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Robert S. Peck

VIOLATING THE INVIOLATE: CAPS ON DAMAGES AND THE RIGHT TO TRIAL BY JURY

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I. INTRODUCTION

The false belief that juries seek to redistribute wealth through verdicts that demonstrate little regard for a lawsuit's merits, coupled with the idea that complicit judges refuse to restrain those juries, comprise the processional music of the *tort reform* movement.[1] Notwithstanding the discordant notes that reality strikes against this misleading cacophony,[2] the movement's well-heeled patrons have grown so entranced by its rhythms and so insatiable in their appetite for more that they have spawned a self-perpetuating industry of lobbyists and publicists, who have, in turn, built a highly lucrative livelihood unimaginable in pursuit of any other concept so bankrupt of empirical support, so fanciful in its claims, and so reliant on both fictional anecdotes[3] and the occasionally aberrant verdict, which, the public is not told will be reduced through normal processes.[4] Accompanied

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* Robert S. Peck is president of the Center for Constitutional Litigation, P.C. and an adjunct professor of constitutional law at the law schools of American University and George Washington University . He was counsel and successfully argued State *ex rel. Ohio Academy of Trial Lawyers v. Sheward*, 715 N.E.2d 1062 (Ohio 1999) in the Ohio Supreme Court.

[1] *See* Stephen Daniels & Joanne Martin, *"The Impact That It Has Had is Between People's Ears:" Tort Reform, Mass Culture, and Plaintiffs' Lawyers*, 50 DePaul L. Rev. 453, 453-54 (2000) (describing tort reform's false vision of civil litigation as too many lawsuits resulting in skyrocketing awards that are capriciously awarded in a wasteful and inefficient system that punishes deep-pocket defendants at a heavy cost to society); *see also* William Haltom & Michael McCann, *Distorting the Law: Politics, Media and the Litigation Crisis* (U. of Chi. Press 2004) (discussing the factors that have fueled a misguided popular belief that the litigation system is out of control when the empirical data demonstrates otherwise).

[2] Professor Valerie Hans has tested the *deep pockets* theory that businesses are punished by juries merely because of their wealth and found it wanting. *See* Valerie P. Hans, *Business on Trial: The Civil Jury & Corporate Responsibility* (Yale U. Press 2000).

[3] Professor Marc Galanter of the University of Wisconsin Law School has repeatedly chronicled the far-fetched claims and fractured anecdotes that fuel the tort reform movement. *See e.g.* Marc Galanter, *An Oil Strike in Hell: Contemporary Legends about the Civil Justice System*, 40 Ariz. L. Rev. 717 (1998); Marc Galanter, *Real World Torts: An Antidote to Anecdote*, 55 Md. L. Rev. 1093 (1996); Marc Galanter, *News from Nowhere: The Debased Debate on Civil Justice*, 71 Denver U. L. Rev. 77 (1993); Marc Galanter, *The Day After the Litigation Explosion*, 46 Md. L. Rev. 3 (1986).

[4] Remittitur, a new trial, and appeal provide some of the means through which jury verdicts may be legitimately reduced. *See generally* Fleming James, *Remedies for Excessiveness or Inadequacy of Verdicts*, 1 Duq. L. Rev. 143 (1963). Still complaining about the jury system supported by weak anecdotal evidence of outlier verdicts is a longstanding tradition among those who would destroy the tort

by a political and financial divide[5] that makes the battle more imperative and by a political environment in which facts matter so little,[6] the tort reform movement has flourished, despite its irrationality and its nonsensical approach to law. Ohio's recent enactment of two different statutes,[7] both of which flout recent binding precedent that establishes the unconstitutionality of many of its provisions,[8] is merely another chapter in a continuing saga

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system. In a treatise on the jury first published in 1852, historian William Forsyth wrote, "It would not be difficult for an opponent of the system to cite ludicrous examples of foolish verdicts, but they would be a very unfair sample of the average quality; and nothing can be more unsafe than to make exceptional cases the basis of legislation." William Forsyth, *History of Trial by Jury* 376 (James Appleton Morgan ed., B. Franklin 1971).

[5] The two major political parties have largely lined up on opposite sides of the tort reform debate. For example, the 2004 Republican Party Platform advocated tort reform and directed considerable venom at plaintiffs' trial lawyers for supposedly bringing frivolous lawsuits to enrich themselves at the expense of business. It further accused the 2004 Democratic presidential ticket of being beholden to those trial lawyers and thus incapable of addressing the so-called litigation crisis. *2004 Republican Party Platform*: *A Safer World and a More Hopeful America*, at 43, http://www.gop.com/media/2004platform.pdf (accessed Dec. 30, 2005). Political giving patterns appear to reinforce this Republican/Democratic dichotomy. The Center for Responsive Politics reveals that, for the 2005-06 election cycle, the top business political action committees (PAC), representing industries who generally fight for tort reform, contributed to Republicans over Democrats by an average of sixty-nine percent to thirty-one percent, while the PAC of the Association of Trial Lawyers of America, the major national opponent of tort reform, favored Democrats by ninety-five percent to four percent margin. *See* Center for Responsive Politics, *Top 20 Contributors to Federal Candidates, 2005-2006*, http://www.opensecrets.org/pacs/topacs.asp?txt=A&Cycle=2006 (accessed Dec. 30, 2005).

[6] *See* Paul Krugman, *Karl Rove's America*, N.Y. Times A19 (July 15, 2005) (explaining that we no longer live in a world "where even partisans sometimes changed their views when faced with the facts"). The political phenomenon in which facts matter less than the desired policy result is, of course, hardly a new one. Still, it appears that rather than be the exceptional event it once was, it has become politics as usual.

[7] Amend. Substitute Sen. Bill 80 was signed into law by the Governor on January 7, 2005 and went into effect on April 7, 2005. Amend. Substitute Sen. Bill 281 was signed into law by the Governor on January 10, 2003 and was effective April 11, 2003. Both enactments contain, *inter alia*, limits on compensatory damages for noneconomic loss.

[8] *See e.g. Crowe v. Owens Corning Fiberglas*, 718 N.E.2d 923 (Ohio 1999) (per curiam) (holding punitive damages cap unconstitutional); *State ex rel. Ohio Acad. of Tr. Laws. v. Sheward*, 715 N.E.2d 1062 (Ohio 1999) (holding omnibus tort reform statute that, *inter alia*, included caps on noneconomic damages and punitive damages unconstitutional); *Sorrell v. Thevenir*, 633 N.E.2d 504 (Ohio 1994) (finding deduction of collateral benefits from jury award violates right to trial by jury, due process, equal protection, and right to a remedy); *Zoppo v. Homestead Ins. Co*., 644 N.E.2d 397 (Ohio 1994), *cert. denied*, 516 U.S. 809 (1995) (assigning determination of punitive damages to court violates right to trial by jury); *Galayda v. Lake Hosp. Systems, Inc.*, 644 N.E.2d 298 (Ohio 1994), *cert. denied sub. nom. Damian v. Galayda*, 516 U.S. 810 (1995) (finding law requiring that future damages in medical malpractice cases be paid periodically rather than as a lump sum violates right to trial by jury and due process); *Morris v. Savoy*, 576 N.E.2d 765 (Ohio 1991) (finding $200,000 cap on general damages in medical malpractice cases violates due process); *Pryor v. Webber*, 263 N.E.2d 235 (Ohio 1970) (holding evidence of compensation from collateral sources to diminish damages prejudicial to jury determination); *Gladon v. Greater Cleveland Reg. Transit Auth*., 1994 WL 78468 (Ohio App. 8th Dist. 1994), *rev'd on other grounds*, 662 N.E.2d 626 (Ohio 1996) (holding $250,000 noneconomic damage limit violated jury trial and equal protection rights); *Samuels v. Coil Bar Corp*., 579 N.E.2d 558 (Ohio Com. Pleas 1991) (finding collateral source offset in wrongful death actions violates jury trial, due process, equal protection, and remedy rights); *Duren v. Suburban Community Hosp*., 495 N.E.2d 51 (Ohio Com. Pleas. 1985) (holding wrongful death cap unconstitutional on due process and equal protection grounds); *Simon v. St. Elizabeth Med. Cntr.*, 355 N.E.2d 903 (Ohio Com. Pleas 1976) (finding damage cap violates equal protection); *Graley v. Satayatham*, 343 N.E.2d 832 (Ohio Com. Pleas 1976) (finding collateral source deduction violates equal protection).

that shows no end.[9]

This article focuses on the centerpiece of these two new enactments: caps on noneconomic damages,[10] an idea that forms the *sine qua non* of the tort reform movement.[11] With a bravado that is belied by actual experience, cap supporters make naked and unsupportable claims that capping noneconomic damages will cut insurance premiums,[12] increase product development,[13] deter frivolous lawsuits,[14] stem the flow of doctors from states,[15] and reduce wasteful reliance on defensive medicine.[16] Recently, the

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[9] Professor Stephen J. Werber has detailed the ongoing warfare between a pro-tort reform Ohio legislature and a state supreme court that has repeatedly struck down enacted measures in a series of articles. *See* Stephen J. Werber, *Ohio: A Microcosm of Tort Reform Versus State Constitutional Mandates*, 32 Rutgers L.J. 1045 (2001); Stephen J. Werber, *Ohio Tort Reform in 1998: The War Continues*, 45 Cleve. St. L. Rev. 539 (1997); Stephen J. Werber, *Ohio Tort Reform Versus the Ohio Constitution*, 69 Temp. L. Rev. 1155, 1199-200 (1996). The last time provisions like these were reenacted after being declared unconstitutional the Ohio Supreme Court characterized the Legislature's actions as an "[a]ttack on the [j]udiciary as a [c]oordinate [b]ranch of [g]overnment." *Sheward*, 715 N.E.2d at 1071.

[10] Ohio's definition of noneconomic damages is typical. Ohio Rev. Code Ann. § 2323.43(H)(3) (Anderson 2005). Ohio Revised Code § 2323.43(H)(3) defines noneconomic damages as "nonpecuniary harm that results from an injury, death, or loss to person or property . . . including, but not limited to, pain and suffering, loss of society, consortium, companionship, care, assistance, attention, protection, advice, guidance, counsel, instruction, training, or education, disfigurement, mental anguish, and any other intangible loss."

[11] *See e.g.* Richard E. Anderson, *The Case for Legal Reform*, in *Medical Malpractice: A Physician's Sourcebook* 201, 214-23 (Richard E. Anderson ed., Humana Press 2004) (identifying a $250,000 cap on noneconomic damages as the *most important* reform); Robert S. Peck & Ned Miltenberg, *Challenging the Constitutionality of Tort 'Reform'*, in *ATLA's Litigating Tort Cases* § 29:20 (Roxanne Barton Conlin & Gregory S. Cusimano eds., ATLA Press 2004).

[12] *See* Lucinda M. Finley, *The Hidden Victims of Tort Reform: Women, Children, and the Elderly*, 53 Emory L.J. 1263, 1271-72 (2004) (concluding that given the available empirical data refuting the claim, "it is hard to understand why the interest groups clamoring for tort reform have been so successful in convincing legislatures that limiting damages for the few negligently injured people whose cases go to trial, win, and recover more in noneconomic damages than the amount of a damages cap, will alleviate the periodic cycles that afflict the liability insurance markets").

[13] *See* The American Assembly, *Tort Law and the Public Interest: Competition, Innovation and Consumer Welfare* 37-38 (Peter H. Schuck ed., Norton 1991) (reporting that claims that tort liability has harmed product development and innovation are extravagant at best and hard to justify given how few people who are injured actually sue).

[14] *See* Daniel J. Capra, *"An Accident and a Dream:" Problems with the Latest Attack on the Civil Justice System*, 20 Pace L. Rev. 339 (2000) (investigating the claim of a frivolous lawsuit crisis and finding it wanting).

[15] *See* Govt. Acctg. Off., *Medical Malpractice: Implications of Rising Premiums on Access to Health Care*, 10 GAO-03-836 (Aug. 2003) (reporting that claims by doctors' organizations and the news media that physicians were moving out of states experiencing the high insurance premium increases in the absence of damage caps "were not accurate or involved relatively few physicians"); Robert S. Peck, *The Great Disappearing Doctor Hoax*, 1-5 Mealey's Tort Ref. Update 19 (Dec. 2003) (summarizing the empirical evidence that neither affordability nor availability of health care was adversely affected by medical malpractice litigation); Katherine Baicker & Amitabh Chandra, *The Effect of Malpractice Liability on the Delivery of Health Care*, NBER Working Paper No. 10709 (Aug. 2004) (finding that malpractice payments made on behalf of physicians do not drive increases in premiums, do not seem to affect the overall size of the physician workforce, and do not result in increases in use of treatments as defensive medicine).

[16] *See* Perry Beider and Stuart Hagen, *Limiting Tort Liability for Medical Malpractice* (CBO Jan. 8, 2004) (available at http://www.cbo.gov/showdoc.cfm?index=4968&sequence=0) (accessed Jan. 22,

Wisconsin Supreme Court exhaustively examined the available empirical data and found that caps do not have a measurable impact on medical malpractice insurance premiums,[17] do not positively affect the size of the physician population and the availability of health care,[18] "have no effect on a consumer's health care costs,"[19] and would not reduce the costly practice of defensive medicine.[20] The Court concluded that the legislature's "rationales [were] so broad and speculative" that they could not support the constitutionality of the cap, which operated to the particular detriment of the most severely injured medical malpractice victims.[21]

Wisconsin's Supreme Court is not the only court that has struck down noneconomic damage caps after finding that the illogical and irrational assumptions of the enacting legislature failed to satisfy even the minimum scrutiny required to overcome constitutional challenges under state equal protection and due process guarantees. At least eight states have issued such a ruling.[22] Other courts, however, have shied away from such a perfectly appropriate examination of legislative assumptions[23] and have

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2005) (finding "no evidence that restrictions on tort liability reduce medical spending" and "no statistically significant difference in per capita health care spending between states with and without limits on malpractice torts").

[17] *Ferdon ex rel. Petrucelli v. Wis. Patients Compen. Fund*, 701 N.W.2d 440, 473 (Wis. 2005).

[18] *Id.* at 487.

[19] *Id.* at 485.

[20] *Id.* at 489.

[21] *Id.* at 490-91.

[22] *See Moore v. Mobile Infirmary Assn.*, 592 So. 2d 156 (Ala. 1991) (finding $400,000 noneconomic damage cap in medical malpractice cases violates jury trial and equal protection guarantees); *Wright v. Central Du Page Hosp. Assn.*, 347 N.E.2d 736 (Ill. 1976) (finding $500,000 cap unconstitutional as denial of equal protection); *Trovato v. DeVeau*, 736 A.2d 1212 (N.H. 1999) (finding $50,000 cap on wrongful death claims where no dependant relative survives violates right to a remedy and equal protection); *Brannigan v. Usitalo*, 587 A.2d 1232 (N.H. 1991) (finding $875,000 limitation on noneconomic damages recoverable in actions for personal injury violates equal protection); *Carson v. Mauer*, 424 A.2d 825 (N.H. 1980) (finding abrogation of collateral source rule and $250,000 noneconomic damage cap in medical malpractice cases violate equal protection); *Arneson v. Olson*, 270 N.W.2d 125 (N.D. 1978) (imposing $300,000 statutory limit on damages recoverable in medical malpractice action and abrogating collateral source rule violated state and federal equal protection and due process guarantees); *Morris v. Savoy*, 576 N.E.2d 765 (Ohio 1991) (finding $200,000 cap on general damages in medical malpractice cases violates due process); *Boucher v. Sayeed*, 459 A.2d 87 (R.I. 1983) (finding statute admitting evidence of collateral source payments in medical malpractice cases was unconstitutional as a violation of equal protection rights); *Knowles v. U.S.*, 544 N.W.2d 183 (S.D. 1996) (finding statute limiting medical malpractice compensatory damages to $1 million violated substantive due process), *superseded by statute*, S.D. Codified Laws § 21-3-11.1 (1997); *Ferdon*, 701 N.W.2d at 466 (finding cap on noneconomic damages in medical malpractice cases violates equal protection).

[23] Both the U.S. Supreme Court and the majority of state supreme courts have found that legislative findings are not immune from challenge. *See e.g. Minn. v. Clover Leaf Creamery Co.*, 449 U.S. 456, 464 (1981) (holding "parties challenging legislation under the Equal Protection Clause may introduce evidence supporting their claim that it is irrational"). *See also Nixon v. Shrink Mo. Govt. PAC*, 528 U.S. 377, 378 (2000) (finding "[t]he quantum of empirical evidence needed to satisfy heightened judicial scrutiny of legislative judgments will vary up or down with the novelty and plausibility of the justification raised"); *Evans v. Romer*, 517 U.S. 620, 632-633 (1996) (stating to survive rational relationship review, a law must be grounded in sufficient factual context for Court to ascertain some relation between the classification and the purpose it serves); *Heller v. Doe*, 509 U.S. 312, 321 (1993) (finding "even the standard of rationality as we so often have defined it must find some footing in the realities of the subject addressed by the legislation"); *Planned Parenthood v. Casey*, 505 U.S. 833 (1992) (sustaining a facial challenge on due process grounds to a statute that regulated access to abortion

instead deferred to legislative caprice.[24]

In addition to due process and equal protection arguments, challengers have also succeeded in invalidating damage caps by asserting other constitutional infirmities, including separation of powers,[25] the right to a remedy,[26] and the single-subject rule.[27] Despite the impressive array of constitutional arguments that can be brought to the fore against damage caps, the preeminent argument remains the constitutional right to a jury trial.[28] Caps on damages, particularly the variation on the theme recently enacted in Ohio,[29] invariably and inevitably conflict with the constitutional jury-trial right.[30] Most states express that right very strongly, but 38 states, including Ohio, declare the right to trial by jury to be "inviolate."[31]

This article will explain why damage caps and the constitutional

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services on the basis of expert testimony on the effect of the law); *Ferdon*, 701 N.W.2d at 460; *Chiles v. St. Employees Attys. Guild*, 734 So.2d 1030, 1034 (Fla. 1999) (stating legislative statements of policy and fact do not "obviate the need for judicial scrutiny"); *Kinney v. Kaiser-Aluminum & Chem. Corp.*, 322 N.E.2d 880, 883-84 (Ohio 1975).

[24] *See e.g. Judd ex rel. Montgomery v. Drezga*, 103 P.3d 135 (Utah 2004); *Est. of Verba v. Ghaphery*, 552 S.E.2d 406 (W. Va. 2001); *In re Kirkland v. Blaine County Med. Ctr.*, 4 P.3d 1115 (Idaho 2000).

[25] *See e.g. Sheward*, 715 N.E.2d at 1079; *Best v. Taylor Mach. Works*, 680 N.E.2d 1057 (Ill. 1997); *Sofie v. Fibreboard Corp.*, 771 P.2d 711 (Wash. 1989).

[26] The right to remedy provision is sometimes called "access to courts" or "open courts" and is found in the constitutions of 37 states. Jennifer Friesen, *State Constitutional Law: Litigating Individual Rights, Claims, and Defenses* 347 n.11 (3d ed., 1996). For cases employing this provision to invalidate caps, s*ee e.g. Trovato v. DeVeau*, 736 A.2d 1212 (N.H. 1999) (finding $50,000 cap on wrongful death claims where no dependant relative survives violates right to a remedy and equal protection); *Smith v. Dept. of Ins*., 507 So.2d 1080, 1089-89 (Fla. 1987) (per curiam) (finding $450,000 cap on noneconomic damages recoverable in actions for personal injury violates access to courts and jury provisions); *Boswell v. Phoenix Newsps.*, 730 P.2d 186, 194-95 (Ariz. 1986), *cert. denied*, 481 U.S. 1029 (1987) (finding retraction in lieu of damages in defamation actions violates state "open courts" provision).

[27] *Sheward*, 715 N.E.2d at 1062 (finding omnibus tort reform statute held unconstitutional as violation of single-subject rule, among other grounds).

[28] *See e.g. Lakin v. Senco Prods., Inc.*, 987 P.2d 463 (Or. 1999) (finding $500,000 cap on noneconomic damages in personal injury and wrongful death actions violates jury trial right).

[29] *See infra* § III.

[30] Only Colorado and Louisiana fail to provide a constitutional right to a jury trial. *See Kaitz v. Dist. Ct.*, 650 P.2d 553, 554 (Colo. 1982); *Duplantis v. U.S. Fid. & Guar. Ins. Corp.*, 342 So. 2d 1142, 1143 (La. Ct. App. 1977). The other states' provisions can be found at Ala. Const. art. I, § 11; Alaska Const. art. I, § 16; Ariz. Const. art. II, § 23; Ark. Const. art. II, § 7; Cal. Const. art. I § 16; Conn. Const. art. I, § 19; Del. Const. art. 1, § 4; Fla. Const. art. I, § 22; Ga. Const. art. I, § 1, ¶ 11; Haw. Const. art. I, § 13; Idaho Const. art. I, § 7; Ill. Const. art. I, § 13; Ind. Const. art. I, § 20; Iowa Const. art. I § 9; Kan. Const., Bill of Rights § 5; Ky. Const. § 242; Me. Const. art. I, § 20; Md. Const., Declaration of Rights art. 23; Mass. Const. pt. I, art. 15; Mich. Const. art. I, § 14; Minn. Const. art. I, § 4; Miss. Const. art. III, § 31; Mo. Const. art. I, § 22(a); Mont. Const. art. III, § 23; Neb. Const. art. I, § 6; Nev. Const. art. I, § 3; N.H. Const. pt. I, art. 20; N.J. Const. art. I, ¶ 9; N.M. Const. art. II, § 12; N.Y. Const. art. I, § 2; N.C. Const. art. I, § 25; N.D. Const. art. I, § 13; Ohio Const. art. I, § 5; Okla. Const. art. II, § 19; Or. Const. art. VII, § 3; Pa. Const. art. I, § 6; R.I. Const. art. I, § 15; S.C. Const. art. I, § 14; S.D. Const. art. VI, § 6; Tenn. Const. art. I, § 6; Tex. Const. art. I, § 15; Utah Const. art. I, § 10; Vt. Const. ch. I, art. 12; Va. Const. art. I, § 11; Wash. Const. art. I, § 21; W. Va. Const. art. III, § 13; Wis. Const. art. I, § 5; Wyo. Const. art. I, § 9.

[31] Those states are Alabama, Arizona, Arkansas, California, Connecticut, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Washington, and Wisconsin.

guarantee of a jury trial are irreconcilable, with particular emphasis on Ohio and the 2005 caps enacted in that state.

II. THE RIGHT TO TRIAL BY JURY IS INVIOLATE

The Seventh Amendment to the United States Constitution declares that:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.[32]

Regardless of whether the object of concern is criminal or civil, the right to trial by jury "is no mere procedural formality, but a fundamental reservation of power in our constitutional structure. Just as suffrage ensures the people's ultimate control in the legislative and executive branches, jury trial is meant to ensure their control in the judiciary."[33] It is little wonder then, that the jury guarantee is one of the "great ordinances of the Constitution."[34] Because damage caps invade the fact-finding province of the jury and constitute a form of reexamination by a means other than recognized by the common law,[35] there can be little doubt that a federal damage cap would run afoul of the U.S. Constitution.

However, because the Supreme Court has not seen fit to incorporate the guarantees of the Seventh Amendment within those rights embraced and applied to the states by the Fourteenth Amendment,[36] cap challengers must rely upon state constitutional jury-right guarantees. Like most states, rather than copy the federal formulation, the Ohio Constitution flatly declares: "The right of trial by jury shall be inviolate . . . ."[37] Despite the differences in phrasing of the various state and federal jury rights, the two appear to be

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[32] U.S. Const. amend. VII.

[33] *Blakely v. Wash.*, 542 U.S. 296, 305-306 (2004) (referring to the Sixth Amendment right to trial by jury).

[34] *Springer v. Phillipine Islands*, 277 U.S. 189, 209 (1928) (Holmes, J., dissenting).

[35] *See infra* § II(B)(2).

[36] Most of the Bill of Rights has been applied to the States through the Incorporation Doctrine, which holds that the Fourteenth Amendment's Due Process Clause makes obligatory upon the states certain fundamental rights. *See e.g. Gideon v. Wainwright*, 372 U.S. 335, 341(1963) ("[T]his Court has looked to the fundamental nature of original Bill of Rights guarantees to decide whether the Fourteenth Amendment makes them obligatory on the States."). The Seventh Amendment, however, has not been incorporated in this manner. *See Palko v. Conn.*, 302 U.S. 319, 324 (1937), *overruled in part by Wolf v. Colo.*, 338 U.S. 25 (1949) and *Mapp v. Ohio*, 367 U.S. 643 (1961); *Walker v. Sauvinet*, 92 U.S. 90, 92 (1875).

[37] Ohio Const. art. I, § 5.

united by a common canon of construction: both the U.S. Supreme Court and state supreme courts have taken a historical approach to construing the right.[38]

A. *The Lessons of History*

Justice Oliver Wendell Holmes famously wrote that a "page of history is worth a volume of logic."[39] Courts apparently have taken that dictum to heart with respect to the jury-trial right. The U.S. Supreme Court has long held that the proper inquiry in a Seventh Amendment case is a historical one: "Since Justice Story's day, we have understood that 'the right of trial by jury thus preserved is the right which existed under the English common law when the [Seventh] Amendment was adopted.'"[40] Similarly, state courts regularly formulate the constitutional jury-trial inquiry in terms of whether it applied to analogous common and statutory law extant at the time the constitutional guarantee was adopted.[41] Ohio does not depart from this history-based formulation.[42]

Jury trials stretch back at least to ancient Greek times.[43] The Magna Carta provided a guarantee of a jury trial by asserting that neither imprisonment, dispossession, banishment nor destruction of person or property could occur "except by the legal judgment of his peers or by the law of the land."[44] This language in the Magna Carta was not new but

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[38] *See e.g. Bringe v. Collins*, 335 A.2d 670, 676 (Md. 1975), *application denied*, 421 U.S. 983 (1975) (holding "the Maryland Constitution, like the Seventh Amendment, guarantees a right to a jury trial in actions at law, where historically there was a right to a jury trial"); *see also N.C. St. B. v. Dumont*, 286 S.E.2d 89 (N.C. 1982); *Steiner v. Stein*, 66 A.2d 719 (N.J. 1949); *Gen. Elec. Credit Corp. v. Richman*, 338 N.W.2d 814, 817 (N.D. 1983).

[39] *N.Y. Trust Co. ex rel. Purdy v. Eisner*, 256 U.S. 345, 349 (1921). *See also* Oliver Wendell Holmes, *The Common Law*, 1 (Dover Publications 1991) (stating "[t]he life of the law has not been logic: it has been experience").

[40] *Markman v. Westview Instruments, Inc.*, 517 U.S. 370, 376 (1996) (quoting *Baltimore & Carolina Line, Inc. v. Redman*, 295 U.S. 654, 657 (1935)).

[41] *Unisys Corp. v. S.C. Budget and Control Bd. Div. of Gen. Servs. Info. Tech. Mgt. Off.*, 551 S.E.2d 263, 271 (S.C. 2001) (holding "[i]t is well-settled that art. I, § 14 [the jury-trial provision] secures the right to a jury trial only in cases in which that right existed at the time of the adoption of the constitution in 1868"); *Lakin*, 987 P.2d at 468 (finding "whatever the right to a jury trial in a civil case meant in 1857 [the time of the Oregon Constitution's adoption], it has the same meaning today"); *Dept. of Revenue v. Printing H.*, 644 So. 2d 498, 500 (Fla. 1994) (holding that the inviolate jury trial right preserved in the Florida Constitution is the same as the right "enjoyed at the time this state's first constitution became effective in 1845") (quoting *In re Forfeiture of 1978 Chevrolet Van*, 493 So. 2d 433, 434 (Fla. 1986)).

[42] *See Sorrell*, 633 N.E.2d at 510(holding a jury trial is guaranteed in "those causes of actions where the right existed at common law at the time the Ohio Constitution was adopted").

[43] *See* James L. Coke, *On Jury Trial*, 1 Or. L. Rev. 177 (1922) (tracing history of jury trial to ancient Athens), cited in *Lakin*, 987 P.2d at 468; *see also* Maximus A. Lesser, *The Historical Development of the Jury System* 6-9 (1992); William Forsyth, *History of Trial by Jury* 1-5 (1999 reprint) (1875). In the Aeschylus's play, Eumenides, the goddess of wisdom is credited with devising the jury system. Lloyd E. Moore, *The Jury: Tool of Kings, Palladium of Liberty* 1 (2d ed. 1973).

[44] Magna Carta § 39 (1215). *See also Cleveland Ry. Co. v. Halliday*, 188 N.E. 1, 3 (Ohio 1933) (recognizing the American constitutional right to trial by jury is derived from Magna Carta); William

previously found in 12th century English lawbooks and 11th century documents of the Holy Roman Empire.[45] Since that time, no phrase in the Magna Carta "has been cited more often as a guarantee of the liberties of the citizen."[46] In fact, the concept of judgment by peers is "one of the oldest principles of English law."[47]

The Supreme Court has similarly acknowledged that "[t]he right of trial by jury is of ancient origin, characterized by Blackstone as 'the glory of the English law' and 'the most transcendent privilege which any subject can enjoy.'"[48] Blackstone added, that it was "always so highly esteemed and valued by the people, that no conquest, no change of government, could ever prevail to abolish it."[49] State courts have expressed similar sentiments: The guarantee of trial by jury in civil cases "has been regarded from the earliest times as one of the safeguards of the liberties of the people and as one of the essentials to the due administration of justice."[50] That celebrated observer of American mores during the 19th century, Alexis de Tocqueville, found the jury an essential institution for American democracy, ascribing the people's "political good sense" to the "long use that they have made of the jury in civil matters."[51]

The veneration heaped on the jury-trial right helps explain why it stands as an insuperable obstacle to tort reform. The right to trial by jury was of extraordinary importance, not just in England, but in colonial America as well. Virginia, for example, used juries for both civil and criminal cases at least since 1624.[52] Jury trials were guaranteed, as well, in the 1641 Massachusetts Body of Liberties.[53]

In 1744, the First Continental Congress asserted a right to trial by jury.[54] Unhappy experiences under British rule heightened the importance of jury trials in the colonial mind. The issue perfectly blended diverse colonial aspirations. The jury represented both the height of English liberty, as well as a means by which colonists could resist royal oppression. The

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Sharp McKechnie, *Magna Carta: A Commentary on the Great Charter of King John*, 134-37 (2d ed., J. Maclehose Glasgow and Sons 1914) (discussing the Anglo-Saxon origins of trial by jury).

[45] *Sources of Our Liberties: Documentary Origins of Individual Liberties in the United States Constitution and Bill of Rights* 5 (Richard L. Perry & John C. Cooper eds., rev. ed., Am. B. Found. 1978) [hereinafter *Sources of Our Liberties*].

[46] *Id*.

[47] *Id*. at 7.

[48] *Dimick v. Schiedt*, 293 U.S. 474, 485 (1935).

[49] William Blackstone, *Commentaries on the Laws of England* 350 (U. of Chi. Press 2002).

[50] *Chesson v. Kieckhefer Container Co*., 26 S.E.2d 904, 906 (N.C. 1943).

[51] Alexis de Tocqueville, *Democracy in America* 126 (Hackett Publg. Co. Inc. 2000).

[52] Stephan Landsman, *The Civil Jury in America: Scenes from an Unappreciated History*, 44 Hastings L.J. 579, 592 (1993).

[53] Massachusetts Body of Liberties ¶ 29 (1641) ("In all actions at law it shall be the libertie of the plantife and defendant by mutual consent to choose whether they will be tried by the Bensh or by a Jurie, unlesse it be where the law upon just reason hath otherwise determined.") (reprinted in *Sources of Our Liberties supra* n. 45, at 151).

[54] *Lakin*, 987 P.2d at 468 n. 4.

British evidently so feared the power of colonial juries that they employed extraordinary devices to avoid them. They were aware that colonial culture celebrated famous jury trials such as the acquittal of preacher William Penn and parishioner William Mead, charged with unlawful assembly after being locked out of their church in 1670;[55] the acquittal of seven Anglican bishops, charged with seditious libel for refusing to read the King's proclamation to their congregations in 1687;[56] and the acquittal of printer John Peter Zenger, charged with seditious libel for publishing a newspaper critical of the colonial governor in 1735.[57] The manner in which juries vindicated fundamental liberties and rebelled against the authorities had a profound effect on the American colonies.[58]

By the time it became necessary to break the political bond with England and assert the rights of Englishmen, the denial of the jury-trial right was high among colonial complaints. Chief Justice Rehnquist once observed that interference with the right to a jury trial was "one of the important grievances leading to the break with England."[59] Others have given it even more emphasis, calling the "fight over jury rights" nothing less than "the fight for American independence."[60]

It is little wonder, then, that the Declaration of Independence charged England, among other complaints, with "depriving us in many cases, of the benefit of Trial by Jury."[61] The Declaration's complaint

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[55] The Trial of William Penn and William Mead, 22 Charles II, 6 Howell's State Trials 951 (1670). Penn was arrested for preaching to his congregation on Gracechurch Street after being locked out by the authorities, while Mead was arrested for listening to Penn. When the jury returned a verdict not to the liking of the London Lord Mayor, they were sent back to the jury room without food or drink and with threats of physical harm. They nonetheless persisted in their verdicts, were fined for their efforts, and imprisoned until they paid their fines. The decision to acquit Penn and Mead was a landmark for religious liberty and an affirmation in colonial minds of the importance of juries. *See* Robert S. Peck, *The Bill of Rights and the Politics of Interpretation* 85-87 (West 1992).

[56] *The Trial of the Seven Bishops*, 12 Howell's St. Trials 183 (1688). The bishops had refused to read a declaration of King James II to their congregations as a matter of religious liberty. Ironically, the declaration was about religious tolerance. A jury acquitted them. *See* Peck, *supra* n. 55, at 87-89.

[57] James Alexander, *A Brief Narrative of the Case and Trial of John Peter Zenger*, *Printer of the New York Weekly Journal* (Stanley Katz, ed., Belknap Press of Harvard U. Press 1972). Zenger was acquitted by a jury for publishing a newspaper that engaged in vicious and satirical attacks on New York's colonial governor in a celebrated trial that advocated truth as a defense and stands as a landmark in press freedom. *See* Peck, *supra* n. 55, at 102-07.

[58] Perhaps the fate and experiences of John Wilkes was most influential in this regard. Wilkes, a member of Parliament, published an attack on a peace treaty with France, only to be arrested, expelled from the legislative body, and sentenced to exile. He returned and was reelected to Parliament repeatedly but not seated and eventually imprisoned. *See Powell v. McCormack*, 395 U.S. 486, 527-28 (1969). He eventually prevailed on the political front and then in a civil action in which the legitimacy of an award of punitive damages was established. *Wilkes v. Wood*, 98 Eng. Rep. 489 (C.B. 1763). The Supreme Court has recognized that "Wilkes' struggle and his ultimate victory had a significant impact in the American colonies." *Powell*, 395 U.S. at 530.

[59] *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 340 (1979) (Rehnquist, J., dissenting).

[60] Roscoe Pound, *The Development of Constitutional Guarantees of Liberty* 72 (Yale U. Press 1957).

[61] *Declaration of Independence* [¶ 20] (1776).

referred to experience under the 1765 Stamp Act, which was used to avoid civil jury trials. The Act, purportedly a revenue measure, taxed newspapers, pamphlets, college degrees, miscellaneous items, and, most importantly, the types of legal documents that were needed to pursue cases in civil court,[62] effectively closing those courts to the colonists.[63] Admiralty courts, which operated without juries, were given jurisdiction to enforce the act, precisely because the British assumed juries would be sympathetic to the American plight.[64] In response, the Americans convened the Stamp Act Congress to protest that "trial by jury is the inherent and invaluable right of every British subject in these colonies."[65]

In the aftermath of these colonial experiences and other similar events highlighting the importance of juries in England, all of the new American states guaranteed the right to trial by jury in civil cases upon declaring independence. In fact, "[t]he right to trial by jury was probably the only one universally secured by the first American state constitutions."[66] Typically, these constitutions declared the right to be *sacred*.[67] Congress also included the jury-trial right in the 1787 Northwest Ordinance, guaranteeing the right to "trial by jury" and "judicial proceedings according to the course of the common law" to the territories, which included Ohio.[68]

When the new federal Constitution, proposed in 1787, failed to guarantee a civil jury-trial right, the oppositional Antifederalists had their most salient argument against ratification: "One of the strongest objections originally taken against the constitution of the United States, was the want of an express provision securing the right of trial by jury in civil cases."[69] The outcry for a jury trial was a dramatic rebuttal to Alexander Hamilton's suggestion in Federalist No. 83 that the jury right did not belong in the Constitution.[70]

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[62] *Sources of Our Liberties*, *supra* n. 45, at 263.
[63] Edmund S. Morgan & Helen M. Morgan, *The Stamp Act Crisis: Prologue to Revolution* 178-86 (N.C. Press 1995).
[64] *Sources of Our Liberties*, *supra* n. 45, at 263.
[65] Resolutions of the Stamp Act Congress 1765, ¶ 7, reproduced in *Sources of Our Liberties*, *supra* n. 45, at 270.
[66] Leonard Levy, *Legacy of Suppression: Freedom of Speech and Press in Early American History* 281 (1960) (quoted in *Parklane Hosiery Co.*, 439 U.S. at 341 (Rehnquist, J., dissenting)).
[67] *See e.g.* Va. Decl. of Rights § 11 (1776) ("the ancient trial by jury is preferable to any other and ought to be held sacred"); Pa. Const. § XI (1776) ("parties have the right to trial by jury, which ought to be held sacred"); N.C. Const. § XIV (1776) ("sacred and inviolable"); Del. Decl. of Rights § 13 (1776); Md. Const. § III (1776); N.J. Const. art. XXII (1776); Ga. Const. art. XLI (1777); Mass. Const. art. XV (1780); N.H. Const. art. I, § XX (1784).
[68] Northwest Ordinance art. II (1797) (reproduced in *Sources of Our Liberties*, *supra* n. 45, at 395). *See also Kneisley v. Lattimer Stevens Co.*, 533 N.E.2d 743, 746 (Ohio 1988).
[69] *Parsons v. Bedford*, 28 U.S. 433, 445 (1830). *See also* Alexander Hamilton, *Federalist No. 83*, 495 (Clinton Rossiter ed., New Am. Lib. 1961) (calling it the objection that has "met with most success").
[70] *Id*. At the same time Hamilton made this dismissive statement about the need to guarantee jury-trial rights in the federal Constitution, he also acknowledged that the "friends and adversaries of the plan of the convention, if they agree in nothing else, concur at least in the value they set upon the trial by jury; or

At the North Carolina ratification convention, for example, delegate James M'Dowall declared, "What made the people revolt from Great Britain? The trial by jury, that great safeguard of liberty, was taken away . . . ."[71] Only the promise of a bill of rights that included a jury-trial right secured ratification of the Constitution.

As Justice Black has noted, "[o]f the seven States which, in ratifying the Constitution, proposed amendments, six included proposals for the preservation of jury trial in civil cases."[72] The Bill of Rights included what is now the Seventh Amendment's civil-jury right to assure, *inter alia*, that corrupt or politically motivated legislators did not interfere with a jury's prerogatives.[73] The Supreme Court has since recognized that the "[m]aintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care."[74]

Ohio's first constitution in 1802 adopted the now-prevailing formulation of the jury-trial right: "That the right of trial by jury shall be inviolate."[75] When the state drafted a new constitution, largely to curb legislative power and legislative collusion with corporate interests in ransacking the public treasury,[76] a strengthened and independent judiciary was established[77] and an "inviolate" right to trial by jury was reasserted.[78] Ohio still operates under this 1851 charter.

In construing this right, the Ohio Supreme Court has noted that "[f]or centuries it has been held that the right of trial by jury is a fundamental constitutional right, a substantial right, and not a procedural

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if there is any difference between them it consists in this: the former regard it as a valuable safeguard to liberty; the latter represent it as the very palladium of free government." *Id*. at 499.

[71] Quoted in Charles Wolfram, *The Constitutional History of the Seventh Amendment*, 57 Minn. L. Rev. 639, 683 (1973).

[72] *Galloway v. U.S.*, 319 U.S. 372, 399 n. 3 (1943) (Black, J., dissenting). Those states were Massachusetts, New Hampshire, Virginia, New York, North Carolina, and Rhode Island. *Id*.

[73] Wolfram, *supra* n. 71, 664-65.

[74] *Dimick*, 293 U.S. at 486.

[75] Ohio Const. art. VIII, § 8 (1802).

[76] *I Report of the Debates and Proceedings of the Convention for the Revision of the Constitution of the State of Ohio*, 1850-51, at 175 (1851; reprinted 1933) (remarks of Charles Reemelin) (arguing "[u]nder the old Constitution, the legislature swallowed up all the rest of the government"); *Id*. vol. 2, at 87 (remarks of Benjamin Stanton) (arguing that, unless new principles restraining the General Assembly were adopted, Ohio would experience the "subversion of all our freedom, for our General Assembly might barter away one right and another, till every vestige of freedom, and all proper powers of our [g]overnment, might be lost by an imprudent assumption of power"). As R.P. Ranney, later a justice of the Ohio Supreme Court, complained at the convention, every possible business incorporated to take advantage of the General Assembly's largess for their needs. *Id*. vol. 1, at 370. *See also Sheward*, 715 N.E.2d at 1076-79 (discussing the developments that brought about the current Ohio Constitution).

[77] Frederick Woodbridge, *A History of Separation of Powers in Ohio: A Study in Administrative Law*, 13 U. Cin. L. Rev. 191 (1939).

[78] Ohio Const. art. I, § 5 (amended 1912).

privilege."[79] It protects all aspects of the jury trial, both from legislative or judicial usurpation.[80]

B. *The Caps Affect Causes of Actions within the Jury-Trial Right*

Without question, the jury-trial right was a preeminent and fundamental constitutional guarantee from the very beginning of this nation. Venerability, however, does not answer the question of whether a damage cap necessarily violates the jury-trial right. To satisfy the historical test, two elements must exist if tort reform-styled noneconomic damages caps are violative of the right: 1) tort cases must have been a common-law action at the time these constitutions containing the jury-trial were adopted;[81] and 2) the determination of damages must have been a factual determination made by the jury at that time.[82] The latter requirement reflects the understanding that "trial by jury has been the accepted and approved method of determining questions of disputed fact among English-speaking peoples for more than 900 years . . . ."[83]

1. Tort Cases Present Issues to Which the Right to a Jury Trial Attaches

Indisputably, the jury-trial right applies with full force to the types of tort actions that are the object of damage caps. Professor William Prosser recognized long ago that torts do not yield to easy definition, but are nonetheless distinguishable from rights created by equity.[84] The distinction is significant because cases that were tried under a court's equity jurisdiction were not entitled to a jury trial. For this reason, torts have always been cognizable in common-law courts, but not courts of divorce, ecclesiastics, probate, admiralty, or equity.[85]

In his 19th century treatise on torts, Professor William Hale wrote that the law traditionally recognized three forms of common-law actions:

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[79] *Cleveland Ry. Co.*, 188 N.E. at 3. *Accord Kneisley*, 533 N.E.2d at 746.
[80] *Gibbs v. Girard*, 102 N.E. 299, ¶ 2 of syllabus (1913). Under Ohio Supreme Court rules, only the syllabus of a case has the controlling force of law; the majority opinion merely states the views of the author. *See* William M. Richman & William L. Reynolds, *The Supreme Court Rules for the Reporting of Opinions: A Critique*, 46 Ohio St. L.J. 313, 322-34 (1985).
[81] *Sorrell*, 633 N.E.2d at 510 (citing *Belding v. State ex rel. Heifner*, 169 N.E. 301, ¶ 1 of the syllabus (1929)). *Compare Granfinanciera, S. A. v. Nordberg*, 492 U.S. 33, 41-42 (1989) ("Although 'the thrust of the Amendment was to preserve the right to jury trial as it existed in 1791,' the Seventh Amendment also applies to actions brought to enforce statutory rights that are analogous to common-law causes of action ordinarily decided in English law courts in the late 18th century, as opposed to those customarily heard by courts of equity or admiralty") (citing *Curtis v. Loether*, 415 U.S. 189, 193 (1974)).
[82] *Zoppo*, 644 N.E.2d at 401; *compare e.g. Baltimore*, 295 U.S. at 657.
[83] *McDowell v. Norfolk S. R.R.. Co.*, 120 S.E. 205, 207 (N.C. 1923).
[84] William L. Prosser, *The Law of Torts vol. 1*, 1 n.1 (1971) (citing Lee, *Torts and Delicts*, 27 Yale L.J. 721, 723 (1918)). *Cf.* Thomas M. Cooley, *A Treatise on the Law of Torts or the Wrongs Which Arise Independent of Contract* 2-3 (2d ed., Callaghan & Co. 1888).
[85] William B. Hale, *Handbook on the Law of Torts* (West Pub. Co. 1896).

real, personal and mixed.[86] Real actions were lawsuits brought for the specific recovery of real property and, by 1896, were "long time . . . extinct."[87] Mixed actions were cases brought for the specific recovery of real property as well as damages for injury to that property.[88] Personal actions were matters brought for the recovery of personal chattel, damage from breach of contract, and damages for injury to person or property.[89] By this categorization, personal injuries were a form of action known as "actions of trespass."[90]

Dean Thomas Cooley's influential treatise, first published in 1879, defined trespass as "the unlawful disturbance by force of another's possession."[91] Cooley provided examples that confirm tort actions are within the scope of actions of trespass. For example, he included as a trespass the resulting case of one "injured by the throwing of a lighted squib into a crowd . . . ."[92] He cited as another example, an injury when a man throws a log on a highway and hits the plaintiff.[93]

William Blackstone, who was treated as the oracle of the English common law by early Americans,[94] similarly defined "trespass in its largest and most extensive sense" as "any transgression or offense against the law of nature, of society, or of the country in which we live, whether it relates to a man's person or to his property."[95] Trespass was but one of the two writs available; actions on the case being the other.[96] The law of trespass came about in the 13th century as a remedy for forcible wrongs, including breach of the peace.[97] It was the remedy for civil wrongs, whether that wrong was committed against person, land or goods.[98] An intentional act gave rise to liability, even when no damage occurred.[99] The most common form of trespass was the tort of battery.[100]

The Ohio Supreme Court has recognized that negligence and other

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[86] *Id.* at 12.
[87] *Id.*
[88] *Id.*
[89] *Id.*
[90] *Id.*
[91] Thomas M. Cooley, *A Treatise on the Law of Torts* 511 (2d ed., Callaghan & Co. 1888).
[92] *Id*. at 514.
[93] *Id.*
[94] As the U.S. Supreme Court wrote, "Blackstone's Commentaries are accepted as the most satisfactory exposition of the common law of England. At the time of the adoption of the Federal Constitution . . . more copies of the work had been sold in this country than in England, so that undoubtedly the framers of the Constitution were familiar with it." *Schick v. U.S.*, 195 U.S. 65, 69 (1904).
[95] Blackstone, *supra* n. 49, at 208.
[96] John G. Fleming, *The Law of Torts* 16 (3d ed., Law Book Co. of Australasia 1965).
[97] *Id.*
[98] *Id.*
[99] *Id.* at 18.
[100] *Id.* at 25.

tort actions "evolved from the common-law action of trespass on the case, and battery actions existed at common law at the time of the adoption of our state Constitution."[101] As a result, Ohio courts have concluded that the right to trial by jury extends to tort actions derived from common law.[102] Other state courts that have examined the question have concurred,[103] as has the U.S. Supreme Court.[104]

2. The Determination of Damages Falls within the Jury's Prerogative

History demonstrates as well, that the determination of damages constitutes a fact within the jury's province to determine. The jury's preeminent role in the assessment of damages appears to have been settled at least since the time of Lord Coke,[105] the 17th century scholar and jurist whose writings were "a lodestar" for American common lawyers[106] and whose reading of the Magna Carta had unparalleled influence on American lawyers.[107] In addition, William Blackstone's famous *Commentaries*, the definitive source for understanding the common law that preexisted American constitution-writing,[108] established that "the quantum of damages sustained by [a plaintiff] . . . cannot be [ascertained] without the intervention of a jury."[109]

The jury's authoritative role in assessing damages was established as well by colonial practice. One incident notoriously well-known throughout the colonies[110] and a source of American allegiance to the jury-trial right, occurred when New York's acting colonial governor arbitrarily attempted to overrule a jury and reduce the damages awarded in a case involving a politically-connected defendant. One Antifederalist said the event inspired "a flame of patriotic and successful opposition, that will not

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[101] *Sorrell*, 633 N.E.2d at 510. *See also Morris*, 576 N.E.2d at 778; *Mominee v. Scherbarth*, 503 N.E.2d 717, 733 (Ohio 1986) (Douglas, J., concurring).
[102] *See e.g. Sorrell*, 633 N.E.2d at 510; *Kneisley*, 533 N.E.2d at 746.
[103] *See e.g. Lakin*, 987 P.2d 463; *Condemarin v. U. Hosp.*, 775 P.2d 349, 364, 366 (Utah 1989); *Sofie*, 771 P.2d at 718-19; *McClanahan v. Gibson*, 756 S.W.2d 889, 889 (Ark. 1988); *Beurklian v. Allen*, 432 N.E.2d 707, 708 (Mass. 1982).
[104] *See City of Monterey v. Del Monte Dunes at Monterey, Ltd*., 526 U.S. 687, 709 (1999) (citing *Curtis v. Loether*, 415 U.S. 189, 195-96 (1974)) (finding "the Seventh Amendment jury guarantee extends to statutory claims unknown to the common law, so long as the claims can be said to 'sound basically in tort,' and seek legal relief").
[105] Austin Wakeman Scott, *Trial by Jury and the Reform of Civil Procedure*, 31 Harv. L. Rev. 669, 675 (1918); *see also* Edward Coke, *First Part of the Institutes of the Laws of England* § 155b (15th ed. 1794).
[106] *Wash. v. Glucksberg*, 521 U.S. 702, 712 n. 10 (1997).
[107] Jeffrey M. Shaman, *On the 100th Anniversary of Lochner v. New York*, 72 Tenn. L. Rev. 455, 477 (2005).
[108] *See supra* n. 94.
[109] Blackstone, *supra* n. 49, at 397.
[110] Among those thought to be in attendance at the civil trial was future Chief Justice John Jay. Herbert Alan Johnson, *John Jay: Lawyer in a Time of Transition*, *1764-1775*, 124 U. Pa. L. Rev. 1260, 1266 (1976).

be easily forgotten."[111] The matter began in July 1763, when merchant Waddell Cunningham drew a concealed sword, stabbed and beat rival Thomas Forsey, disabling him for a period of 82 days.[112] A criminal trial, in January 1764, brought conviction and an inconsequential fine of £30 for Cunningham.[113] Subsequently, a civil trial resulted in the much more substantial verdict of £1,500.[114] After the court refused Cunningham's motion to set aside the verdict and order a new trial, he unsuccessfully appealed to the New York Supreme Court of the Judicature, which found that he had identified no error below.[115] Cunningham nonetheless persisted and sought review of the verdict before New York's governing council, under a gubernatorial edict that gave the council jurisdiction over appeals through a writ of error.[116] Lieutenant Governor Cadwallader Colden, serving as acting governor, took charge of the appeal. Colden took the position that the council could review the evidence and overrule the jury's verdict.[117]

Colden's announced view brought the unanimous opposition of the bar.[118] New York Attorney General, John Tabor Kempe, chastised Colden, reminded him that juries are the judges of facts and that writs of error applied to matters of law alone.[119] With the New York Supreme Court refusing to permit the council to take up the appeal, Colden ordered the justices to appear before the council. Chief Justice Daniel Horsmanden defended the Court's decision to deny the appeal, declaring that the "Trial was Regular and Solemn; and conducted with the utmost fairness and Deliberation."[120] Horsmanden noted that the only complaint that Cunningham made was that the damages were excessive, "which did not appear to the Court to be well founded; and the Trespass being very atrocious, and the Proofs clear, the Court over-ruled the Motion."[121]

The Chief Justice went on to assert that if a writ of error was available against the amount of a jury's verdict, it would "alter[] the Ancient, and wholsome Laws of the Land," namely the common law fact-finding role of the jury.[122] While judicial error was subject to such

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[111] *The Complete Anti-Federalist* vol. 2, 149 (Herbert Storing ed., U. of Chi. Press 1981). *See also* Wolfram, *supra* n. 71, 696 n. 141.
[112] Helen Hill Miller, *The Case for Liberty* 188 (U. of N. Carolina Press 1965).
[113] *Id.* at 190.
[114] *Id.* Forsey had prayed for damages of £5,000. *Id.*
[115] Matthew Tulchin, *An Analysis of the Development of the Jury's Role in a New York Criminal Trial*, 13 J.L. & Pol. 425, 446 (2005).
[116] Miller, *supra* n. 112, at 190.
[117] Tulchin, *supra* n. 115, at 446.
[118] Johnson, *supra* n. 110, at 1267; Miller, *supra* n. 112, at 193.
[119] Miller, *supra* n. 112, at 193.
[120] *Id.* at 196.
[121] *Id.*
[122] *Id.*

correction, he added, "in all these Removes, the Verdict of the Jurors suffers no Re-Examination."[123] The Chief Justice's explanation was widely disseminated in newspapers and broadsides.[124] It succeeded in convincing the council to resist Colden's approach, which caused him to complain that the court then "must become uncontroulable. However agreable this may be to Judges fond of Power, it must become terrible to the People under their jurisdiction."[125]

Cunningham then, with Colden's support, petitioned the King for a hearing.[126] At the same time, the Stamp Act controversy was swirling through the colonies. The New York Committee of Correspondence, that approved the call for the Stamp Act Congress, included in its resolution an acknowledgment of the *Forsey v. Cunningham* case as part of its protest:

> [A]n illegal attempt had been made, during the late Recess, to deprive the Inhabitants of this Colony of their antient and undoubted Right of Trials by their Peers, by bringing an Appeal from the Verdict of a Jury, in a cause between Forsey and Cunningham.[127]

On October 9, Colden received royal authorization to convene the council to take appeals "from verdicts of juries on questions of fact," generally and Cunningham's appeal, specifically.[128] The court nonetheless persisted in defying the new order, because it could conceive of no legal means by which an appeal could properly be taken, even after the King's order.[129] The General Assembly passed a resolution supporting the court and stated that "an appeal from the verdict of a jury is subversive of that right [to trial by jury]."[130]

Although the incident was shaping up as a dramatic confrontation between royal power and legal reason, the controversy fizzled out with the appointment of a new governor and a dispatch from London declaring that, after consultation with lawyers for the Crown, all appeals must again be limited to review of judicial error.[131]

The developments in *Forsey v. Cunningham* secured for early Americans the status of the jury as the proper assessors of damages and the narrow role left to judges and appellate courts with respect to damages.

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[123] *Id.*
[124] *Id.* at 198-99.
[125] *Id.* at 198.
[126] *Id.*
[127] *Id.* at 199.
[128] Tulchin, *supra* n. 115, at 447.
[129] Miller, *supra* n. 112, at 200.
[130] Tulchin, *supra* n. 115, at 447 (quoting Stephen C. Hutchins, *Civil List and Constitutional History of the Colony and State of New York* (Gaunt 2003)).
[131] Miller, *supra* n. 112, at 202.

Ever since, U.S. courts repeatedly recognized that the award of damages was within the strict province and discretion of the jury. In fact, early on, the U.S. Supreme Court followed the principles that animated *Forsey*. In *United States v. Laub*,[132] the Court declared it "a point too well-settled to be drawn into question, that the effect and sufficiency of the evidence, are for the consideration and determination of the jury; and the error is to be redressed, if at all, by application to the court below for a new trial, and cannot be made a ground of objection on a writ of error."[133] The only interference permitted to a jury's award of damages occurred when the award was so excessive that the jury was motivated by passion or prejudice.[134] In 1822, Justice Joseph Story, sitting on circuit, described that authority as consistent with common-law practices so that remittitur could be ordered as long as the option of a new jury trial was also offered.[135] For authority, Story relied upon British Chief Justice Lord Ellenborough's decision in *Chambers v. Caulfield*,[136] where he declared:

> [I]f it appeared to us from the amount of the damages given as compared with the facts of the case laid before the jury, that the jury must have acted under the influence either of undue motives, or some gross or misconception on the subject, we should have thought it our duty to submit the question to the consideration of a second jury.[137]

By 1886, the Supreme Court declared that "nothing is better settled than that . . . [in] actions for torts where no precise rule of law fixes the recoverable damages, it is the peculiar function of the jury to determine the amount by their verdict."[138] The Court again relied on Justice Story to define the scope of the jury's authority:

> Mr. Justice Story well expressed the rule on this subject that a verdict will not be set aside in a case of tort for excessive damages "unless the court can clearly see that the jury have committed some very gross and palpable error, or have acted under some improper bias, influence or prejudice, or have totally mistaken the rules of law by which the damages

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[132] 37 U.S. 1 (1838).
[133] *Id.* at 5.
[134] Even today, courts use similar language to describe the rare occasions when the jury's damage award is properly subject to review. As the Supreme Court has noted, courts "use different verbal formulations, [but] there may not be much practical difference between review that focuses on 'passion and prejudice,' 'gross excessiveness,' or whether the verdict was 'against the great weight of the evidence.'" *Honda Motor Co. v. Oberg*, 512 U.S. 415, 432 n. 10 (1994).
[135] *Blunt v. Little*, 3 Mason, 102 (Cir. Ct. Mass. 1822) (Story, J.) (cited in *Dimick*, 293 U.S. at 482).
[136] 102 Eng. Rep. 1280 (K.B. 1805).
[137] *Id.* at 1285.
[138] *Barry v. Edmunds*, 116 U.S. 550, 565 (1886).

> are to be regulated," – that is, "unless the verdict is so excessive or outrageous," with reference to all the circumstances of the case, "as to demonstrate that the jury have acted against the rules of law, or have suffered their passions, their prejudices, or their perverse disregard of justice to mislead them." *In no case is it permissible for the court to substitute itself for the jury, and compel a compliance on the part of the latter with its own view of the facts in evidence, as the standard and measure of that justice, which the jury itself is the appointed constitutional tribunal to award.*[139]

State courts in the 19th and early 20th century consistently took a similar view.[140] Expressed in remarkably similar language, modern courts have also subscribed to the primacy of the jury in assessing damages. For example, the Connecticut Supreme Court recently said:

> Litigants have a constitutional right to have factual issues resolved by the jury. This right embraces the determination of damages when there is room for a reasonable difference of opinion among fair-minded persons as to the amount that should be awarded . . . . The amount of a damage award is a matter peculiarly within the province of the trier of fact, in this case, the jury.[141]

An echo of that approach can be seen in other states.[142] After initially muddying the waters, the U.S. Supreme Court has recently clarified its agreement as well. For years, tort reformers cited language in *Tull v. United States*,[143] for the proposition that the jury's job did not extend to the assessment of damages. Specifically, *Tull* stated that "[n]othing in the [Seventh] Amendment's language suggests that the right to a jury trial extends to the remedy phase of a civil trial."[144] Reliance on that naked statement, however, proved misplaced; particularly because the next sentence states that "[i]nstead, the language 'defines the kind of cases for

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[139] *Id.* (citing *Whipple v. Cumberland Mfg. Co.*, 29 F. Cas. 934 (D. Me. 1843)) (emphasis added).
[140] *See e.g. Ward v. White*, 9 S.E. 1021, 1023-24 (Va. 1889) (awarding damages within strict province and discretion of jury); *Tenn. Coal & R.R. Co. v. Roddy*, 5 S.W. 286 (Tenn. 1887); *Hulin v. W. Union Telegraph Co.*, 117 S.E. 588, 590 (N.C. 1923).
[141] *Mather v. Griffin Hosp*., 540 A.2d 666, 673 (Conn. 1998).
[142] *See e.g. Bunch v. King County Dept. of Youth Services*, 116 P.3d 381, 389 (Wash. 2005) (citations omitted) ("The jury is given the constitutional role to determine questions of fact, and the amount of damages is a question of fact . . . . 'The jury's role in determining noneconomic damages is perhaps even more essential.'"); *Tonik v. Apex Garages, Inc.*, 275 A.2d 296, 299 (Pa. 1971) ("The duty of assessing damages is within the province of the jury and should not be interfered with by the court, unless it clearly appears that the amount awarded resulted from caprice, prejudice, partiality, corruption or some other improper influence."); *Flynn v. Vancil*, 242 N.E.2d 237, 240 (Ill. 1968) ("The question of damages is peculiarly one of fact for the jury.").
[143] 481 U.S. 412 (1987).
[144] *Id.* at 426 n.9.

which jury trial is preserved, namely "suits at common law."'"[145]

In fact, *Tull* stands for the unremarkable proposition that a legislature that creates a previously unknown cause of action may set the damages awardable in that action. Common law actions, however, continue to receive an undiluted jury-trial right as it was practiced in 1791. In reviewing that historic test, which was rehearsed earlier in this article,[146] the Supreme Court more recently declared that the jury was the judge of damages in common-law actions in 1791 and thus remains the judge of damages today.[147] The Court's clear holding in *Feltner v. Columbia Pictures Television, Inc.*, establishes that the "right to a jury trial includes the right to have a jury determine the amount of . . . damages."[148] In *Feltner*, the Court unanimously found *Tull* to be inapposite for precisely the proposition that tort reformers offered it,[149] thereby restricting its application to statutory actions without common-law antecedents. Applying the *Feltner* principle in a subsequent decision, the Court took the Fourth Circuit to task for ordering a remittitur without offering the plaintiff the option of a new jury trial.[150] These recent declarations leave little doubt that the jury's constitutional role includes the assessment of damages, a result that is not subject to reexamination except on limited grounds, provided that any remittitur can be refused in favor of a new jury trial.

A cap on noneconomic damages obviously offends the *Feltner* principle. It overrides a jury's verdict, which includes a determination of the proper amount of noneconomic damages needed to compensate a plaintiff based on the evidence presented at trial. Even when the trial judge agrees with the jury's determination, and thus the verdict is emphatically not the product of passion or prejudice or any other improper consideration, a cap exercises judicial authority that does not exist to revise the verdict downward, rendering the jury's verdict advisory, rather than constitutionally secured.

Ohio jurisprudence mirrors these principles. Whether one looks at early decisions about the right to trial by jury or more recent ones, the right is properly treated as sacrosanct. Just two years after the Ohio Constitutional Convention, in which he played a prominent role and in which he appeared to anticipate the present debate over damage caps,

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[145] *Id.*
[146] *See supra* nn. 81-140 and accompanying text.
[147] *Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340, 355 (1998) ("if a party so demands, a jury must determine the actual amount of . . . damages . . . in order 'to preserve the substance of the common-law right of trial by jury.'").
[148] *Id.* at 353.
[149] *Id.* at 355.
[150] *Hetzel v. Prince William County*, 523 U.S. 208 (1998) (per curiam); *compare e.g. Markota v. E. Ohio Gas Co.*, 97 N.E.2d 13 (Ohio 1951).

Justice R. P. Ranney wrote for the Ohio Supreme Court that "it is beyond the power of the General Assembly to impair the right, [to trial by jury] or materially change its character."[151] Well-established precedent also focuses on the right as one of substance and not a mere question of procedure.[152] The jury-trial right is subject to extension, but not abridgement.[153]

A cap on damages, however, impairs the right by taking over one of the fact-finding responsibilities of the jury. In 1913, the Ohio Supreme Court condemned fact-finding by the legislative body in a lawsuit, as "a sinister and indirect invasion and usurpation of the right of trial by jury . . . [and] clearly unconstitutional."[154] The determination of the damages to be awarded in compensation constitutes one of the critical facts the jury must determine.[155]

More recent judicial pronouncements accord with these venerable precedents:

> [I]t is axiomatic that the assessment of damages is thoroughly and peculiarly within the province of the jury which heard the testimony and appraised the witnesses as the incidents giving rise to the injury unfolded before it, and that such appraisal should not be disturbed, either upward or downward, unless 'their judgment appears to have been the result of passion and prejudice . . .', . . . or is such as 'to shock the sense of fairness and justice' of the reviewing court.[156]

Going further, the Ohio Supreme Court has noted that legislation is invalid if it would permit a court to "enter judgments in disregard of the jury's verdict and thus violate the plaintiff's right to have all facts determined by the jury, including damages."[157]

There cannot be any doubt that the overwhelming majority position, fully embraced in Ohio jurisprudence, is that the determination of damages

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[151] *Work v. State*, 2 Ohio St. 297, 306 (1853).
[152] *Cleveland Ry. Co*., 188 N.E. at 1, ¶ 1 of syllabus.
[153] *Gunsaullus v. Pettit*, 17 N.E. 231 (Ohio 1888).
[154] *Gibbs*, 102 N.E. at 301; *compare People v. Bigge*, 297 N.W. 70, 76 (Mich. 1941) (holding "[t]he right of trial by jury is too firmly established in American jurisprudence to allow it to be whittled away by the legislature").
[155] The determination of noneconomic damages is a determination of what amount of compensation is necessary to make the plaintiff whole for his or her injuries. It is a fundamental principle of tort law that the purpose of a civil action is to make a plaintiff whole for his or her injuries. *Fantozzi v. Sandusky Cement Prod. Co.*, 597 N.E.2d 474, 482 (Ohio 1992) (identifying the make-whole requirement as a fundamental principle of tort law).
[156] *Spicer v. Armco Steel Corp.*, 322 N.E.2d 279, 280 (Ohio App. 12th Dist. 1974) (per curiam) (citations omitted).
[157] *Sorrell*, 633 N.E.2d at 510; *see also Zoppo*, 644 N.E.2d at 401 (striking down as a violation of the jury-trial right a legislative reassignment of the determination of punitive damages from the jury to the judge).

is a fact found by the jury and thus within the protection of the jury-trial right. When a damages determination is appropriately subject to review, that review is within the authority of only the trial judge, with the adversely-affected party retaining the option of insisting on a new jury trial. In such a regime, there is no room for legislative interference through a statute that adopts a one-size-fits-all limitation on common-law damages.

III. OHIO'S 2005 CAPS ON DAMAGES AND THE OHIO CONSTITUTION

Despite the certitude with which Ohio constitutional law in particular views caps on damages as invalid, the Ohio legislature has ventured into that thicket again, presumably hoping that a changed Supreme Court membership would reject centuries of precedents to uphold the caps.[158] Two pieces of legislation that included caps on noneconomic damages, were enacted, one oriented to medical malpractice and a second applying to products liability and other torts. Neither law's caps satisfy constitutional requirements.

A. *Ohio's Medical Malpractice Reform Unconstitutionally Caps Damages*

Amended Substitute Senate Bill 281, a bill to revise actions for "medical, dental, optometric, and chiropractic claim[s],"[159] went into effect on April 11, 2003.[160] Key components of the bill included:

- Procedural requirements in medical, dental, optometric, or chiropractic claims, requiring a court to determine, upon a defendant's motion, whether the action was brought in good faith and award costs and attorneys' fees if no reasonable good

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[158] Winning the political race for seats on the Ohio Supreme Court has cheered some tort reform groups, which look to those newly appointed justices to reverse the Court's earlier holdings. *See e.g.* American Tort Reform Association, *Election 2004: A Win for Civil Justice Reform*, http://www.atra.org/show/7836 (accessed Dec. 31, 2005); Institute for Legal Reform, *Chamber Highlights Successful Pro-Business Election Effort, Business Drive to Get-out-the-Vote behind Election Victories*, http://www.instituteforlegalreform.com/newsroom/display_release110304.html (accessed Dec. 31, 2005). One commentator has also chronicled how the constitutional battle over tort reform fuels the electoral battles over seats on the Ohio Supreme Court. *See* James T. O'Reilly, *Writing Checks or Righting Wrongs: Election Funding and the Tort Decisions of the Ohio Supreme Court*, 51 Clev. St. L. Rev. 643 (2004). Electoral victories of this type, which does not amend the state constitution, should not change embedded principles as if they were the spoils of political wars. The Supreme Court has noted that "[a] basic change in the law upon a ground no firmer than a change in [a court's] membership invites the popular misconception that this institution is little different from the two political branches of the Government. No misconception could do more lasting injury to this Court and to the system of law which it is our abiding mission to serve." *Mitchell v. W.T. Grant Co.*, 416 U.S. 600, 636 (1974) (Stewart, J., dissenting) (quoting *Planned Parenthood*, 505 U.S. at 864).

[159] Amend. Substitute Sen. Bill 281, Ohio 124th Gen. Assembly (2003).

[160] Ohio Legis. Serv. Commn., *Final Bill Analysis of Ohio Amended Substitute Senate Bill 281*, 124th Gen. Assembly (Jan. 10, 2003), at 1 (2003) http://lsc.state.oh.us/analyses/fnla124.nsf/All%20Bills%20and%20Resolutions/F0F77688D1FE5D1C85256C9900517060 (accessed Nov. 5, 2005).

faith basis is found;[161]

- Limits noneconomic damages in such cases to the greater of $250,000 or an amount equal to three times the plaintiff's economic loss, to a maximum of $350,000 for each plaintiff or a maximum of $500,000 for each occurrence; the limits rise to $500,000 per plaintiff and $1 million per occurrence for permanent and substantial physical deformity, loss of use of a limb, or loss of a bodily organ system, or for permanent physical functional injury that permanently prevents the injured person from being able to independently care for him- or herself and perform life-sustaining activities;[162]
- Regulates payment of future damages in excess of $50,000 so that payments may be made periodically rather than in a lump sum;[163]
- Grants civil immunity to health care professionals engaged in voluntary medical work;[164]

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[161] Amend. Substitute Sen. Bill 281 at § 2323.42. The provision, which attempts to change civil procedure in medical malpractice cases, runs afoul of the Ohio Constitution as violating separation of powers. In Ohio, authority to promulgate rules of civil procedure are within the exclusive province of the Ohio Supreme Court and are not shared with the legislature. Ohio Const. art. IV, § 5(B) (the "supreme court shall prescribe rules governing practice and procedure in all courts of the state, which rules shall not abridge, enlarge, or modify any substantive right" and "[a]ll laws in conflict with such rules shall be of no further force or effect after such rules have taken effect."). The exclusive assignment of authority to the Supreme Court is further reinforced by a provision denying the legislature any authority to exercise judicial power. Ohio Const. art. II, § 32. The Ohio Supreme Court has twice invalidated a "certificate of merit" requirement as a prerequisite to filing a lawsuit, which the legislature imposed on two different occasions to accomplish the same purposes as the present requirement. *See Sheward*, 715 N.E.2d at 1087; *Hiatt v. S. Health Facilities, Inc.*, 626 N.E.2d 71 (Ohio 1994). The new provision in Amended Substitute Senate Bill 281 appears to be aimed at a similar objective: to weed out weaker cases (or cases dependant on discovery to succeed) at an early stage, an authority that is patently procedural and outside legislative cognizance.

[162] Amend. Substitute Sen. Bill 281 at § 2323.43. The constitutional infirmities of this provision are discussed *infra.* As an apparent alternative attempt to enforce the damage limits, the bill also denies trial courts jurisdiction to enter judgment on an award of noneconomic damages in excess of the limits it establishes. *Id*. at § 2323.43(D)(1). This indirect attempt to cap damages is as offensive to the Constitution as any direct attempt would be. As the U.S. Supreme Court has noted, it is a judicial power, not a legislative one, to decide cases. *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 218-19 (1995) (citing Frank H. Easterbrook, *Presidential Review*, 40 Case W. Res. L. Rev. 905, 926 (1990)). Rather than limit one level of court from exercising jurisdiction, the provision denies any Ohio court the authority to render a judgment with which the legislature disagrees.

[163] Amend. Substitute Sen. Bill 281 at § 2323.55. A previous statutory requirement establishing periodic payments for medical malpractice awards above $200,000 in future damages was struck down by the Ohio Supreme Court on jury-trial grounds in *Galayda*, 644 N.E.2d 298, because it reduced the jury's award twice: once reasonably to present value and a second time through periodic payments that devalued the award further.

[164] Amend. Substitute. Sen. Bill 281 at § 2305.234. Article I, §16 of the Ohio Constitution declares that "[a]ll courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay." Ohio Const. art. I, § 16. The Ohio Supreme Court has authoritatively construed this guarantee to assure that a plaintiff has "an opportunity granted at a meaningful time and in a meaningful manner" to

- Permits the introduction of evidence of collateral sources so that juries may deduct that amount from their awards;[165]
- Regulates expert evidence in medical malpractice cases;[166]

The damage cap adopted in the legislation does not take it outside existing Ohio precedent, which has consistently found caps violative of trial by jury, among other constitutional objections.[167] Under the new law's provisions, noneconomic damages cannot exceed $250,000 unless the economic damages awarded are more than one-third that amount ($83,333.34).[168] In that case, the noneconomic damage cap becomes three times economic damages up to, but not exceeding, $350,000 per plaintiff or $500,000 per occurrence.[169] For certain catastrophic injuries, defined as permanent and life-altering, the cap is moved up to $1,000,000 per plaintiff, including derivative claims.[170]

Despite the complicated formulas adopted and the apparent recognition that a single one-size-fits-all approach is, at a minimum, unfair, the limitations still invade the jury's province. The right of the jury to assess damages is meaningless if their determination, based on the evidence adduced before them, can be revised downward through a legislative formula. After all, Ohio has long held that "[t]he right of trial by jury, being guaranteed to all our citizens by the constitution of the state, cannot be invaded or violated by either legislative act or judicial order or decree."[171]

As did the abrogation of the collateral source rule struck down in *Sorrell*, this cap unconstitutionally instructs courts to "enter judgments in

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pursue legal recourse. *Hardy v. VerMeulen*, 512 N.E.2d 626, 628 (Ohio 1987). *Accord Gaines v. Preterm-Cleveland, Inc.*, 514 N.E.2d 709, 716 (Ohio 1987) (stating "[d]enial of a remedy and denial of a meaningful remedy lead to the same result: an injured plaintiff without legal recourse"). The current bill's grant of immunity leads to precisely the result condemned by the Ohio Constitution.

[165] Amend. Substitute Sen. Bill 281 at § 2323.41. A prior abrogation of the collateral source rule was struck down on multiple constitutional grounds, including the right to trial by jury, in *Sorrell*, 633 N.E.2d 504.

[166] Amend. Substitute Sen. Bill 281 at § 2743.43. Because the provision attempts to regulate evidence, it runs afoul of the Supreme Court's exclusive authority over the rules of evidence. *See In re Coy*, 616 N.E.2d 1105, 1108 (Ohio 1993) (holding it unconstitutional for the legislature to "change (enlarge) the Evidence Rules as promulgated by this court"). Perhaps supporters of this provision thought it might survive judicial review because it allows a trial court to override its exclusion if the expert evidence would be probative. That concession to judicial authority, however lodges the decision in the trial court, while the Ohio Constitution places the ultimate rulemaking authority in the Supreme Court. Ohio Const. art. IV, § 5(b). The legislature may not choose where the assignment goes.

[167] *See e.g. Sheward*, 715 N.E.2d at 1092 n. 4.

[168] Ohio Rev. Code Ann. § 2323.43 (Anderson 2005).

[169] *Id*. Thus, if an act of medical malpractice occurs in delivering a newborn and results in significant injuries to mother and child that otherwise do not satisfy the law's permanent physical deformity exception, each would be limited to $250,000 in noneconomic damages because the injury would constitute a single occurrence with a maximum cap of $500,000. If the baby's father had a claim for loss of consortium, this provision would actually provide less per plaintiff, requiring that the $500,000 cap be divided three ways.

[170] Ohio Rev. Code Ann. § 2323.43(A)(3) (Anderson 2005).

[171] *Gibbs*, 102 N.E. at 299, ¶ 2 of syllabus.

disregard of the jury's verdict and thus violate the plaintiff's right to have all facts determined by the jury, including damages."[172] The *Sorrell* Court was critical of the effect of the legislative action, which it characterized as "essentially grant[ing] the tortfeasor a rebate for the damages he caused."[173] Such a result defies logic, particularly because noneconomic damages are a form of compensatory damages intended to make the plaintiff whole.[174] In fact, the U.S. Supreme Court has recognized that "one of the hallmarks of traditional tort liability is the availability of a broad range of damages to compensate the plaintiff 'fairly for injuries caused by the violation of his legal rights.'"[175] These injuries may well include emotional distress and pain and suffering.[176] A cap, as the Ohio Supreme Court has acknowledged, accomplishes quite the opposite "[i]t is irrational and arbitrary to impose the cost of the intended benefit to the general public solely upon a class consisting of those most severely injured by medical malpractice."[177]

Although it was not a cap challenge, the Ohio Supreme Court had occasion to look at interference with the jury's authority to determine damages in a case that successfully challenged the reassignment of punitive damage determinations from the jury to the judge.[178] There, the Court found that the statute "impairs the traditional function of the jury in determining the appropriate amount of damages . . ." and thus violates the right to a jury trial.[179] Applying this precedent to the most recent prior attempt by the legislature to cap noneconomic damages, the Court found that no amount of prestidigitation could allow the legislature to substitute its determination for the jury. Instead, the use of indirection that was intended to mask its reexamination of the jury's verdict merely "create[d] the illusion of compliance by permitting the jury to assess the amount of . . . damages to be awarded, but requiring the court to nullify the jury's determination and substitute the will of the General Assembly in any case where a jury awards . . . damages in excess of the amounts specified."[180] The Court added:

> The [jury-trial] right belongs to the litigant, not the jury, and a statute that allows the jury to determine the amount of . . . damages to be awarded but denies the litigant the benefit of that determination stands on no better constitutional footing than one that precludes the jury from making the

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[172] 633 N.E.2d at 510.
[173] *Id*.
[174] *Fantozzi*, 597 N.E.2d at 482.
[175] *U. S. v. Burke*, 504 U.S. 229, 235 (1992) (quoting *Carey v. Piphus*, 435 U.S. 247, 257 (1978)).
[176] *Id*.
[177] *Sheward*, 715 N.E.2d at 1092 (quoting with approval *Nervo v. Pritchard*, No. CA-6560 (Ohio App. 5th Dist. 1985)).
[178] *Zoppo*, 644 N.E.2d at 401.
[179] *Id.*
[180] *Sheward*, 715 N.E.2d at 1091 (referring to a punitive damage cap but equally applicable to a noneconomic damage cap).

determination in the first instance.[181]

The new medical malpractice cap, thus, deserves the fate of previous efforts: invalidation.

B. *Ohio's General Tort Reform Unconstitutionally Caps Damages*

In 2005, the Ohio General Assembly enacted a new general tort reform measure.[182] Like the medical malpractice bill, it contained a number of provisions that had previously been declared unconstitutional, including:

- Limits on noneconomic damages;[183]
- Abrogation of the collateral source rule;[184]
- Limits on the amount of punitive damages recoverable, setting up different standards for large employers and small employers,[185] as well as other provisions limiting the instances in which punitive damages may be awarded.[186]

The noneconomic damage caps enacted in Amended Substitute Senate Bill 80 follow a similar pattern to those established in the medical malpractice bill. The caps generally limit noneconomic damages to the greater of $250,000 or an amount equal to three times economic damages with a revised ceiling of $350,000 per plaintiff or $500,000 per occurrence.[187] The legislation sets no limitations for certain permanent physical injuries.[188] If the catastrophically injured party's life expectancy is 67 years or more after the incident, the cap is calculated by multiplying that number of years by $15,000.[189] In passing this provision, the General Assembly reenacted a less generous version of a previous law that was

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[181] *Id*.
[182] Amend. Substitute Sen. Bill 80, Ohio 125th Gen. Assembly (2005).
[183] *Id*. at § 2315.18. The specific limitations and procedures governing noneconomic damages will be discussed *infra*.
[184] *Id*. at § 2315.20. *See supra* n. 165 regarding a previous invalidation of similar earlier legislation.
[185] Amend. Substitute Sen. Bill 80 at § 2315.21. A previous cap on punitive damages was invalidated in *Sheward*, 715 N.E.2d at 1092-93.
[186] Among those provisions further inhibiting the award of punitive damages, Amended Substitute Senate Bill 80 establishes a government standards defense for manufacturers of medical devices and over-the-counter drugs, as well as manufacturers and suppliers of certain other products. Amend. Substitute Sen. Bill 80 at §§ 2307.80(C)-(D). It also prohibits multiple punitive damage awards where an award of punitive damages has already been imposed and paid based on the same act or course of conduct. *Id.* at § 2315.21(D)(5)(a). The myriad constitutional problems with those provisions are beyond the scope of the article.
[187] *Id.* at § 2315.18(B)(2).
[188] *Id*. at § 2315.18(B)(3).
[189] *Id*. at § 2315.18(8)(B)(2).

struck down by the Ohio Supreme Court.[190]

To the extent this legislation follows the same regime with respect to damages as Amended Substitute Senate Bill 281, its constitutional infirmities duplicate those discussed earlier.[191] However, the new bill adds a new procedural twist that is separately and distinctly constitutionally infirm. In its entirety, Section 2315.19 provides:

> (A)(1) Upon a post-judgment motion, a trial court in a tort action shall review the evidence supporting an award of compensatory damages for noneconomic loss that the defendant has challenged as excessive. That review shall include, but is not limited to, the following factors:
>
> (a) Whether the evidence presented or the arguments of the attorneys resulted in one or more of the following events in the determination of an award of compensatory damages for noneconomic loss:
>
> (i) It inflamed the passion or prejudice of the trier of fact.
>
> (ii) It resulted in the improper consideration of the wealth of the defendant.
>
> (iii) It resulted in the improper consideration of the misconduct of the defendant so as to punish the defendant improperly or in circumvention of the limitation on punitive or exemplary damages as provided in section 2315.21 of the Revised Code.

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[190] *See Sheward*, 715 N.E.2d at 1092-93. The only difference between the prior invalid cap and the current one is that the multiple for awards that could exceed the $1 million cap was $35,000 per year in the old law, compared to $15,000 per year in the new one. *Id.* Presumably, this reflects a legislative determination that the types of injuries denominated as noneconomic in nature have a lesser value today than they did in 1996, when the previous cap was enacted. Such a determination appears irrational on its face. Ironically, the previous cap was a reenactment of a yet earlier cap on noneconomic damages that was also found unconstitutional. *See id*. at 1094-95. Unlike in other efforts, where the third time is the charm, law is anchored in precedent and the doctrine of *stare decisis.*

[191] *See supra* nn. 167-82 and accompanying text.

> (b) Whether the verdict is in excess of verdicts involving comparable injuries to similarly situated plaintiffs;
>
> (c) Whether there were any extraordinary circumstances in the record to account for an award of compensatory damages for noneconomic loss in excess of what was granted by courts to similarly situated plaintiffs, with consideration given to the type of injury, the severity of the injury, and the plaintiff's age at the time of the injury.
>
> (B) A trial court upholding an award of compensatory damages for noneconomic loss that a party has challenged as inadequate or excessive shall set forth in writing its reasons for upholding the award.
>
> (C) An appellate court shall use a de novo standard of review when considering an appeal of an award of compensatory damages for noneconomic loss on the grounds that the award is inadequate or excessive.[192]

This section is designed to discourage *excessive noneconomic damages* even after the damages have been reduced to comply with the cap. After a defense objection to the amount of noneconomic damages awarded, it requires the judge to determine whether the plaintiff's closing arguments inflamed the jury and led to the undue size of the award, to engage in a comparative analysis of the award in relation to awards in other cases involving comparable injuries for comparable plaintiffs, and to identify *extraordinary circumstances* that can explain any departure from the *norm* for comparable injuries. If, after undertaking such an analysis, the judge finds no reason to reduce the award further, the judge must then – and only then – draft written findings. No such findings are necessary if the judge further reduces the award. Thus, for a judge seeking the path of least resistance, even a modest reduction of the jury's verdict will obviate the need to write findings. Finally, the section authorizes *de novo* appellate review of the final award.

1. The Legislature Cannot Establish Criteria for Reexamination of a Jury Verdict

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[192] Ohio Rev. Code Ann. § 2315.19 (Anderson 2005).

The first requirement, scrutinizing whether the jury was inflamed, went after a deep-pocket defendant, or sought to punish a defendant by enlarging the compensatory award, generally does not require the judge to do anything that is not part of existing excessiveness review already,[193] though it turns that review on its head. Normally, a judge reviews an allegedly excessive verdict to determine if a reasonable jury, reviewing the evidence adduced, could have reached the conclusion of this jury.[194] Ohio precedent holds that a jury's verdict is presumptively valid, unless the contrary appears upon the record.[195] Moreover, courts sustain a general verdict unless it is clearly inconsistent with any theory relevant to the issues before the court, as long as there is evidence to support the result.[196]

Amended Substitute Senate Bill 80 departs from this time-tested and constitutionally compelled approach by mandating that the trial judge not view the evidence as a whole from the perspective of the rational juror, but from a specific set of legislatively selected issues in isolation from the other evidence. The result undermines the jury's role as trier of fact, while also denigrating the judge's control over the conduct of the trial.

In fact, the reexamination mandated by Section 1215.19, while framed in traditional passion-and-prejudice language, misapprehends the jury's constitutional role. Under Ohio law, an excessive verdict caused by passion and prejudice requires the trial court to grant a new trial,[197] not to substitute its judgment for that of the jury. An excessive verdict that is not the product of passion or prejudice permits the court to reduce the verdict by remittitur to an amount warranted by the evidence.[198] Remittitur, however, requires the consent of the plaintiff, otherwise a new jury trial must be ordered.[199] Critically, it is the plaintiff's consent, and not the defendant's,

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[193] Ohio utilizes four criteria to determine whether to order a remittitur: (1) unliquidated damages were assessed by a jury; (2) the verdict was not influenced by passion or prejudice; (3) the award was excessive; and (4) the plaintiff agreed to the reduction in damages. *Dardinger v. Anthem Blue Cross & Blue Shield*, 781 N.E.2d 121 (Ohio 2002). When a verdict is influenced by passion or prejudice, the remedy is a new trial. *Litchfield v. Morris*, 495 N.E.2d 462 (Ohio App. 10th Dist. 1985).

[194] *Hartzler v. Licking County Humane Soc.*, 740 F. Supp. 470 (S.D. Ohio 1990). That standard is no different from the one articulated by the U.S. Supreme Court for excessiveness review:

> There may not be much practical difference between review that focuses on "passion and prejudice," "gross excessiveness," or whether the verdict was "against the great weight of the evidence." All these may be rough equivalents of the standard this Court articulated in Jackson v. Virginia, [443 U.S. 307, 324 (1979)] (whether "*no rational trier of fact could have" reached the same verdict*).

Honda Motor Co., 512 U.S. at 432 n.10 (parenthetical in original; emphasis added).

[195] *Prudential Ins. Co. of Am. v. Hashman*, 454 N.E.2d 149 (Ohio App. 4th Dist. 1982); *Dworken v. Loudenslager*, 51 N.E.2d 207 (Ohio App. 2d Dist. 1943); *McCrary v. Jones*, 39 N.E.2d 167 (Ohio App. 2d Dist. 1941).

[196] *Miller v. Johnson*, 123 N.E.2d 61 (Ohio App. 2d Dist. 1953).

[197] *See* 30 Ohio Jur. 3d *Damages* § 157 (2003).

[198] *Id.*

[199] *Lance v. Leohr*, 459 N.E.2d 1315, 1316 (Ohio App. 9th Dist. 1983).

that is necessary.[200]

Any other approach, including Section 2315.19's scheme, denies the plaintiff the benefit of a constitutionally guaranteed jury trial. It authorizes a trial court to "enter judgments in disregard of the jury's verdict and thus violate the plaintiff's right to have all facts determined by the jury, including damages."[201] In essence, Section 2315.19 makes the same error that the Ohio Supreme Court condemned in *Zoppo v. Homestead Insurance Co*.[202] There, the legislature reassigned responsibility for determining the amount of punitive damages to the judge, when that determination had always been within the jury's exclusive province. The Court flatly declared that a law that "impairs the traditional function of the jury in determining the appropriate amount of damages . . . [and] voliates the right to trial by jury."[203] The new statute similarly impairs that function by allowing the judge to displace the jury's determination.

It also invades the judicial authority of the trial judge. Broad discretion in the conduct of trials is a universally-acknowledged, time-honored tradition that constitutes the essence of judicial power.[204] The trial judge, of course, is in the best position to determine whether the evidence supports the verdict, regardless of whatever other evidence or improper argument may have entered the courtroom and must determine whether any prejudicial effect tainted the jury's verdict.[205] While the new statutory provision permits a trial judge to make those determinations, it is infested with suggestions that a lesser award is preferable by putting a laser-like focus on a handful of factors that may not have had any discernible effect on the overall results. Respect for the constitutional role of juries, however, establishes that any preference should be weighted in favor of the jury's verdict. A trial judge's understanding of the whole trial and determination that the jury's verdict is not against the weight of the evidence should have the respect that is normally accorded through abuse of discretion review. Section 2315.19 discards that respect by requiring written justification only if the trial judge upholds the verdict and then imposes *de novo* appellate review. It abridges the authority that is inherently vested in a trial judge.

2. Comparability Has No Role in Excessiveness Review of Compensatory Damages

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[200] *Id.*
[201] *Sorrell*, 633 N.E.2d at 510.
[202] 644 N.E.2d 397.
[203] *Id*. at 401.
[204] *State ex rel. Butler v. Demis*, 420 N.E.2d 116, 119 (Ohio 1981); *Maddex v. Columber*, 151 N.E. 56, 57 (Ohio 1926).
[205] *See e.g. Cooper Indus. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 440 (2001) (recognizing the *superior vantage* point that trial courts have in evaluating evidence, particularly those issues turning on witness credibility and demeanor).

In adopting an approach that requires noneconomic damage awards in similar cases be compared in order to determine excessiveness, the legislation attempts to import the unsatisfactory template that the U.S. Supreme Court has adopted for punitive damages[206] and applies them to compensatory damages. In *BMW of North America, Inc. v. Gore*,[207] the Court found that grossly excessive punitive damage awards violate the due process rights of defendants. To determine whether such a gross violation has occurred, the Court enunciated three criteria: 1) Is the punitive award grossly excessive in light of the reprehensibility of the defendant's misconduct?; 2) Is the disparity between the harm or potential harm to the plaintiff and the amount of punitive damages excessive?; and 3) Is the punitive award comparable to civil damages or punitive awards in similar cases?[208]

The third *Gore* factor is a comparability test. While having some validity in the federal punitive damages regime, where the jury's determination of damages is not binding at the federal level, it cannot be valid at the state level where the jury-trial right attaches, particularly with respect to any form of compensatory damages. The *Gore* factors were employed for a singular due process purpose: to provide fair notice of the punishment possible for the egregious misconduct subject to punitive damages.[209] Thus, the Court noted that "[e]lementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose."[210] The same *notions of fairness* do not demand similar predictability in the types of compensatory damages misconduct might entail. Instead, compensatory damages must, as best as monetary damages can, make the victim whole. That requires an individualized determination of damages based on facts presented at trial.

It is beyond dispute that a defendant is liable for the "natural, proximate and probable consequences" for any injury for which the defendant was the proximate cause.[211] Thus, for example, where a defendant negligently injures a person, causing them to lose wages, comparisons to assure some form of equity does not take place between two similarly injured plaintiffs, when one earns minimum wage and the other earns $250,000 a year. Each will be compensated according to their loss.

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[206] For a well-considered critique of the path that the Court has undertaken, *see* Jeffrey R. White, *State Farm and Punitive Damages: Call the Jury Back*, 5 J. High Tech. L. 79 (2005).
[207] 517 U.S. 559 (1996).
[208] *Id.* at 574-75.
[209] *Id*. at 574.
[210] *Id*.
[211] *Brothers v. Youngstown*, 685 N.E.2d 822, 826 (Ohio App. 7th Dist. 1996) (citing 30 Ohio Jur. 3d, *Damages* § 12 (1981)).

The same differences are inherent in the type and scope of noneconomic loss each person suffers – even for similar injuries. The same injuries can engender vastly different pain and suffering and vastly different impact on life activities. And contrary to the implications of those advocating comparability for noneconomic damages, economic damages cannot be assessed with any greater certainty than noneconomic damages.[212] They each require individualized determinations. As one commentator, Professor JoEllen Lind, a critic of comparability analysis, put it:

> [P]ain and suffering and emotional distress affect the most unique aspects of our being and cannot in principle be equated from case to case. Comparability review ignores this difficulty. It rests instead on a discredited form of utilitarianism, one that treats the internal states of different individuals as virtually the same. In this way, it flies in the face of our intuitive sense of self and the law's fundamental assumption that separate persons are juridically basic entities.[213]

She adds that "the actual process of comparing awards is so crude that it increases the arbitrariness of damages," rather than renders them more consistent and predictable.[214] Instead, it is the current method of determining noneconomic damages that appears to "generally meet the criteria of results produced through a legitimate, if less than perfect, decision process."[215] Professor Lind then concludes that:

> Comparability review allows federal appellate tribunals to reconstitute themselves into legislators or technocrats under the guise of promoting fairness, efficiency, and legitimacy. But, none of these goals are actually promoted by the practice.[216]

A related problem with comparability review is its discriminatory impact on the verdicts given to women, minorities, children, and the elderly, partially because these categories of plaintiffs either suffer from income inequality or have no income at all, resulting in a heavier reliance upon noneconomic damages to compensate them for their injuries. Perhaps the most substantial research on the discriminatory impact of noneconomic

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[212] *See e.g.* Frank A. Sloan et al., *Suing for Medical Malpractice* (U. Chi. Press 1993); Randall Bovbjerg et al., *Juries and Justice: Are Malpractice and Other Personal Injuries Created Equal?* 54 L. & Contemp. Probs. 5 (1991).
[213] JoEllen Lind, *The End of Trial on Damages? Intangible Losses and Comparability Review*, 51 Buff. L. Rev. 251, 253 (2003).
[214] *Id.* at 258.
[215] *Id.* at 335.
[216] *Id.* at 259.

damage caps has focused on its effect on women claimants. Comparability analysis suffers the same discriminatory-impact flaw. Recent scholarship by Professor Lucinda Finley examined the issue in the context of California's Medical Injury Compensation Reform Act,[217] which limits noneconomic damages in medical malpractice cases to $250,000. Using California jury verdict reporters, Professor Finley examined jury verdicts in medical malpractice cases from 1992 to 2002 in which plaintiffs prevailed and were awarded damages in excess of the cap.[218] She found that "women's pre-cap median jury award was 94% of the men's median," and "women's [post-cap] median was down to 58.6% of the male median."[219] She also discovered that the average compensatory awards to male plaintiffs were significantly higher than the awards to female plaintiffs even before the $250,000 noneconomic damage cap applies.[220] Women on average recovered only "52% of men's average awards."[221] After application of the cap, the disparities in awards increased noticeably: "women on average recovered only 45% of men's average recoveries."[222] Even greater gender disparities were found in medical negligence cases that resulted in death. Post-cap, the female median recovery was only 71.3% of the male median, and women's average recovery was 51.7% of the average male.[223]

Other researchers found similar results in other jurisdictions. Two found that in the 21 states that capped noneconomic damages at the time, women in medical malpractice actions:

> were almost *three times* more likely to include a pain and suffering component as those given to men. The typical pain and suffering verdict awarded to a female in our sample was twice as large as that given to a male. The median pain and suffering award for the ninety-six women who received this form of redress was exactly $100,000, while the median for the thirty-three men was $50,000.[224]

They determined that women received a disproportionate number of noneconomic damages awards because of the gendered nature of injuries. For example,

> [n]early nine out of every ten victims of sexual abuse by medical providers were female. The only compensable

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[217] Cal. Civ. Code Ann. § 3333.2 (LEXIS 2003).
[218] Finley, *supra* n. 12, at 1284.
[219] *Id.* at 1286.
[220] *Id.* at 1285-86.
[221] *Id.*
[222] *Id.*
[223] *Id.* at 1291.
[224] Thomas Koenig & Michael Rustad, *His and Her Tort Reform: Gender Injustice in Disguise*, 70 Wash. L. Rev. 1, 84-85 (1995) (emphasis added).

> injury in most of these sexual abuse cases was emotional "pain and suffering." Elderly women in nursing home cases generally receive only noneconomic damages because they have no present or future earnings to lose. Most housewife victims of incompetent cosmetic surgery have few direct economic losses. Pain and suffering, mental anguish, and loss of consortium are disparately awarded to women in order to reimburse for reproductive injuries. Verdicts compensating for the emotional distress caused by the fear of possible future disability from breast implants or permanent disfigurement from the removal of implants typically include little in economic damages.[225]

Professor Finley further notes:

> Several types of injuries that are disproportionately suffered by women – sexual assault, reproductive harm, such as pregnancy loss or infertility, and gynecological medical malpractice – do not affect women in primarily economic terms. Rather, the impact is felt more in the ways compensated through noneconomic loss damages: emotional distress and grief, altered sense of self and social adjustment, impaired relationships, or impaired physical capacities, such as reproduction, that are not directly involved in market based wage earning activity. Many of these most precious, indeed priceless, aspects of human life are virtually worthless in the market, and there is social resistance to seeing them solely or primarily in commodified, market-based terms.[226]

The inescapable conclusion from this research is that noneconomic damages uniquely and disproportionately compensate women for losses that they alone suffer and constitute a larger proportion of their compensatory damages. The same injuries affect women differently from men and differently from one another. Comparability analysis would compound the discriminatory effects that are inherent in noneconomic damage caps.

The same income inequalities that drive the discriminatory impact on gender also fuel the discriminatory effects of caps on the basis of race. It cannot be gainsaid that such racial income inequalities exist.[227] Thus, as

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[225] *Id.* at 85.
[226] Finley, *supra* n. 12, at 1281.
[227] *See e.g.* Christopher Edley, Jr., *Not All Black and White: Affirmative Action, Race, and American Values* 43 (Hill & Wang Pub. 1996) (reporting that census data on the income of families with one full-time wage earner establishes that the median income of African-Americans is about sixty percent of the median income of whites).

with women, noneconomic damages make up a higher percentage of racial minorities' compensatory awards than those whose incomes are higher.

The income disparity that exists for minorities is compounded by differences in the quality and availability of health care. The Institute of Medicine at the National Academy of Sciences published a 2002 report that found that sophisticated diagnostic tests and treatments were less likely to be utilized in facilities serving minority populations than those serving non-minorities, while less desirable procedures were more frequently employed.[228] Similarly, the federal Agency for Healthcare Research and Quality found racial and ethnic minorities less likely to receive appropriate cancer, cardiac, diabetes, pediatric, or surgical care.[229]

These disparities may explain the findings of Harvard University researchers that incidents of adverse events and medical errors are more pronounced in hospitals that serve predominantly minority populations.[230] Thus, capping noneconomic damages not only undermines the deterrent effect of malpractice accountability, but also has a clear and decidedly adverse impact on minorities and their comparative recoveries for negligently received medical injuries.

Other segments of the population are also adversely affected. Because the elderly often live on fixed and limited incomes and children generally do not have income of any substantial kind, income disparities also account for the discriminatory effect damage caps or comparability analyses have on these categories of claimants. For example, with respect to the elderly, age sixty-five or older, Professor Finley reported that, on average, noneconomic damages for elderly female patients in medical negligence cases that did not result in death were reduced an average of 31.7% by a cap of $250,000.[231] The median recovery for elderly women after application of the cap was 53.7% of the pre-capped amount; the recovery for elderly men was 72.8% of the pre-cap median.[232]

A cap's disparate impact on youth is also glaringly evident. The Wisconsin Supreme Court recently observed that "[y]oung people are most affected by the [state's] $350,000 cap on noneconomic damages, not only because they suffer a disproportionate share of serious injuries from medical malpractice, but also because many can expect to be affected by their

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[228] Inst. of Med., *Unequal Treatment: Confronting Racial and Ethnic Disparities in Health Care* 5 (2002).
[229] Agency for Healthcare Research and Quality, *Addressing Racial and Ethnic Disparities in Health Care*, http://www.ahrq.gov/research/disparit.htm (accessed Jan. 11, 2006).
[230] Harvard Med. Prac. Study, *Patients, Doctors and Lawyers: Medical Injury, Malpractice Litigation, and Patient Compensation in New York* (Pres. and Fellows of Harvard College 1990).
[231] *Id.* at 1289.
[232] *Id.*

injuries over a sixty- or seventy-year life expectancy."[233] Similarly, a 1992 report by the Wisconsin Commissioner of Insurance found that children from ages zero to two with medical malpractice injuries comprise less than ten percent of all malpractice claims, yet their claims comprise a disproportionately large portion of the paid claims due to the severity of their injuries.[234] Thus, "plaintiffs with the most severe injuries appear to be at the highest risk for inadequate compensation. Hence, the worst-off may suffer a kind of 'double jeopardy' under caps."[235]

Perhaps even greater inequities are created by the cap in cases where an infant or child has died as a result of malpractice. Professor Finley's research found that an eighty percent reduction was experienced by families of dead babies and children or a seventy-nine percent reduction in the median award.[236] The cap also limited access to justice because the cap created a disincentive to expend the necessary resources in expert witness fees, depositions, and time to prosecute these complex cases, even though the injuries were among the most serious one could suffer, rendering the cap a form of triple jeopardy.[237]

Rather than alleviate disparities, comparability analysis will exacerbate them because of inherent disparities in the manner in which noneconomic damages compensate different people in different demographic categories, as well as within those categories.

Finally, comparability analysis also suffers the same flaw that the legislation's caps regime does: it disparages the jury's role and determinations and subjects their verdict to unconstitutional revision.

3. *De Novo* Review of Compensatory Damages Violates the Right to a Jury Trial

Section 2315.19 compounds its constitutional error by providing for *de novo* appellate review of the damage award. The provision is obviously patterned after the U.S. Supreme Court's decision in *Cooper Industries, Inc. v. Leatherman Tool Group, Inc*.[238] *Cooper* held that federal district court assessments of punitive damage awards for excessiveness were subject to *de novo*, rather than abuse of discretion, appellate review.[239] Examining the three *Gore* factors, as well as whether a trial or appellate court might be in a

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[233] *Ferdon*, 701 N.W.2d at 466.
[234] *Id.* (citing Off. of the Commr. of Ins., *Wisconsin Health Care Liability Insurance Plan: Preliminary Report on Medical Malpractice in Wisconsin*, Special Report 16, 30, 38 (1992)).
[235] David Studdert et al., *Are Damages Caps Regressive? A Study of Malpractice Jury Verdicts in California*, 23 Health Affairs 54, 65 (2004).
[236] Finley, *supra* n. 12, at 1293.
[237] *Id.* at 1295.
[238] 532 U.S. 424 (2001).
[239] *Id.* at 431.

better position to make those determinations, the *Cooper* Court found that "[c]onsiderations of institutional competence therefore fail to tip the balance in favor of deferential appellate review."[240] In reaching that decision, the Court overturned more than a century of jurisprudence that had recognized punitive damages fell within the jury's authority to assess. In 1851, the Court had called it a "well-established principle of the common law" that:

> In many civil actions . . . the damages assessed depend on the circumstances, showing the degree of moral turpitude or atrocity of the defendant's conduct, and may properly be termed exemplary or vindictive rather than compensatory . . . . This has been always left to the discretion of the jury, as the degree of punishment to be thus inflicted must depend on the peculiar circumstances of each case.[241]

Based on its venerable nature, the Court subsequently concluded, both in 1886 and 1983, that the assessment of punitive damages was "the peculiar function of the jury."[242]

The *Cooper* Court, however, came to a different conclusion. First, it decided that the discretion accorded juries in assessing punitive damages did not mean that the punitive verdict was a fact within the jury's preeminent authority to find,[243] but instead merely an expression of the community's "moral condemnation."[244] As if not convinced of its own argument, however, the Court added: "In any event, punitive damages have evolved somewhat."[245] The Court found that punitive damages once performed a compensatory function that has now been supplanted by new forms of damages, tacitly including noneconomic damages.[246] Because punitive damages had "evolved" and no longer performed a compensatory function,[247] the Court held that a different analysis applied that permitted the judge and appellate court a larger role. The Court also viewed punitive damages as quasi-criminal, thereby treating non-jury authority over the size of the awards as comparable to that maintained over criminal sentencing.[248]

De novo review of punitive awards is only possible under *Cooper* because the Court determined, as a matter of federal constitutional law, that

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[240] *Id.* at 440.
[241] *Day v. Woodworth*, 54 U.S. 363, 371 (1851).
[242] *Barry*, 116 U.S. at 565; *see also Smith v. Wade*, 461 U.S. 30, 34 (1983).
[243] *Cooper*, 532 U.S. at 437 n. 10.
[244] *Id.* at 432.
[245] *Id.* at 437 n. 11.
[246] *Id.*
[247] *Id.* For a critique that demonstrates the Court's ahistorical understanding of punitive damages and why it does not serve as a justification for the Court's abandonment of Seventh Amendment analysis of the jury function in punitive damages, *see* Anthony J. Sebok, *What Did Punitive Damages Do? Why Misunderstanding the History of Punitive Damages Matters Today*, 78 Chi.-Kent L. Rev. 163 (2003).
[248] *Cooper*, 532 U.S. at 432.

the right to a jury trial does not include the assessment of punitive damages. States, applying their independent constitutional jury-trial guarantee, need not follow in lockstep with the Supreme Court's approach.[249] Ohio, for example, has not retreated from its longstanding precedent that gives the jury dominion over the assessment of punitive damages.[250]

Still, the U.S. Supreme Court never suggested that *de novo* review of noneconomic damages could be undertaken, consistent with the Seventh Amendment. Instead, the Court took pains to establish the opposite proposition. Adopting Justice Scalia's dissenting view in *Gasperini v. Center for Humanities, Inc.*,[251] that "the level of punitive damages is not really a 'fact' 'tried' by the jury,"[252] the Court contrasted that with "the measure of actual damages suffered, which presents a question of historical or predictive fact . . . ."[253] The Court identified two different distinct purposes served by compensatory and punitive damages:

> The former are intended to redress the concrete loss that the plaintiff has suffered by reason of the defendant's wrongful conduct . . . . The latter, which have been described as "quasi-criminal," operate as "private fines" intended to punish the defendant and to deter future wrongdoing. A jury's assessment of the extent of a plaintiff's injury is essentially a factual determination, whereas its imposition of punitive damages is an expression of its moral condemnation.[254]

The Court concluded that only "[b]ecause the jury's award of punitive damages does not constitute a finding of 'fact,' [*de novo*] appellate review of the District Court's determination that an award is consistent with due process does not implicate . . . Seventh Amendment concerns . . ."[255] To demonstrate even further solicitude for the jury's constitutional role, the Court found that "nothing in our decision today suggests that the Seventh Amendment would permit a court, in reviewing a punitive damages award, to disregard such jury findings," that established facts that support the size of the punitive damage award.[256] Such jury findings supporting the award could be established through special interrogatories.[257]

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[249] *See Horton Homes, Inc. v. Brooks*, 832 So.2d 44, 59-60 (Ala. 2001) (Moore, C.J., dissenting), *cert. denied sub nom.*, *S. Manufactured Homes, Inc. v. Brooks*, 535 U.S. 1054 (2002).
[250] *See Sheward*, 715 N.E.2d at 1090-91; *Roberts v. Mason*, 10 Ohio St. 223, 225 (1859).
[251] 518 U.S. 415 (1996).
[252] *Cooper*, 532 U.S. at 437 (citing *Gasperini*, 518 U.S. at 459 (Scalia, J., dissenting)).
[253] *Gasperini*, 518 U.S. at 459 (citing *St. Louis, I.M. & S.R. Co. v. Craft*, 237 U.S. 648 (1915)).
[254] *Cooper*, 532 U.S. at 432.
[255] *Id.* at 437.
[256] *Id.* at 440 n.12.
[257] *See* Fed. R. Civ. P. 49(B).

The same respect that the Supreme Court accorded for the jury's constitutionally assigned fact-finding role is not found in Amended Substitute Senate Bill 80. By authorizing *de novo* appellate review of noneconomic damages, the statute authorizes an appellate court to reweigh the evidence and substitute its factual determinations for that of the jury. It repeats the erroneous approach to appellate review that acting Governor Colden asserted in *Forsey v. Cunningham*, from which even royal prerogative retreated.[258] It is black-letter law in Ohio that evidence must be viewed by an appellate court consistently with the verdict and the judgment, if it is at all capable of such a view.[259] Reviewing courts are properly reluctant to disturb a verdict where discretion is the touchstone of that verdict, even if the appeals judges would have reached a different, lesser verdict.[260] The statutory endorsement of *de novo* review upends this tradition, despite its grounding in the constitutional right to a jury trial.

IV. CONCLUSION

Ohio's latest versions of noneconomic damage caps, including its attempt to institute comparability analysis and *de novo* appellate review, breaks no new ground and should receive the same fate as its predecessors: invalidation. As with all previous damage caps rejected by the Ohio courts, it attempts to displace the jury's constitutional role to assess damages with a legislative judgment and seeks to make the judiciary the legislature's accomplice in the task. The exercise of judicial power by the legislature in this fashion is nothing less than donning the mantle of super-judiciary, a role that separation of powers was designed to foreclose. Fortunately, the Ohio Constitution and a wealth of precedents provide an emphatic rebuttal to this ill-considered scheme.

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[258] *See supra* nn. 110-31 and accompanying text.
[259] *Stokes v. Meimaris*, 675 N.E.2d 1289 (Ohio App. 8th Dist. 1996).
[260] *See Knutzen Motor Trucking Co. v. Steiner*, 166 N.E. 243 (Ohio App. 5th Dist. 1929).