect not to be covered, from which might result a denial of service from the only hospital or physician in a geographical area, can hardly be said to be without implicit coercion. The consideration that the election may result in termination of services, or refusal by health care providers to give service, because of knowledge that the patient has previously filed a notice with the state Department of Insurance not to be covered, will cause a thoughtful person to use caution in exercising the right.[102]

Regardless, to the extent such a waiver can be construed as elective, it was the court's first defense of the NHMLA damage cap. Seemingly blending the Director's Special Legislation and Equal Protection arguments, the court engaged in a brief recitation of the Act's pur-

98. *Id.* at 100, 256 N.W.2d at 662.
99. *Id.* at 114–15, 256 N.W.2d at 668–69.
100. NEB. REV. STAT. § 44-2821(2) (Reissue 2010).
101. *Id.*
102. *Prendergast*, 199 Neb. at 132, 256 N.W.2d at 676–77 (White, J., dissenting in part).

ported goal of benefiting claimants, who will be more likely to recover because of the Act's ability to keep malpractice insurance costs low enough that providers are likely to be covered. Indeed, the court regularly prefaced its constitutional analyses with quotations from the Act such as: "[the Act's purpose is] to serve the public interest by providing an alternative method for determining malpractice claims in order to improve the availability of medical care, to improve its quality and to reduce the cost thereof, and to insure the availability of malpractice insurance coverage at reasonable rates."[103]

The court discussed these specious guarantees thusly: "[T]he Nebraska law provides quid pro quo. In return for relatively minor restrictions on the remedy and the ceiling of $500,000, the patient receives assurance of collect[a]bility of any judgment recovered . . . ."[104] The court then concluded that though "laws may result in some inequality . . . a legitimate legislative objective is being furthered by the act."[105] An important note in this seminal case is the court's conclusory finding that "[n]othing in the act suggests, as defendant infers, that the legislation involved was enacted for the relief of the medical care provider."[106] Bear in mind that, as the brief excerpts from the committee hearings and floor debates on NHMLA illustrate, the *entire* purpose of the cap was to relieve medical providers from the "wild" jury awards and "skyrocketing" insurance prices.

Regardless, such was the incunabulum of the Nebraska Supreme Court's defense of damage caps in Nebraska. As will be explored below, the Director of Insurance in *Prendergast* raised Equal Protection, Due Process, Open Courts, Right to a Jury, Special Legislation, and Granting Credit of the State arguments in his opening salvo on the Act.[107] In the intervening forty-two years, there has been no shortage of sound arguments that maintain opposition to the cap. The Nebraska Supreme Court has not faltered in holding fast against the tide of changing interjurisdictional precedent and novel challenges from within our borders. Following is a brief summary of the multitudinous challenges to the caps in Nebraska, accompanying commentary on the strength of the arguments, and notes on the ways in which Nebraska laws and the laws of her sister states have changed, as relevant. As a final preface to the arguments raised below, it is worth reflecting on one conclusion the *Prendergast* court made: "In enacting the medical malpractice damage limitations, the Legislature is doing no more than

103. *Id.* at 112, 256 N.W.2d at 667 (majority opinion) (quoting NEB. REV. STAT. § 44-2801(1) (1976)).

104. *Id.* at 120–21, 256 N.W.2d at 671.

105. *Id.* at 115, 256 N.W.2d at 669.

106. *Id.*

107. *See id.* at 100, 256 N.W.2d at 662.

legislatures of other states have done . . . ."[108] Considering that all but two other states have since rejected such legislative caps, it seems increasingly spurious to hang our hat on such sophistry.

a. Right to a Jury

The *Prendergast* court addressed the Director's challenge on Right to a Jury grounds in the context of whether NHMLA's imposition of an optional "Medical Review Panel" interfered with a role reserved to the jury.[109] The Nebraska court discussed at length that the Panel does not replace a jury (which a claimant is certainly entitled to after the Panel concludes its review of the case), but rather supplements the claimant's later case with additional findings. In so finding, the Nebraska court quoted Justice Brandeis's Supreme Court notation in an analogous federal case that "the ultimate determination of issues of fact by the jury [must] be not interfered with."[110] Ironically, that very rationale was used by many of Nebraska's sister states to find their caps unconstitutional.[111] Specifically, findings of damages are questions of fact, and the jury—not the court—must make the ultimate determination of damages, precluding the courts from reducing damages.[112]

Indeed, in 2003 the Nebraska Supreme Court revisited the Right to a Jury challenge under the state constitution, relying on many interjurisdictional decisions which have, since 2003, been reversed.[113] In *Gourley ex rel. Gourley v. Nebraska Methodist Health System, Inc.*, the court was faced with a case involving negligent prenatal medical care which left the plaintiff with special needs that the family expected would cost over $12.4 million over his lifetime.[114] Despite a $5.6 million award, the plaintiff was awarded a capped total of $1.25 million under NHMLA. In response to this judicial insult the plaintiff's mother stated, "We feel, you have a right to a jury trial."[115]

The court, displaying its evasive maneuverability, found that "[t]he primary function of a jury has always been factfinding, which includes a determination of a plaintiff's damages. The court, however, applies

108. *Id.* at 121, 256 N.W.2d at 672.
109. *Id.* at 106, 256 N.W.2d at 665.
110. *Id.* at 108, 256 N.W.2d at 665 (quoting *Ex Parte* Peterson, 253 U.S. 300, 310 (1920)).
111. *See, e.g.*, Hilburn v. Enerpipe Ltd., 442 P.3d 509, 514 (Kan. 2019).
112. *See, e.g.*, Dimick v. Schiedt, 293 U.S. 474 (1935) (noting that the determination of damages is a question of fact which is properly reserved for the jury).
113. Gourley *ex rel.* Gourley v. Neb. Methodist Health Sys., Inc., 265 Neb. 918, 953, 663 N.W.2d 43, 75 (2003).
114. *Family Fights Cap on Medical Malpractice Damages*, KETV (Sept. 19, 2011, 7:57 AM), https://www.ketv.com/article/family-fights-cap-on-medical-malpractice-damages/7631035 [https://perma.unl.edu/27KR-FJED].
115. *Id.*

the law to the facts. . . . The remedy is a question of law, not fact, and is not a matter to be decided by the jury."[116] In reaching this conclusion, the Nebraska Supreme Court relied primarily on *Adams ex rel. Adams v. Children's Mercy Hospital*.[117] *Adams* was a Missouri case that was overruled several years later *specifically because* the Missouri Supreme Court decided that the state constitution's Right to a Jury provision (complete with language functionally identical to Nebraska's) did in fact render their malpractice cap unconstitutional.[118] One of the last holdout states on malpractice damage cap constitutionality was Kansas, which very recently called out and specifically rejected *Gourley*'s reasoning to find Kansas's cap unconstitutional under its Right to a Jury provision.[119]

In *Schmidt v. Ramsey*, the Eighth Circuit charged into the NHMLA battlefield and, relying predominantly on Nebraska precedent, addressed many NHMLA challenges brought under the Federal Constitution.[120] In *Ramsey*, the plaintiff was awarded $17 million in medical malpractice damages in federal court, under Nebraska's NHMLA, following an infant's botched delivery.[121] It was the largest jury award for medical malpractice in the state's history.[122] Facing the cap's reduction under the NHMLA to $1.75 million, counsel for the plaintiff optimistically opined after the award that the cap was unconstitutional.[123] The plaintiff raised federal constitutional challenges under Right to a Jury, the Takings Clause, Open Courts, Equal Protection, and Substantive Due Process.

With respect to the Right to a Jury argument, the *Ramsey* court spun a chicken-or-the-egg argument on the application of the Seventh Amendment. The circuit court concluded that the NHMLA cap "does not determine damages in the first instance. The jury in this case performed its historical role by finding liability and assessing damages. The Nebraska cap imposed an upper legal limit on that jury determination."[124] This suggests that the court simultaneously found that the

116. *Gourley*, 265 Neb. at 953–54, 663 N.W.2d at 75 (internal citations omitted).
117. Adams *ex rel.* Adams v. Children's Mercy Hosp., 832 S.W.2d 898 (Mo. 1992), *overruled by* Watts *ex rel.* Watts v. Lester E. Cox Med. Ctrs., 376 S.W.3d 633 (Mo. 2012).
118. *Watts*, 376 S.W.3d at 645.
119. Hilburn v. Enerpipe Ltd., 442 P.3d 509, 522 (Kan. 2019).
120. Schmidt v. Ramsey, 860 F.3d 1038 (8th Cir. 2017), *cert. denied sub nom.* Schmidt *ex rel.* S.S. v. Bellevue Med. Ctr. L.L.C., 138 S. Ct. 506 (2017).
121. *Id.* at 1042.
122. Rick Ruggles, *$17 Million Awarded for Child with Brain Damage Born at Bellevue Medical Center*, OMAHA WORLD-HERALD (Aug. 8, 2015), https://www.omaha.com/livewellnebraska/health/million-awarded-for-child-with-brain-damage-born-at-bellevue/article_a4b4cc97-8328-562d-abd2-d21830ea2ab9.html [https://perma.unl.edu/AQF6-9PVK].
123. *Id.*
124. *Ramsey*, 860 F.3d at 1045.

jury's factual findings came "in the *first* instance," but also that the cap *first* "imposed an upper limit" on the jury's determination. Simply, the court clearly purports to acknowledge the constitutional mandate that the jury "first" determine damages,[125] despite immediately contradicting itself by conceding that the effect of the cap supersedes the jury's findings. To say that the jury's findings operated first, despite the application of the cap, is no more than a semantic charade. In the first instance, the jury determined $17 million, but first, the cap acted to limit any award beyond $1.75 million.

Naturally, as did the *Gourley* state court, the circuit court in *Ramsey* discretely alluded to the principle that while the jury determines the facts, the court must apply the law to those facts.[126] This justification for the theory that the jury "first" performed its function does not address the actual constitutional question, however. The constitutional question presented was not whether the jury first made a factual determination and the court subsequently applied the law to the facts. The constitutional question was, rather, whether the Legislature first infringed on the constitutional right to the jury's determination of damages and the jury was subsequently restricted by that infringement.

The Eighth Circuit's perfunctory analysis of the jury's role, by focusing on the timing of the application of the law to the facts, disregarded Supreme Court precedent, including precedent in cases the *Ramsey* court cited in the preceding paragraph of its analysis. Specifically, the *Ramsey* court relied on *Feltner v. Columbia Pictures Television* for the proposition that a judge may not determine damages in the first instance.[127] However, and relevant to the correct constitutional question presented in *Ramsey*, the *Feltner* court asserted that where a right to damages determined by a jury existed at common law, the Seventh Amendment mandates that the jury must determine the fact *and* the amount of damages, lest their constitutional role be violated.[128]

Merging the state and federal analyses then, the question becomes whether the cause of action and right to a jury determination of damages existed at common law, either in Nebraska or federally. The *Gourley* state court answered that question in the affirmative, as have numerous Supreme Court cases at the federal level.[129] The *Gourley* state court's dismissal of the constitutional question rested in its con-

125. *See, e.g.*, Feltner v. Columbia Pictures Television, Inc., 523 U.S. 340, 353 (1998).

126. *Ramsey*, 860 F.3d at 1045 ("[I]t is not the role of the jury to determine the legal consequences of its factual findings.").

127. *Id.*

128. *Feltner*, 523 U.S. at 355.

129. *See, e.g.*, Dimick v. Schiedt, 293 U.S. 474 (1935); Gourley *ex rel.* Gourley v. Neb. Methodist Health Sys., Inc., 265 Neb. 918, 953–54, 663 N.W.2d 43, 75 (2003).

clusion that "[i]f the Legislature has the constitutional power to abolish a cause of action, it also has the power to limit recovery in a cause of action."[130] However, similar to the Eighth Circuit, that overlooks the actual constitutional question presented because the Nebraska Legislature did not choose to abolish the cause of action. Therefore, based on the correct question and the fact that the cause of action indisputably survives, the Legislature disturbed the jury's constitutionally protected role by disrupting and limiting its fact-finding power. Under both the Nebraska and Federal Constitutions, the NHMLA cap violates the Right to a Jury. Numerous other states have reached this same conclusion on similar or related grounds, and it is time for Nebraska to follow their lead.

b. Open Courts

Prendergast addressed the Open Courts challenge to the cap by effectively dismissing it on a theory that "[c]laimants are not denied access to the courts. Those who do not elect otherwise are merely required to follow a certain procedure before submitting their claims to the courts."[131] The court was concerned primarily at that point with whether the Medical Review Panel requirement of the Act precluded access to the courts, and in that sense alone, the court's logic is sound. However, that analysis does little to address the constitution's protection from damage caps.

Fortunately, the *Gourley* plaintiff diligently raised the Open Courts challenge specifically to the application of the damage cap, rather than under contention to the review panel requirement under NHMLA.[132] Instead of diving into a substantive analysis of Nebraska constitutional law, however, the court first noted: "A majority of jurisdictions have held that a cap on damages does not violate the open courts and right to remedy provisions of their state constitution."[133] Following this statement was a list of nine cases from other jurisdictions, nearly half of which *have since been overruled or reversed*. Four of the remaining cases stand as good law in jurisdictions that do not cap economic damages, and the remaining one is still good law in Indiana, which currently has the lowest cap in the country.[134]

Short of citing other jurisdictions' precedent, the *Gourley* court did little to further explore the Open Courts provision, except to merge it with an analysis of the Right to Remedy claim. In so doing, the court concluded that because Nebraska has statutorily adopted the common

130. *Gourley*, 265 Neb. at 954, 663 N.W.2d at 75.
131. Prendergast v. Nelson, 199 Neb. 97, 103, 256 N.W.2d 657, 663 (1977).
132. *Gourley*, 265 Neb. at 950, 663 N.W.2d at 73.
133. *Id.* at 951, 663 N.W.2d at 73.
134. *See generally supra* note 51.

law of England,[135] "[a]lthough plaintiffs have a right to pursue recognized causes of action in court, they are not assured that a cause of action will remain immune from legislative or judicial limitation or elimination."[136] This accompanied a note that "[NHMLA] does not bar access to the courts or deny a remedy. Instead it redefines the substantive law by limiting the amount of damages a plaintiff can recover."[137] The lone citation for Nebraska's *Gourley* conclusion that there was no violation of the Open Courts provision was *Adams*, the Missouri case mentioned above that was overruled specifically because the Missouri Supreme Court found that the state's malpractice caps did in fact violate the Right to a Jury and Open Courts provisions in its constitution.[138]

In lieu of substantive analysis or reliance on valid Nebraska precedent, it is worth first looking at how one of Nebraska's most oft-cited sister states has considered the exact issue. The Florida Supreme Court analyzed its functionally identical Open Courts provision thusly when declaring the state's malpractice cap unconstitutional:

> Access to courts 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 at $450,000. 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 heretofore 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. . . . At least one of the appellees candidly argues that there is no constitutional bar to completely abolishing noneconomic damages by requiring potential injured victims to buy insurance protecting themselves against economic loss due to injury as an alternative remedy. That particular issue is not before us but we note that if it were permissible to restrict the constitutional right by legislative action, without meeting the conditions set forth in *Kluger*, the constitutional right of access to the courts for redress of injuries would be subordinated to, and a creature of, legislative grace or, as Mr. Smith puts it, "majoritarian whim." There are political systems where constitutional rights are subordinated to the power of the executive or legislative branches, but ours is not such a system.[139]

It is interesting to observe here that the Florida court suggested that if the legislature was to abolish the cause of action, as both the Florida and Nebraska Legislatures could theoretically do, there would certainly be a violation of the Open Courts provision. This is certainly

135. NEB. REV. STAT. § 49-101 (Reissue 2010).
136. *Gourley*, 265 Neb. at 952, 663 N.W.2d at 74 (citing Adams *ex rel.* Adams v. Children's Mercy Hosp., 832 S.W.2d 898, 906 (Mo. 1992) (en banc), *overruled by* Watts *ex rel.* Watts v. Lester E. Cox Med. Ctrs., 376 S.W.3d 633 (Mo. 2012)).
137. *Id.*
138. *Id.* (citing Adams *ex rel.* Adams v. Children's Mercy Hosp., 832 S.W.2d 898, 906 (Mo. 1992) (en banc), *overruled by* Watts *ex rel.* Watts v. Lester E. Cox Med. Ctrs., 376 S.W.3d 633 (Mo. 2012)).
139. Smith v. Dep't of Ins., 507 So. 2d 1080, 1088–89 (Fla. 1987).

a valuable rebuttal to the *Gourley* court's assertion that the Right to a Jury is not violated because the Legislature can eliminate the cause of action entirely if it wishes. In any event, the constitutional similarities between the Nebraska and Florida constitutions, combined with Nebraska's frequent reliance on Florida law, and in conjunction with the national trend away from caps (as evidenced by the only *Gourley* case cited in defense having been overruled), should make this Open Courts argument availing to future claimants.

Aside from the analysis under the Nebraska constitution's Open Courts provision, an analysis by the Eighth Circuit provides an interesting argument under the Federal Constitution. In *Ramsey* the circuit court found that, without getting bogged down in common law, the test of Open Courts is a simple evidentiary analysis.[140] Specifically, the circuit court suggested that there can be no violation of Open Courts under the Federal Constitution unless plaintiffs provide evidence that they were unable to acquire an attorney to go to court for them.[141] In *Ramsey*, the plaintiff "ha[d] offered no proof that Nebraska's cap, which has been in effect for decades, discourages lawyers to the point of restricting access."[142] The circuit court cited as examples a pair of federal cases where plaintiffs had made showings that data or affidavits supported a finding that fewer lawyers were taking malpractice cases in their jurisdictions.[143]

Open Courts challenges under federal law often require a showing of procedural or substantive barriers to the courts, oftentimes arising from conduct of the government that precludes one's pursuit of a valid underlying claim.[144] To the extent that access to the courts may depend on the willingness of counsel to represent claimants, the right case may certainly overcome this showing, as medical costs continue to rise. One can easily imagine a claimant such as in the *Gourley* or *Ramsey* cases who, by the time the claim has waded through the court system, has accumulated economic damages in excess of the NHMLA cap. Such a situation would discourage a claimant from seeking relief in the courts in the first place because one faced with such insurmountable economic damages is unlikely to want to spend additional resources on the hundreds of thousands of dollars in actual expenses (experts, discovery, etc.) that litigation would entail.

Further, in the event altruistic lawyers would pick up such a case on a contingency basis in Nebraska and front such expenses, they are either faced with the prospect of no recovery for themselves or with an

140. Schmidt v. Ramsey, 860 F.3d 1038, 1046–47 (8th Cir. 2017), *cert. denied sub nom.* Schmidt *ex rel.* S.S. v. Bellevue Med. Ctr. L.L.C., 138 S. Ct. 506 (2017).
141. *Id.* at 1047.
142. *Id.*
143. *Id.*
144. *See, e.g.*, Christopher v. Harbury, 536 U.S. 403, 412–13 (2002).

ethical dilemma. If a client's economic damages are likely to exceed the cap, even despite the best efforts of the subrogation process, the lawyer's first option is to recoup litigation expenses from the economic damages recovery and take no fee. The lawyer's second option is to recoup the litigation expenses and then collect a fee (often between 40–50%), which poses an ethical, or at least a moral, dilemma given that the award itself does not make the client whole. Neither option is appealing, and both would reasonably discourage any malpractice attorney from embracing such a case. Moreover, it is ironic to suggest that the Act would be unconstitutional on this theory only after the court waits for evidence that lawyers get too expensive when the expense of lawyers was one of the express concerns of the NHMLA Legislature.

c. Equal Protection

The Nebraska Supreme Court first wrangled an Equal Protection challenge to the NHMLA in *Prendergast*.[145] The court consolidated the Director's Due Process and Equal Protection claims and addressed them with respect to contention against the NHMLA Medical Review Panel.[146] As with all Equal Protection arguments, framing is everything, and the framing that the Director sought was that the unequal classes were, respectively, claims covered by the NHMLA and all other tort claims. After respectable analysis the court dismissed the idea, finding a "rational relationship to the legitimate purposes of the legislation."[147] So, the framing of disparate classifications of NHMLA claimants and all other tort claimants demonstrates a "reasonable basis" that is "grounded upon real differences inherent in those tort actions."[148]

Years later, the *Gourley* court revisited the challenge but made a significant about-face prior to its substantive analysis. One point of interest is that in between these decisions, the Nebraska Legislature amended its constitution to include Equal Protection in the Bill of Rights.[149] Though *Gourley* was decided just five years after this constitutional amendment, the court did not even reference any burgeoning precedent, relying instead on its Equal Protection analyses from pre-amendment cases. This is indicative of how, post-amendment, "not much [ ] changed in the way of equal protection doctrine" in Nebraska, whose "court[s do] not appear to be using the amendment to depart from the equal protection standards developed before the

145. Prendergast v. Nelson, 199 Neb. 97, 110–11, 256 N.W.2d 657, 667 (1977).
146. *Id.*
147. *Id.* at 112, 256 N.W.2d at 667.
148. *Id.* at 113–14, 256 N.W.2d at 668.
149. NEB. CONST. art. I, § 3 (amended in 1998 by LR 20CA, 95th Leg., 1st Sess. (Neb. 1997)).

presence of [the] amendment."[150] So, it came to pass that the amendment would neither bolster nor otherwise modify the deployment of Equal Protection claims. Instead, Nebraska largely continues to apply Federal Equal Protection doctrine to its analyses.

In light of that, the post-amendment *Gourley* court's analysis under the Nebraska constitution is particularly befuddling. The pre-amendment *Prendergast* court opened part of its constitutional analysis by saying: "We are dealing with the *fundamental right* to adequate medical care."[151] The plaintiffs in *Gourley*, naturally then, sought heightened scrutiny review of their Equal Protection challenge to the NHMLA cap.[152] The court curtly responded—without reference to *Prendergast*—that "access to the courts to pursue redress for injuries is not the *type* of fundamental right which requires heightened scrutiny."[153] Without addressing the fundamental right noted by the plaintiff (access to healthcare), the court expressly noted that "the Gourleys' interest in unlimited damages is economic" and decided that "[b]ecause the interests at issue are economic, we apply the rational basis test."[154] No such distinction existed at the time under federal precedent, nor did the *Gourley* court offer a reason for its assertion.

Following this bait and switch on fundamental rights, the court proceeded to waddle through an analysis riddled with citations to now-obsolete interjurisdictional precedent, to conclude:

> Finally, we note that some jurisdictions have held that a cap on damages violates equal protection. In some cases, the jurisdiction applied a heightened level of scrutiny, which we reject. Another is unclear about the level of scrutiny. Several fail to give deference to the Legislature and engage in judicial factfinding, which we also reject. Another requires the provision of a replacement remedy, quid pro quo, to limit recovery of damages, which we reject and which will be discussed when dealing with the open courts provision of the Nebraska Constitution. We find these cases unpersuasive. Thus, we conclude that the cap on damages in § 44-2825 satisfies principles of equal protection.[155]

The classifications, as framed before the *Gourley* court, were those plaintiffs who would be unaffected by the cap and those with more serious injuries who would be treated differently by the cap's harsh application. So, post-*Prendergast*, classifications distinguishing between NHMLA and all other tort claimants are unavailing. Similarly, post-*Gourley*, classifications distinguishing between claimants who

150. MIEWALD ET AL., *supra* note 87, at 47.
151. *Prendergast*, 199 Neb. at 114, 256 N.W.2d at 668 (emphasis added).
152. Specifically, the *Gourley* plaintiffs argued for heightened scrutiny based on their fundamental rights to a jury trial, a full remedy, their property, and adequate medical care. *See* Gourley *ex rel.* Gourley v. Neb. Methodist Health Sys., Inc., 265 Neb. 918, 947, 663 N.W.2d 43, 71 (2003).
153. *Id.* (emphasis added).
154. *Id.*
155. *Id.* at 950, 663 N.W.2d at 73 (internal citations omitted).

may or may not be made whole under the cap are also doomed. It is worth recalling that many jurisdictions that have found their caps unconstitutional relied on this framing of the classifications to so find. The mounting precedent on this front was likely abated by the court's dodge of the fundamental rights scrutiny. Regardless, in the sixteen years since *Gourley*, there is overwhelming support for a revisit to the Equal Protection claim, even under these classifications, and even under a rational basis analysis. The Eighth Circuit has since reached a conclusion nearly identical to *Gourley* under the Federal Constitution.[156]

d. Special Legislation

The start of a Special Legislation analysis of the NHMLA cap necessarily begins with *Prendergast*, but as will be seen, it has a unique beginning and ending. The opening of the *Prendergast* analysis states the following: "We have no question as to the right of the Director of Insurance to question the act as special legislation and as granting the credit of the state in aid of an individual, association, or corporation."[157] Despite this apparent assertion that the Special Legislation argument had the best chances of bearing fruit, the opinion inexplicably never directly addresses the constitutionality of the Act under the Special Legislation doctrine—relying instead on what was actually an Equal Protection analysis. More interestingly, the leading of four dissents posited:

> Two provisions of the act, restricting the potential liability of health care providers in malpractice cases, *are clearly unconstitutional as special legislation*. Section 44-2819, R.S.Supp., 1976, provides that any payment to a claimant from a nonrefundable medical reimbursement insurance plan, by reason of his alleged injury, may be taken as a credit against any judgment rendered under the act. This is a significant deviation from the total concept of restitution in that a negligent party may escape paying for a portion of the damage he causes. Section 44-2825, R.S.Supp., 1976, limits the total amount recoverable under the act from a health care provider to $500,000. Likewise, section 44-2825, R.S.Supp., 1976, provides for a shifting of the burden from the responsible health provider tort-feasor, but, here, the burden is shifted not to a collateral source, but to the malpractice victim himself.[158]

The first dissent concluded by finding that "[s]ections 44-2819 and 44-2825, R.S.Supp., 1976, limiting a tort-feasor's liability under the act, are unconstitutional as special legislation prohibited by Article III, section 18, of the Nebraska Constitution. These constitutionally defective provisions are not cured by the election process provided by the act."[159] The *Gourley* court would, years later, bumble through

156. Schmidt v. Ramsey, 860 F.3d 1038, 1047–48 (8th Cir. 2017), *cert. denied sub nom.* Schmidt *ex rel.* S.S. v. Bellevue Med. Ctr. L.L.C., 138 S. Ct. 506 (2017).
157. Prendergast v. Nelson, 199 Neb. 97, 100, 256 N.W.2d 657, 662 (1977).
158. *Id.* at 129–30, 256 N.W.2d at 675–76 (White, J., dissenting) (emphasis added).
159. *Id.* at 132, 256 N.W.2d at 677.

what the *Prendergast* court thought was an analysis of Special Legislation, by way of several direct contradictions.

First, the *Gourley* court engaged in an analysis designed to distinguish between the constitutional interpretations under the similar-but-distinct Equal Protection and Special Legislation provisions.[160] Noting that "language normally applied to an equal protection analysis is sometimes used to help explain the reasoning employed under a special legislation analysis," the court carefully observed that nevertheless "the focus of each test is different."[161] Despite its attention to constitutional detail, the *Gourley* court, one paragraph later, quoted three paragraphs from *Prendergast*'s Equal Protection analysis in support of its Special Legislation analysis.[162]

Regardless, the court explained that "[t]he analysis under a special legislation inquiry *focuses on the Legislature's purpose* in creating the class and asks if there is a substantial difference of circumstances to suggest the expediency of diverse legislation."[163] Interestingly, the court concluded its dismissal of the Special Legislation argument shortly thereafter by stating that "[i]t is not this court's place to second-guess the Legislature's *reasoning* behind passing the act."[164] It is unclear what the distinction between a legislature's "purpose" and a legislature's "reasoning" is in this context, but whatever it may be the *Gourley* court nonetheless undertook a Special Legislation analysis specifically to determine the "purpose" and concluded that it was not the court's place to determine the "reasoning."

In any event, we are left with a *Prendergast* decision (notably not a majority opinion anyway) that (a) gives credit to the merits of a Special Legislation argument, then (b) never addresses the argument under a Special Legislation analysis, and (c) contains a lead dissent that candidly opines as to the Act's constitutional infirmity on Special Legislation grounds. Most recently, we have a *Gourley* opinion that (a) distinguishes between an Equal Protection analysis and a Special Legislation analysis, then (b) relies on a previous Equal Protection analysis in a Special Legislation analysis, and (c) recites the court's proper analysis for Special Legislation doctrine, but (d) claims it is not the court's role to perform that analysis.

Combining this wonky precedent with the interjurisdictional precedent outlined above, there is likely a strong argument that the NH-MLA cap does, in fact, violate Nebraska's Special Legislation provision. Perhaps one cannot fault the court for what some commen-

160. *Gourley*, 265 Neb. at 939–40, 663 N.W.2d at 66.
161. *Id.* at 939, 663 N.W.2d at 66.
162. *Id.* at 939–40, 663 N.W.2d at 66 (quoting *Prendergast*, 199 Neb. at 115, 256 N.W.2d at 669).
163. *Id.* at 939, 663 N.W.2d at 66 (emphasis added).
164. *Id.* at 943, 663 N.W.2d at 69 (emphasis added).

tators have noted is an "ill-defined distinction" that "remains somewhat fleeting," as between Special Legislation and Equal Protection analyses.[165] Regardless, it is incumbent upon the court to perform a legitimate analysis of NHMLA under Nebraska's Special Legislation doctrine. Unlike the Equal Protection analysis, Special Legislation may require a degree of scrutiny somewhat higher than rational basis, though the Nebraska Supreme Court has yet to specifically answer that question.[166]

For now, the court recognizes that the test is merely "different"[167] to the extent that "[t]he analysis under a special legislation inquiry focuses on the Legislature's purpose in creating the class and asks if there is a *substantial* difference of circumstances."[168] The "substantial" qualifier likely suggests some heightened scrutiny nevertheless, considering the *Gourley* court's emphasis on purported "substantial differences of situation or circumstances" in justifying the classification at issue.[169] The court has also added the substantiality qualifier to another part of the Special Legislation test, distinguishing it from the Equal Protection rationality test, in finding that the law must "bear a reasonable and *substantial* relation" to the purpose of the Legislature.[170]

With that in mind, the *Gourley* court quoted *Prendergast* to recognize "a substantial difference between medical care providers and other tort-feasors."[171] In so finding, the court emphasized the need to "consider[ ] what the Legislature could have found at the time the act was passed."[172] Given that the Legislature's primary purpose was addressing "wild" and "skyrocketing" noneconomic damages awards in order to keep insurance affordable for the class of medical providers, it is crucial for the court to squarely address whether there is a substantial difference between that class and every other class of tortfeasors in the state.

It is increasingly difficult to ascertain how other professional malpractice policyholders or even non-professional insureds are substantially differently situated than medical professionals. Why does a lawyer, a premises owner, an automobile driver, an accountant, or any other insured not also deserve protection from wild noneconomic damages awards? If the answer is that the Legislature was "substantially" afraid that insurance would become unaffordable for doctors but not

165. MIEWALD ET AL., *supra* note 87, at 47, 159.
166. *Id.* at 157–58.
167. *Gourley*, 265 Neb. at 960, 663 N.W.2d at 80 (Connolly, J., concurring).
168. *Id.* at 939, 663 N.W.2d at 66 (majority opinion) (emphasis added).
169. *Id.* at 945, 663 N.W.2d at 69.
170. Haman v. Marsh, 237 Neb. 699, 714, 467 N.W.2d 836, 847 (1991) (emphasis added).
171. *Gourley*, 265 Neb. at 940, 663 N.W.2d at 66.
172. *Id.* at 943, 663 N.W.2d at 68.

these other classes, then it bears reminding that the Nebraska Medical Association and the insurance lobby were never able to produce any evidence that doctors were actually leaving the state or retiring as a result of the unavailability of insurance.[173] "When the Legislature confers privileges on a class arbitrarily selected from a large number of persons standing in the same relation to the privileges, without reasonable distinction or substantial difference, then the statute in question has resulted in the kind of improper discrimination prohibited by the Nebraska Constitution."[174]

e. Takings Clause

Nebraska has but once addressed whether Nebraska's Takings Clause applies to capped damages. In *Gourley*, the court's brief analysis bears copying in its entirety:

> Article I, § 21, applies to vested property rights.
>
> As previously discussed, we have held that a person has no property and no vested interest in any rule of the common law or a vested right in any particular remedy. Further, courts have rejected the argument that a cause of action and determination of damages are property. The cap on damages in § 44-2825 does not violate Neb. Const. art. I, § 21. We conclude that the Gourleys' argument is without merit.[175]

The court's urgent dispatching of the Takings argument therefore rests on three foundational presumptions: (1) Nebraska's Takings Clause applies *only* to vested property rights, (2) a person has neither vested property nor vested interest in uncapped damages, and (3) a determination of damages is not property.

The first and second underlying presumptions are that Nebraska's Takings Clause only applies to vested property rights, and that a person does not have a vested interest in a remedy that the Legislature has chosen to restrict. There is ample precedent that Nebraska has indeed found the Takings Clause to apply only to vested property rights.[176] However, the assertion that a property right has not vested in an award determination by a jury as the factfinder is inharmonious with Nebraska precedent.

For example, Nebraska's former wrongful death statute supplied that the "personal representative" was to give the proceeds of any settlement or awards to the court for distribution.[177] In assessing the interests of the beneficiaries, the court stated: "[The statute] makes it

173. *See Hearing on LB 703 Before the Pub. Health & Welfare Comm.*, *supra* note 8.
174. *Gourley*, 265 Neb. at 976, 663 N.W.2d at 90 (McCormack, J., concurring in part and dissenting in part) (citing Bergan Mercy Health Sys. v. Haven, 260 Neb. 846, 851, 620 N.W.2d 339, 344 (2000)).
175. *Id.* at 954, 663 N.W.2d at 76 (majority opinion) (internal citations omitted).
176. *See, e.g.*, Tracy v. City of Deshler, 253 Neb. 170, 568 N.W.2d 903 (1997).
177. *See* Hickman v. Sw. Dairy Suppliers, Inc., 194 Neb. 17, 24, 230 N.W.2d 99, 104 (1975).

clear that no apparent heir or beneficiary . . . has any vested right to any of the proceeds recovered in said action *until . . . a determination made by the court as to who is entitled to receive the proceeds and how much*."[178] In this context the court was fulfilling the jury's role as a factfinder, and the court concluded that after the factfinder makes a determination of "who" is entitled to "how much," a vested property right manifests.

Similarly, Nebraska's alimony system, for example, depends on the court's role as a factfinder in determining the value for alimony and property rights assignments. The Nebraska Supreme Court has declared that, "Such an award . . . whether intended solely as a property settlement or as an allowance for support, or both, is such a definite and final adjustment of mutual rights and obligations between husband and wife as to be capable of a present vesting and to constitute an absolute judgment."[179] Once a factual determination of the value of an award is made, "upon its entry, that amount became vested and not subject to modification."[180]

In Nebraska, "[t]he type of right that 'vests' can be generally described as 'an interest which it is proper for the state to recognize and protect and of which the individual may not be deprived arbitrarily without injustice.'"[181] "With respect to property, a right is considered to be 'vested' if it involves 'an immediate fixed right of present or future enjoyment and an immediate right of present enjoyment, or a present fixed right of future enjoyment.'"[182] For a right to be vested, it "must be 'fixed, settled, absolute, and not contingent upon anything.'"[183] Though the Nebraska Supreme Court has not yet analyzed the damage caps under the state's property law, these propositions would be the likely starting point. A likely conclusion based on the existing cap precedent would be that the court would find the cap to be a "condition" or that the factfinder's determination is not the "absolute" or "settled" interest. These findings are likely distinguishable because the relevant precedent considers actual real property expectation and remainder interests as "conditions."

Regardless, recall that the *Gourley* court's third underlying presumption is that a factual determination of damages is not property. In support of this, the court merely recites that "courts have rejected

178. *Id.* at 24–25, 230 N.W.2d at 104 (emphasis added).

179. Torrey v. Torrey, 206 Neb. 485, 490, 293 N.W.2d 402, 406 (1980).

180. *Id.*

181. U.S. Cold Storage, Inc. v. City of La Vista, 285 Neb. 579, 592, 831 N.W.2d 23, 33 (2013) (quoting 16B AM. JUR. 2D *Constitutional Law* § 746 at 190 (2009)).

182. *Id.* at 592, 831 N.W.2d at 34 (quoting 16B AM. JUR. 2D *Constitutional Law* § 746 at 191 (2009)).

183. *Id.* at 592, 831 N.W.2d at 33–34 (quoting 16B AM. JUR. 2D *Constitutional Law* § 746 at 191 (2009)).

th[at] argument."[184] This notably falls short of an actual analysis of Nebraska's Takings Clause and property law. The court cited only two cases, one from Alaska and one from Virginia (which has the third lowest cap in the country behind Indiana and Nebraska),[185] in support of that conclusory assertion.[186] Contrary to the Nebraska court's finding, the Virginia case cited did not consider whether a cause of action and determination of damages are property.[187] Rather, its analysis focused on how the state's Takings Clause did not protect a common law right to uncapped damages because the legislature had permissibly abolished that right.[188] Nowhere did the Virginia court discuss whether or not a determination of damages or cause of action are "property."

Similarly, the Alaska case cited did not mention whether a cause of action or determination of damages are property.[189] Rather, in addressing a cap on punitive damages under its Takings Clause, the Alaska court found that a taking only occurs where "the statute affects a property interest in punitive damages *that has already vested*."[190] The question for the Alaska court then became whether the statutory cap applied *before* or *after* the award of damages. The Alaska court concluded, "If [the cap statute] is construed as a cap on punitive damages, limiting them *before* they are awarded to successful plaintiffs, no constitutional problem exists."[191] To wash their hands of it, the Alaska court concluded that caps apply before the award, and thus there was no constitutional infirmity.[192] Recall also that the Alaska court was addressing a cap on punitive damages, which are unavailable in Nebraska.

f. Timing Arguments

In all, these arguments tacitly propose that if the cap in Nebraska is construed to apply *before* the factfinder determines damages and the vested right accrues at the time the factfinder makes the determination, there is no constitutional infirmity. However, this conflicts with Nebraska precedent. Specifically, recall that Nebraska has found that the cap must be applied after the factfinder makes its determination but before the court—acting not as a factfinder but as the agent of

184. Gourley *ex rel.* Gourley v. Neb. Methodist Health Sys., Inc., 265 Neb. 918, 954, 663 N.W.2d 43, 76 (2003).
185. *See supra* subsection III.A.1.a.ii.
186. *Gourley*, 265 Neb. at 954, 663 N.W.2d at 76.
187. Pulliam v. Coastal Emergency Servs. of Richmond, Inc., 509 S.E.2d 307 (Va. 1999).
188. *Id.* at 317–18.
189. Evans *ex rel.* Kutch v. State, 56 P.3d 1046 (Alaska 2002).
190. *Id.* at 1058 (emphasis added).
191. *Id.*
192. *Id.*

law—issues its judgment, so as to reduce the gross damages rather than the net capped damages.[193] This means that the vested right arising from the factfinder's determination is in fact impacted by a cap applied after the award. Thus, reducing the award to satisfy the cap necessarily violates the Takings Clause of the Nebraska constitution.

Despite this, both the *Gourley* court and the Eighth Circuit *Ramsey* court suggest that the cap is applied *after* the factfinder makes its determination but *before* the court "applies the law to the facts" or "reduce[s the award] to a final judgment," respectively.[194] Fortunately, Nebraska has taken a firm position on exactly when the cap applies: "[A] statutory limitation on damages . . . 'applies to cap the total recovery *after* the reduction of the plaintiff's damages for his or her comparative negligence, rather than applying [it] . . . *before* the reduction . . . , since the latter approach would multiply the effect of the damage limitation.'"[195] Therefore, Nebraska has conceded that the cap takes effect after the award determination. Based on Nebraska's reliance on Alaska's case, Nebraska has conceded that this is an unconstitutional taking.

Further, this does not preclude the Right to a Jury or Open Courts arguments given that either: (a) the jury is still denied an unhindered opportunity to make a determination of damages in the first instance because the Act itself did so, or (b) the Nebraska court will have to concede the conflict and recognize that, under the respective precedent they have relied upon, one or the other constitutional argument is valid.

2. Economic Damages Distinction

a. Economic Versus Noneconomic Damages Generally

The Takings Clause argument is particularly availing when the cap is applied to situations where actual, ascertainable economic damages are being denied by the courts. Similarly, many of the other defenses of the cap drafted in the Nebraska courts are also strikingly hollow in light of Nebraska's bar of actual sustained and other nonspeculative or future damages. In *Gourley*, Nebraska Supreme Court Judge Gerrard opined in concurrence that:

> Given the stark comparison between the assets of the Fund and the potential poverty that can result from forcing negligently injured persons to find their own means of paying for catastrophic medical expenses, it may ultimately be

193. Connelly v. City of Omaha, 284 Neb. 131, 159, 816 N.W.2d 742, 765 (2012).

194. Schmidt v. Ramsey, 860 F.3d 1038, 1046 (8th Cir. 2017), *cert. denied sub nom.* Schmidt *ex rel.* S.S. v. Bellevue Med. Ctr. L.L.C., 138 S. Ct. 506 (2017); Gourley *ex rel.* Gourley v. Neb. Methodist Health Sys., Inc., 265 Neb. 918, 954, 663 N.W.2d 43, 75 (2003).

195. *Connelly*, 284 Neb. at 159, 816 N.W.2d at 764–65 (emphasis added) (quoting 57 AM. JUR. 2D *Municipal, etc., Tort Liability* § 602 at 611 (2012)).

> determined that the act, in capping recovery for economic damages, is unconstitutional as applied to plaintiffs whose proven economic damages exceed the cap. . . .
>
> . . . .
>
> . . . . [T]he discretion of the Legislature is circumscribed, as always, by the Nebraska Constitution, particularly where the abrogation of fundamental rights is concerned. The effect of the act on a substantial right—recovery of economic damages—is especially troubling, and potentially unreasonable, when balanced against the negligible effect that such recovery would have on the Fund.
>
> . . . .
>
> As previously stated, I concur, albeit grudgingly, in the per curiam opinion's conclusions regarding the constitutional challenges to the act. I join in the opinion of the court regarding the other issues presented. I remain deeply troubled by the public policy choices reflected in the act, particularly the denial of economic recovery to negligently injured persons. It is pointedly unfair, and may well prove unconstitutional, for the law of this state to safeguard a surplus of tens of millions of dollars in the Excess Liability Fund by denying negligently injured persons money for needed medical care and potentially condemning them to undue poverty.[196]

Judge Gerrard engaged in a lengthy explanation of the distinction between economic and noneconomic damages. Referring to the restriction on economic damages as a "fundamental flaw" in the Act, Judge Gerrard articulated that economic damage awards should include "the cost of medical care, past and future, and related benefits, i.e., lost wages, loss of earning capacity, and other such losses."[197] However, Judge Gerrard was possibly too optimistic when he noted that "[n]oneconomic damages are generally the largest portion of a medical liability settlement," at least to the extent his assertion applied to future economic damage cases.[198] In acknowledgment of this concern though, he concluded that the cap was likely unconstitutional, at least as applied to cases where economic damages exceed the cap, noting that the constitution would "pre[c]lude application of the cap where it would prevent a complete recovery of economic damages."[199] Therefore, he opined, the Act would not be inoperable, but the cap merely would not be applied in such a case.

However, it is also likely that allowing as-applied exceptions for economic damages would in itself render the Act unconstitutional. It is certainly a just and fair assertion that the cap should not apply to economic damages, which would align Nebraska with the majority of other states. However, consider two hypothetical cases before the Nebraska court. Plaintiff A is awarded a verdict containing $5 million in economic damages (a modest recovery for future earnings and medical treatment) and $2.25 million in noneconomic damages (say, pain and

196. *Gourley*, 265 Neb. at 968–70, 663 N.W.2d at 85–86 (Gerrard, J., concurring).
197. *Id.* at 961, 663 N.W.2d at 80.
198. *Id.* at 962, 663 N.W.2d at 81.
199. *Id.* at 969, 663 N.W.2d at 85.

suffering and consortium). Plaintiff B is awarded $5 million in noneconomic damages and $2.25 million in economic damages. It would likely not feel fair to reduce Plaintiff B's settlement per the cap to $2.25 million and apply the cap to effect a complete elimination of noneconomic damages. For Plaintiff A, would the cap apply at all? Further, can it be fairly said that Plaintiffs A and B are treated equally if only one of their awards is reduced? No matter which of several approaches the court may use to distinguish between the reductions in these two cases, there are classifications being made that treat each case differently. Under the circumstances, such classifications are only arguably rationally related to the original purpose of the NHMLA, particularly given that both original awards would have the same effect on the insurance industry, and therefore, the availability of qualified medical service providers. As long as the cap continues to operate indiscriminately on both economic and noneconomic damages, there will be an increasing number of cases where claimants are denied numerous constitutional protections.

b. Nebraska's Near-Precedent on Economic Damage Distinctions

The foregoing analysis is not to say that the cap is otherwise constitutional, but it is easy to see how its constitutional infirmity is particularly egregious in cases with high economic damages. *Prendergast* was not a majority opinion, a challenge to its precedential value that was raised and dismissed in *Gourley* after the court concluded that "only three judges are necessary to determine that an act is constitutional."[200] The Nebraska constitution mandates that no Act "shall be held unconstitutional except by the concurrence of five judges,"[201] but the *Gourley* court concluded that "only three judges are necessary to determine that an act is constitutional."[202] Notably, it is arguable that this provision in the Nebraska constitution is, itself, unconstitutional as against the Federal Constitution. This argument has actually been noted, but not addressed, by one member of a four-judge majority that failed to overturn a Nebraska law in one such case.[203] For better or worse, the supermajority requirement in the Nebraska constitution permits cases such as *Prendergast*, where a majority of the judges believe NHMLA to be unconstitutional, and yet the law stands.

200. *See generally id.* at 940, 663 N.W.2d at 66–67; Prendergast v. Nelson, 199 Neb. 97, 256 N.W.2d 657 (1977).

201. NEB. CONST. art. V, § 2; *see, e.g.*, State *ex rel.* Belker v. Bd. of Educ. Lands & Funds, 184 Neb. 621, 171 N.W.2d 156 (1969).

202. *Gourley*, 265 Neb. at 940, 663 N.W.2d at 67.

203. State *ex rel.* Belker v. Bd. of Educ. Lands & Funds, 185 Neb. 270, 283–84, 175 N.W.2d 63, 70 (1970) (Spencer, J., dissenting).

Specifically, the *Prendergast* and *Gourley* concurrences and dissents noted numerous constitutional infirmities with NHMLA's damage cap. For example, Judge White noted in his *Prendergast* dissent that parts of the Act "restricting the potential liability of health care providers in malpractice cases, are clearly unconstitutional as special legislation."[204] In recognizing that the *Prendergast* court was not presented with all of the constitutionality issues that the justices identified in their discussions, Judge White opined: "The majority opinion's holding of constitutionality of the act is limited only to those issues discussed therein."[205] Judge White then noted that a finding that one part of "the act is constitutional should not be interpreted as a determination that all sections of the act are constitutional."[206]

As quoted above, Judge Gerrard found in *Gourley* that the cap's "unwarranted restriction on economic damages is, in my view, a fundamental flaw."[207] This is a testament to his careful consideration of the legislative history of the Act's cap, noting that the Legislature's original intent was to apply the cap only to "general" damages, not economic damages.[208] In this way, his concurrence acknowledges that the application of the cap to economic and noneconomic damages is a judicial construct, rather than a legislative one.

c. Severability of the NHMLA Cap

In *Gourley*, the lower court had found the cap severable from the rest of NHMLA, a finding that the Nebraska Supreme Court did not have to address after finding it constitutional.[209] The district court did, however, identify that the Act contains a severability clause, and the Nebraska Supreme Court typically tests severability by looking to whether "[t]he valid portions of the act can be enforced independently, and the invalid portions did not constitute an inducement to passage of the act as a whole."[210] As the bill's sponsor put it on the floor of the Legislature with respect to the cap: "[W]e recognize that there is the threat of unconstitutionality in this area . . . . The doctors are willing to accept the risk that it might not be constitutional. . . . If it is unconstitutional the severability clause comes into play, and it is out."[211]

It is certainly true, as the *Prendergast* and *Gourley* concurrences and dissents noted, that the Act would continue to function without the damage cap. The Act is a complex scheme defining multiple as-

204. *Prendergast*, 199 Neb. at 129, 256 N.W.2d at 675 (White, J., dissenting).
205. *Id.* at 132, 256 N.W.2d at 677.
206. *Id.* at 128, 256 N.W.2d at 675.
207. *Gourley*, 265 Neb. at 961, 663 N.W.2d at 80 (Gerrard, J., concurring).
208. *Id.* at 963, 663 N.W.2d at 81.
209. *Id.* at 924, 663 N.W.2d at 56 (majority opinion).
210. Snyder v. IBP, Inc., 229 Neb. 224, 229, 426 N.W.2d 261, 265 (1988).
211. *Floor Debate on LB 434, 703*, *supra* note 10, at 8639.

pects of medical liability, creating a state damages fund, establishing a review panel, fixing limitations periods, and providing numerous other guidelines for medical providers and claimants alike. Further, because the economic damages application is a judicial construct, a finding restricted to enforcing the cap only as against noneconomic damages does not even implicate a severability analysis.

d. Doctrine of Constitutional Avoidance

The Nebraska Supreme Court first announced the avoidance theory in 1919, declaring that: "It is the policy of the courts to uphold rather than overthrow legislative action."[212] At the time *Gourley* was decided, the court's policy on avoidance was that: "[W]here a statute is susceptible of two constructions, under one of which the statute is valid while under the other of which the statute would be unconstitutional or of doubtful validity, that construction which results in validity is to be adopted."[213]

Not only does the NHMLA cap raise multiple constitutional questions on its face, but its application to economic damages exacerbates this concern as noted by multiple concurrences and dissents in the seminal cases. Moreover, as first noted by Senator Chambers, the Legislature was well aware of the cap's questionable constitutionality.[214] In fact, the Legislature heard conflicting testimony that other states at that point had already found their caps unconstitutional.[215] As a matter of judicial construction, the court's treatment of economic damages as falling under the purview of the cap represents the antithesis of constitutional avoidance.

As evidenced above, there were a multitude of reasons for the *Prendergast* and *Gourley* courts to recognize that at the very least their decisions would raise serious constitutional concerns. As a result, the courts should have avoided the construction they adopted. Reflecting on (1) the number of overturned cases the Nebraska Supreme Court has relied on in its past constitutional analyses, (2) the strong concurrences and dissents in *Prendergast* and *Gourley*, as well as (3) Nebraska's current anomalous divergence from other states with respect to the cap's application to total damages, there is ample evidence for

212. Union Stockyards Co. v. State Ry. Comm'n of Neb., 103 Neb. 224, 226, 170 N.W. 908, 909 (1919), *modified sub nom.* Union Stock Yards Co. v. Neb. State Ry. Comm'n, 103 Neb. 224, 170 N.W. 908 (1919).

213. State v. Burke, 225 Neb. 625, 633, 408 N.W.2d 239, 246 (1987) (citing State v. Evans, 215 Neb. 433, 439, 338 N.W.2d 788, 793 (1983)).

214. *Floor Debate on LB 434, 703*, *supra* note 10, at 8585 ("A law can be 100 percent unconstitutional, but until such time as it is challenged in court and declared to be unconstitutional it is the law.").

215. *Id.* at 9445.

the next challenger to successfully raise a constitutional avoidance argument at least with respect to economic damages.

e. Conclusion on Distinguishing Economic from Noneconomic Damages

The *Gourley* court was cognizant of the harsh application of the cap to economic damages. In addressing this concern, the court simply noted that other courts have approved of such application by citing to the states that currently rank first, third, and fourth in terms of lowest recoveries under the caps.[216] This, at the least, fell short of a comprehensive analysis, leaving ample room for revisiting the issue, particularly given the number of relied-upon states that have since reversed course. Also, recall that the application of the cap to economic damages is a judicial construct rather than a legislative mandate. Further, the Nebraska Supreme Court has recognized that severability is an option for the cap that would not disturb the rest of the NHMLA. Lastly, the court's application of the cap to economic damages is perhaps one of the most egregious examples of disregard for the doctrine of constitutional avoidance that currently exists in Nebraska law. The effective denial of any general recovery, in addition to preclusion from even an economic recovery for claimants injured under the Act, is, as Senator Chambers put it to the floor, "unconscionable."[217]

IV. RECOMMENDATIONS

There are innumerable arguments and references contained herein that may serve the next round of litigators in their challenges to the NHMLA cap. There is also ample support cited herein for a bold practitioner to make a strong case to the Legislature that the law must change. Below is a synopsis of the strongest arguments presented herein.

A. Court Action

1. Conformity with Other States

Perhaps the strongest argument, by way of visual aid, is to pull up *Gourley* and *Prendergast* on your favorite legal search platform. Even only sixteen years since *Gourley* was decided, a simple scroll through the case will reveal no fewer than twenty-four red flags in the constitutional analysis section. As the interjurisdictional synthesis herein demonstrates, *supra* section III.A, Nebraska has assumed the role of perhaps the most restricted recovery state in the country. This is a

216. Gourley *ex rel.* Gourley v. Neb. Methodist Health Sys., Inc., 265 Neb. 918, 949, 663 N.W.2d 43, 72 (2003); *see* Goguen, *supra* note 49.

217. *Floor Debate on LB 434, 703*, *supra* note 10, at 8652.

direct result of the interplay between the effective bar on punitive damages, the existence of the cap, and the application of the cap to both noneconomic and economic damages. The Nebraska courts have not been directly confronted with the effect of this trifecta in the context of the position it places Nebraska in with respect to her sister states.

It would certainly be prudent to have a prepared piecemeal argument for a district court that, case by case, revokes the precedent of the foreign cases Nebraska has relied upon in the past for each proposition of law. Each since-overruled case *Gourley* relied upon opens a fissure in the strength of its precedential value. To capitalize on the weight of this overturned precedent, many of the cases cited herein contain an express reference to Nebraska, in addition to each of those courts' express rejection of Nebraska's law. Nebraska's position as a holdout state for claimants' rights is an unenviable position from a policy-optics standpoint. *Stare decisis* only carries a court's decision so far when the court is faced with the reality that Nebraska is, if not the harshest, at least one of three harshest states on injured malpractice victims in the country.

2. Constitutional Reconsideration

The first effort that practitioners must take in their next challenge of the NHMLA damage cap is to hammer every constitutional argument at every stage of litigation. In both *Prendergast* and *Gourley*, the concurrences and dissents noted that several constitutional arguments may have had traction, except that they were either not raised below or were not adequately argued on appeal. The plethora of interjurisdictional precedent that has been reversed since Nebraska last relied upon it is perhaps the best evidence of the courts' need to reconsider the constitutionality of the NHMLA damage cap.

However, as discussed herein, *supra* section III.B, many of the constitutional defenses of the cap that the Nebraska Supreme Court has made based on its own precedent fall short on substantive analyses. Several of them are likely simply misplaced. To that end, the plaintiffs in the trio of Nebraska cases on the NHMLA's damage cap constitutionality (*Prendergast*, *Gourley*, and *Ramsey*) each made a tactical decision to deploy a shotgun approach to the constitutional arguments. This was likely wise given the opportunity to be heard in front of the Nebraska Supreme Court at all on the issue. However, this has proven to consistently result in a lack of substantive response on some of the stronger issues, oftentimes resulting in three-sentence dismissals of the claim.

Noting that only one argument has to win, a rifle approach may be better depending on the future composition of the court. For example, the catch-22 the court has placed itself in with respect to the Right to

a Jury and Takings Clause "before-or-after" paradox may be worth strategically deploying by itself. Similarly, the Special Legislation argument has been considered by concurrences and dissents to be a strong unconstitutionality argument since *Prendergast* and may well be the breakthrough on its own.

3. Novel Approaches with the Courts

Practitioners should be willing to make bold and novel claims to the extent they are supported by our precedent and that of Nebraska's sister states. This may involve framing old arguments in new ways, developing new arguments, or simply creating an argument that is better supported and easier to read than the other side's brief. For example, Nebraska courts' perpetual confusion over the correct distinction between Equal Protection and Special Legislation analyses provides an opportunity for a prepared litigator to win either argument. Specifically, if a lawyer can package the distinction in a way that clearly delineates between the two tests, they may succeed in an argument that the standard of review is in fact higher in Special Legislation. Either way, because the Nebraska courts seem to struggle with the distinction, they may be more likely to give weight to whichever attorney can present the cleanest distinction.

Similarly, with either Special Legislation or Equal Protection, the framing of classifications can make or break an argument. To the extent Nebraska is hung up on the right to damages being a purely economic interest, with a claimant having no right to uncapped damages, the next litigator should invoke classifications that reference the actual fundamental right identified by *Prendergast*—adequate medical care. First, one may see fit to re-challenge the previously rejected classification of below-cap claims versus above-cap claims. One should argue under this classification that increased liability improves the standard of care, which in turn protects the recognized "fundamental right" to adequate medical care. Second, the next litigator to reach the courts on this issue may use all of the courts' previous language on the risk of providers turning opt-out patients away (opt-outs as a class), or, conversely, of providers who have not opted into coverage or have lapsed (noncovered providers as a class), both of which would also speak directly to the fundamental right to quality medical care.

Aside from reframing issues and creating novel classifications, the greatest opportunity for forward momentum likely manifests in the weight of the interjurisdictional policy that is now contrary to Nebraska's. It is certainly a fairly anticipated argument, oft-recited by the courts, that it is up to the Legislature, not the courts, to determine the policy of Nebraska. However, it is a sound rebuttal to scour the legislative history for the myriad places where the NHMLA legislators expressed the questionable constitutionality of the Act, in conjunction

with legislators' observations that it is up to the courts to make such a determination and sever the cap from the rest of the Act. In any event, there are many arguments and referential sources captured herein that will allow for some revised, strengthened, and new arguments to deliver to the courts.

B. Legislative Action

1. Pure Removal of the Cap

Because it is unlikely that Nebraska is soon to reverse course on its stance on punitive damages, the Legislature must be made aware of Nebraska's uniquely restrictive position with respect to recovery. The concerns expressed by the legislators who debated the original Act and the *Prendergast* dissenters have certainly proven valid. On one hand, the Legislature may simply find affirmation in the Nebraska Supreme Court's tolerance of the cap. On the other, no legislator wants to wear a badge that says: "My state is the harshest in the country on injured malpractice victims." It is likely that legislators are simply unaware of the interplay between Nebraska's rejection of punitive damages, the NHMLA cap, and the court's interpretation of the cap with respect to economic damages.

For the reasons outlined throughout this Comment, there is ample support for the notion that the cap serves no purpose at all, except to provide a special benefit to the medical lobby at the expense of severely injured Nebraska citizens. There has been, and likely continues to be, no credible evidence that a mass exodus of providers will occur if we eliminate the cap. Indeed, the vast majority of states have continued to retain medical professionals despite their lack of caps. Additionally, there is likely no evidence that because of Nebraska's current rank among the top three provider-friendly cap states, Nebraska has been able to attract and retain providers that it otherwise would not have been able to recruit.

Moreover, though increasing costs of medical care continue to result in more capped cases, the reality is that the actual number of "wild" awards is quite low. There is likely no evidence that "wild" settlements dramatically alter, in any significant way, either the availability of coverage for providers or the cost of that coverage which is passed on to customers. Further, if an underlying purpose of the Act was to ensure the availability of recovery, there is almost certainly no credible evidence that either (a) Nebraska claimants would lose that opportunity without the cap, or (b) citizens of states that do not have caps have been unable to recover for malpractice.

Lastly, malpractice awards improve the standard of care. A severe injury is often the result of an egregiously negligent act or omission. Capping awards, particularly to the extent they preclude even a full

economic recovery for seriously injured claimants, incentivizes disregard for the most crucial standards of care. Additionally, if a provider's negligence results in extensive economic damages and a claimant is prevented from being made whole, that provider has imposed potentially significant costs on other providers. To wit, consider the *Ramsey* case, where the family anticipated nearly $5 million in actual economic expenses as a result of the provider's negligence. The provider's insurer was liable (in coordination with the state's excess liability fund) for only $1.75 million. The rest of society is going to suffer the balance of those damages as a result of that provider's negligence.

Further, imagine being a continuing care provider for that claimant. You are certainly disincentivized to provide them the best care because of the claimant's inability to obtain insurance or otherwise pay for your services. As a result of one provider's negligence, and the protection afforded to that provider by the NHMLA cap, this family is now unable to find adequate medical care. Recall that the first sentence of the NHMLA Act reads as follows: "The Legislature finds and declares that it is in the public interest that competent medical and hospital services be available to the public in the State of Nebraska . . . ."[218] In an increasing number of cases, the Act's cap tacitly defeats the Act's stated purpose.

2. Increasing and Aligning Cap

This is certainly an option for the Legislature. However, in light of the myriad problems with the cap discussed herein, this solution does little more than kick the can down the road. Between Nebraska, Virginia, and Indiana, it is as though the three states are engaged in a staring contest. As soon as one of the three holdout states blinks and decides to remove its caps, it is likely the other two will follow. At this point, in constitutional defense of their caps as currently applied to all damages, the three courts only have each other to rely upon for precedential support. Because the debates in the Legislature are certain to demand a summary of other states' current position on caps, it would be embarrassing for Nebraska to wait until it is the last—and thus certainly the most restrictive—cap in the country to amend it. To that extent, increasing the cap to align it more substantively with the majority of the states may seem like an option for a legislature concerned with optics. But again, such a solution does little more than kick the can down the road.

218. NEB. REV. STAT. § 44-2801 (Reissue 2010).

3. Removal of Economic Damages Application

Because the cap's application to economic damages is a judicial construct and not rooted in the text of the Act, this is likely a tricky legislative proposition. It is certainly attractive to suggest an amendment that contains language such as "such limitation on damages shall apply only to those determinations made by the factfinder that related to a claimant's pain and suffering or loss of consortium." However, this does little to resolve general verdict awards, or determinations that fail to adequately break out what specific damages are attributable to which losses. Further, it will not take more than one or two newspaper articles for jurors to begin attributing all damages to allocations other than pain and suffering, for example.

If removal of the cap in its entirety is not an option for the Legislature, any amendment to restrict application of the cap to noneconomic damages will likely spawn a wave of litigation that necessarily parses and redefines entire categories of damages. However, it is possible that the Legislature could structure an amendment in such a way as to have a comparable effect without engaging legal terms of art. For example, the Legislature may address the core concern directly with language such as "any limitation on recovery under this section shall not affect any claimant's right to that portion of an award of damages determined by the factfinder to be economic in nature and ascertainable at the time of such determination." Such an amendment invokes language for which judicial construction is well-established and would serve to apply the cap to the damages originally contemplated by the Legislature.

4. Adjustment for Inflation

A last point of concern is that adjustment to the cap currently depends on the initiative of a legislator voluntarily amending the recoverable limitation value. Historically, this has been done just about every decade and appears to approximate the original cap's inflation adjustment at around the five-year midpoint of each successive amendment. This rewards a claimant whose claim arises the year the amendment takes effect with an over-adjusted value, as compared to the claimant whose claim arises the year before the next modification. Notwithstanding the possible constitutional questions that raises, it is unnecessary and risky. Nebraska is familiar with using cost-of-living adjustments in its statutes, and tying the future values to an objective standard will undoubtedly prevent unnecessary squabbling.

V. CONCLUSION

Nebraska, once an intentional leading advocate for claimants' rights, has fallen behind the times with respect to the NHMLA cap on

damage awards. Nebraska now finds itself in the regrettable position of having one of the three most restrictive bars to recovery for injured malpractice victims in the country. Legislative and judicial disregard of this status will continue to stain Nebraska in the eyes of her sister states, as recently evidenced when the *Gourley* claimant was featured on HBO's documentary "Hot Coffee."[219] Since the *Gourley* case, the majority of the states on whose precedent the court relied have changed course, most often rejecting their malpractice caps completely. The Nebraska courts rely on the Legislature to assert the policy of the state, and the Legislature relies on the courts to define that policy. However, both the Legislature and the courts have within their power the ability to rectify Nebraska's stalwart adherence to objectionable legislative and judicial precedent. There is no justifiable rationale for Nebraska's reliance on the past as a defense of the NHMLA damage cap. Nebraska may do well to recognize that nearly all of the other states in the country have in fact rejected such a policy, opting instead to look to the future for the protection of their citizens. Perhaps the arguments and references noted in this Comment will help move Nebraska into the future with respect to the NHMLA cap. If Nebraska continues to look to the past under the guise of *stare decisis*, she is likely to soon find herself as the only state placing such harsh restrictions on her citizens. In the words of Justice Cardozo:

> I am ready to concede that the rule of adherence to precedent, though it ought not to be abandoned, ought to be in some degree relaxed. I think that when a rule, after it has been duly tested by experience, has been found to be inconsistent with the sense of justice or with the social welfare, there should be less hesitation in frank avowal and full abandonment. . . . "That court best serves the law which recognizes that the rules of law which grew up in a remote generation may, in the fullness of experience, be found to serve another generation badly, and which discards the old rule when it finds that another rule of law represents what should be according to the established and settled judgment of society . . . ."[220]

219. HOT COFFEE (HBO television broadcast June 27, 2011); *see, e.g.*, *"Hot Coffee" Exposes How Hard Caps on Malpractice Awards Shift Burden to Taxpayers*, DEMOCRACYNOW! (Jan. 25, 2011), https://www.democracynow.org/2011/1/25/hard_caps_on_malpractice_awards_shift [https://perma.unl.edu/U5WE-TMRJ].

220. Benjamin N. Cardozo, Adherence to Precedent: The Subconscious Element in the Judicial Process, William I. Storrs Lecture Series Before the Law School of Yale University (1921), *in* THE NATURE OF THE JUDICIAL PROCESS, 1921, at 150–51.