

TORT REFORM: WOULD A NONECONOMIC DAMAGES CAP BE CONSTITUTIONAL, AND IS ONE NECESSARY IN IOWA?

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I. INTRODUCTION

A construction worker begins his day, like any other, driving to that

day's worksite sipping on a cup of coffee.¹ He arrives and begins his work. Today he is using a nail gun to build the frame of the house he is constructing. The worker raises the nail gun over his head and presses the firing mechanism. Instead of one nail piercing the wood, a series of three nails are discharged one after another. The second nail strikes the steel of the first, causing the firing end of the gun to recoil towards the worker's face. The third nail then fires, penetrating the worker's brain. As a result of the injuries, a portion of the worker's brain is surgically removed. The worker now suffers from diminished mental and emotional capacity, paralysis in his left arm and leg, an inability to live independently, and a radical personality change. His life will never be the same. The worker is a husband, father, and friend to many. The nail gun manufacturer is determined to be at fault, and the jury returns a verdict in excess of nine million dollars for the worker and his wife. This jurisdiction's noneconomic damages² cap reduces the award for each plaintiff to \$500,000.³ Should this damage award be reduced?

"Because of excessive litigation, everybody pays more for health care, and many parts of America are losing fine doctors[; n]o one has ever been healed by a frivolous lawsuit."⁴ "I urge . . . Congress to pass medical liability reform."⁵ President George W. Bush's words, spoken during his 2003 State of the Union Address, sparked the busiest year for tort reform since 1995.⁶ On the national scene, the House of Representatives passed legislation that sought to limit noneconomic damage recovery to \$250,000,⁷

1. The following factual scenario is taken from *Lakin v. Senco Prods., Inc.*, 987 P.2d 463, 466-67 (Or. 1999).

2. Noneconomic damages generally refers to "subjective, nonmonetary losses, including but not limited to pain, mental suffering, emotional distress, humiliation, injury to reputation, loss of care, comfort, companionship and society, loss of consortium, inconvenience and interference with normal and usual activities apart from gainful employment." OR. REV. STAT. § 31.710(2)(b) (2003).

3. See *Lakin v. Senco Prods., Inc.*, 987 P.2d at 474 (finding Oregon's statutory cap unconstitutional because it took away from the jury's right to decide the case).

4. President George W. Bush, State of the Union Address (Jan. 28, 2003), in 149 CONG. REC. H212 (daily ed. Jan. 28, 2003), available at <http://whitehouse.gov/news/releases/2003/01/20030128-19.html>.

5. *Id.*

6. See *20 States Have Enacted Tort Reforms This Year*, INS. J., Aug. 4, 2003, at 9, 9, available at <http://www.insurancejournal.com/magazines/west/2003/08/04/features/31359.htm> (illustrating that by July of 2003, twenty states had already enacted laws attempting to curb tort recoveries, already surpassing the number of laws passed in 1995).

7. 149 CONG. REC. H1871 (daily ed. Mar. 13, 2003).

only to see it rejected with a 49-48 vote by the Senate on July 10, 2003.⁸ However, there have been indications that the same or a similar bill will be back in front of Congress soon.⁹ In Iowa, Governor Tom Vilsack invoked his controversial line-item veto power to overturn tort reform legislation that would have capped punitive damage awards at \$250,000.¹⁰ The hottest of these tort reform issues sweeping across America is caps on noneconomic damages.¹¹ Most recently, on March 10, 2004, the Iowa House of Representatives endorsed House file 2440, a bill which would cap noneconomic damages in medical negligence cases at \$250,000.¹²

Part II of this Note begins with an overview analyzing how jurisdictions outside Iowa have dealt with caps on noneconomic damages, including a discussion on states that have upheld the caps as constitutional and states that have overturned caps as unconstitutional. Part III considers how the Iowa Supreme Court has analyzed the constitutionality of other tort reform issues and then applies that logic to a hypothetical noneconomic damages statute. Finally, Part IV addresses whether a noneconomic damages cap is necessary in Iowa considering the litigation climate in the state, the insurance costs, and a sample of jury verdicts from Polk County.

II. OVERVIEW

Constitutional challenges to caps on damages can take many different forms. Generally, the statutes are challenged as violating some right

8. *U.S. Senate Says No to Tort Reform Bill*, MED. MALPRACTICE L. & STRATEGY (L.J. Newsletters, Phila., Pa.), July 2003, at 6, 6.

9. *See 20 States Have Enacted Tort Reforms This Year*, *supra* note 6, at 9 (indicating that Senate Majority Leader Bill Frist has indicated the bill will be brought back in the fall of 2003).

10. *See Iowa Pols Sue Gov for Veto of WC & Tort Reforms*, INS. J., Aug. 7, 2003, available at <http://www.insurancejournal.com/news/newswire/midwest/2003/08/07/31266.htm> (showing that a lawsuit has been filed against the governor for vetoing portions of HF 692 that dealt with tort reform).

11. U.S. CHAMBER INST. FOR LEGAL REFORM, 2003 U.S. CHAMBER OF COMMERCE STATE LIABILITY SYSTEMS RANKING STUDY 11 (2003), available at <http://www.instituteforlegalreform.org/resources/IRLLiabilityStudy.pdf> (showing that twenty-five percent of the respondents to the survey chose capping damages as the leading issue for improving the litigation environment in their state, up from four percent the previous year and nineteen percent believed tort reform was the leading issue).

12. Lynn Okamoto, *House Backs Medical Malpractice Caps*, DES MOINES REG., Mar. 11, 2004, at 4B.

protected under a particular state's constitution.¹³ These statutes have been claimed to violate equal protection, substantive due process, the right to trial by jury, the right of open access to the courts, special legislation clauses, and the doctrine of separation of powers.¹⁴

A. Equal Protection and Substantive Due Process Challenges

Equal protection has been characterized as prohibiting “class legislation arbitrarily discriminatory against some and favoring others in like circumstances.”¹⁵ Thus, an equal protection argument can be made by claiming that caps on damages divide tort victims into two categories, those who recover fully and plaintiffs who have been seriously injured but do not fully recover.¹⁶ The argument is then advanced by claiming that those parties who do not fully recover have been arbitrarily discriminated against.¹⁷ For example, Barbara Moore, the plaintiff in *Moore v. Mobile Infirmary Ass'n*,¹⁸ argued that a damages cap statute favored those health care providers whose actions were the most egregious and created class legislation by allowing full recovery to some, while limiting the recovery for

13. See, e.g., *McGuire v. C & L Rest. Inc.*, 346 N.W.2d 605, 613 & n.10 (Minn. 1984) (holding that imposing a cap on damages under the Civil Damage Act to recoveries against intoxicating liquor vendors, but not 3.2 beer vendors, violated the Equal Protection Clauses of both the federal and state constitutions).

14. See, e.g., *Evans ex rel. Kutch v. State*, 56 P.3d 1046, 1050-57 (Alaska 2002) (holding that the Alaska statute capping damages does not violate the above mentioned rights); 3 ATLA'S LITIGATING TORT CASES § 29:20, at 29-67 (Roxanne Barton Conlin & Gregory S. Cusimano eds., 2003) (stating that “a growing number of courts around the country” have found such statutes to violate state constitutional rights); Monique A. Anawis, *Presentation: Tort Reform 2003*, 6 DEPAUL J. HEALTH CARE L. 309, 316-17 (2003) (identifying as challenges to damage caps “the ‘open courts provision,’ . . . the prohibition against ‘special legislation,’ . . . the right to a jury trial, and . . . the separation of powers doctrine”); Steve Fox, Note, *Constitutional Roadblocks to Michigan's Cap on Non-Economic Damages in Product Liability Suits*, 47 WAYNE L. REV. 1385, 1389-93 (2002) (highlighting numerous challenges to noneconomic damages caps).

15. *Moore v. Mobile Infirmary Ass'n*, 592 So. 2d 156, 165 (Ala. 1991) (quoting Opinion of the Justices, No. 102, 41 So. 2d 775, 777 (Ala. 1949)).

16. See *Arneson v. Olson*, 270 N.W.2d 125, 135-36 (N.D. 1978) (holding that limiting the recovery of the most seriously injured victims violates equal protection under the North Dakota state constitution). *But see Evans ex rel. Kutch v. State*, 56 P.3d at 1052-55 (upholding damages caps vis-à-vis an equal protection claim despite the plaintiff's contention that two classes of successful tort victims are treated differently).

17. See *Moore v. Mobile Infirmary Ass'n*, 592 So. 2d at 157, 167 (addressing the argument that a medical malpractice damages cap of \$400,000 “creates classifications based upon the severity of the injury”).

18. *Moore v. Mobile Infirmary Ass'n*, 592 So. 2d 156.

the most severely injured.¹⁹ The court agreed.²⁰

The level of scrutiny used by courts in analyzing the statutes is very important and many times predetermines whether a given statute will be upheld.²¹ Equal protection and substantive due process inquiries are very common when challenging the constitutionality of caps on noneconomic damages, and on most occasions, because the same standard is used, the two are decided the same.²²

B. *The Right to Trial by Jury Challenges*

“[T]he framers [of the Constitution] intended all citizens who are given a cause of action to have that cause heard and determined by a jury of their peers.”²³ Thus, many challengers of noneconomic damage caps claim that capping damages usurps the jury’s traditional role as the decider of the facts.²⁴ Parties seeking to uphold caps under the right to trial by jury

19. *Id.* at 166-67.

20. *Id.* at 167.

21. *See* ATLA’S LITIGATING TORT CASES, *supra* note 14, § 29:21, at 29-70 (stating that the level of scrutiny applied to these cases is many times “outcome determinative”); Anawis, *supra* note 14, at 315 (“Caps on non-economic damages have been found unconstitutional when either strict scrutiny or intermediate scrutiny has been applied. When the rational basis test is used, caps have been held constitutional.”).

22. A statute that is overturned under equal protection will also likely fail under substantive due process and vice versa because the standard for deciding substantive due process challenges is usually the same as the standard adopted for the equal protection inquiry. *See* *Evans ex rel. Kutch v. State*, 56 P.3d 1046, 1055 (Alaska 2002) (applying a slightly less deferential equal protection standard than substantive due process standard, and concluding that because the statute in question violated the equal protection standard, it violated the substantive due process standard as well); *Arneson v. Olson*, 270 N.W.2d 125, 133-36 (N.D. 1978) (applying intermediate level of scrutiny to both equal protection and due process questions and holding that medical malpractice legislation in question violated both equal protection and due process); *Pulliam v. Coastal Emergency Servs. of Richmond, Inc.*, 509 S.E.2d 307, 318 (Va. 1999) (applying identical rational basis standard to due process and equal protection violation claims and holding that the plaintiff suffered neither denial of due process nor of deprivation of equal protection).

23. *Fox*, *supra* note 14, at 1396 (citing THE FEDERALIST No. 83 (Alexander Hamilton)); *see also* *People v. Bigge*, 297 N.W. 70, 76 (Mich. 1941) (“The right of trial by jury is too firmly established in American jurisprudence to allow it to be whittled away by the legislature . . .”).

24. *See* *Moore v. Mobile Infirmary Ass’n*, 592 So. 2d at 156-65 (overturning a noneconomic damages statute after noting that juries are in place to assess damages for pain, suffering, and other noneconomic damages in personal injury cases). “Maintenance of the jury as a fact-finding body is of such importance and occupies so

claim that “the cap [is] a ‘policy decision’ applied after the jury’s determination, and [does] not constitute a re-examination of the factual question of damages.”²⁵ The court’s decision as to the extent of a jury’s role seems to be the determinative factor in deciding whether caps violate a citizen’s constitutional right to trial by jury.

In *Sofie v. Fibreboard Corp.*,²⁶ the Washington Supreme Court overturned a noneconomic damages cap on the grounds that it violated the plaintiff’s right to trial by jury.²⁷ The plaintiff, Mr. Sofie, suffered from lung cancer caused by his exposure to asbestos while working as a pipe fitter.²⁸ “The testimony indicated that Mr. Sofie spent what remained of his life waiting for the next ‘morphine cocktail,’ for the next hot bath, for anything that would lessen his consuming physical agony.”²⁹ After receiving a verdict in excess of one million dollars for pain and suffering and loss of consortium, the trial judge was forced to reduce the noneconomic portion of damages to just over \$125,000, despite the judge’s concession that the jury’s damage award was reasonable.³⁰

In its analysis, the Washington Supreme Court gave the statute implementing the cap every reasonable presumption of constitutionality.³¹ Despite the court’s high level of deference to the state legislature, it found the cap to be in contravention of the Washington Constitution.³² To overturn the cap, the court relied on its own precedent, as well as language taken from interpretations of the Seventh Amendment by the United States Supreme Court.³³

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.” *Lakin v. Senco Prods., Inc.*, 987 P.2d 463, 469 (Or. 1999) (quoting *Dimick v. Schiedt*, 293 U.S. 474, 486 (1935)).

25. *Evans ex rel. Kutch v. State*, 56 P.3d at 1051 (upholding a cap on noneconomic damages) (discussing *Davis v. Omitowoju*, 883 F.2d 1155, 1159-65 (3d Cir. 1989)); *see also Pulliam v. Coastal Emergency Servs. of Richmond, Inc.*, 509 S.E.2d at 312 (holding that once the jury has heard the facts and determined the damages, the constitutional mandate of a trial by jury has been satisfied).

26. *Sofie v. Fibreboard Corp.*, 771 P.2d 711 (Wash. 1989).

27. *Id.* at 723.

28. *Id.* at 713.

29. *Id.*

30. *Id.*

31. *See id.* at 715.

32. *See id.* at 716 (concluding that the state constitution “protects the jury’s role to determine damages”).

33. *E.g., Dimick v. Schiedt*, 293 U.S. 474, 476-88 (1935), *quoted in Sofie v. Fibreboard Corp.*, 771 P.2d at 717.

The *Sofie* court relied in part on *Dimick v. Scheidt*,³⁴ where the United States Supreme Court “used historical analysis to determine whether the Seventh Amendment allowed additur.”³⁵ The United States Supreme Court “found that determining damages . . . was very much within the jury’s province and therefore [was] protected by the Seventh Amendment.”³⁶ “The [Supreme] Court [of the United States] also indicated that a judge should give more deference to a jury’s verdict when the damages at issue concern a noneconomic loss.”³⁷

The Iowa Constitution article I, section 9 provides that “[t]he right of trial by jury shall remain inviolate; but the general assembly may authorize trial by a jury of a less number than twelve men in inferior courts; but no person shall be deprived of life, liberty, or property, without due process of law.”³⁸ This portion of the Iowa Constitution is practically identical to article I, section 21 of the Washington Constitution,³⁹ the provision used to overturn the damages cap in *Sofie*.⁴⁰ Considering that the Washington Supreme Court could not justify a damages cap despite the large amount of deference it gave to its legislature, and the fact that the Iowa and Washington constitutional provisions are nearly identical, one could presume a similar analysis would be undertaken by the Iowa Supreme Court. Whether the outcome would be similar, however, clearly amounts to only speculation.

C. The “Open Courts” Provision

Challenging noneconomic damages caps using the “open courts” provision is best illustrated by an examination of the Florida Supreme

34. *Dimick v. Scheidt*, 293 U.S. 474.

35. *Sofie v. Fibreboard Corp.*, 771 P.2d at 717 (citing *Dimick v. Schiedt*, 293 U.S. at 476-82).

36. *Id.*

37. *Id.*

38. IOWA CONST. art. I, § 9.

39. *Compare id.* (“The right of trial by jury shall remain inviolate; but the general assembly may authorize trial by a jury of a less number than twelve men in inferior courts; but no person shall be deprived of life, liberty, or property, without due process of law.”), with WASH. CONST. art. I, § 21 (“The right of trial by jury shall remain inviolate, but the legislature may provide for a jury of any number less than twelve in courts not of record, and for a verdict by nine or more jurors in civil cases in any court of record, and for waiving of the jury in civil cases where the consent of the parties interested is given thereto.”).

40. *See Sofie v. Fibreboard Corp.*, 771 P.2d at 716 (discussing article I, § 21 of the Washington Constitution).

Court's decision in *Smith v. Department of Insurance*.⁴¹ The Florida legislature sought to cap noneconomic damages at \$450,000.⁴² Smith argued that the cap was contrary to article I, section 21 of the Florida Constitution, which states: "The courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay."⁴³ The court stated that "[a]ccess to [the] courts is granted for the purpose of redressing injuries."⁴⁴ The court continued by claiming that if a plaintiff received a verdict for \$1,000,000 and then the legislature statutorily and arbitrarily capped the damages at \$450,000, that plaintiff does not receive constitutional redress for his injuries, and thus the courts are not open to him.⁴⁵ The court concluded by severing the portion of the legislation pertaining to the damages cap.⁴⁶ Supporters of noneconomic damages statutes rebut this rationale by claiming that caps "do not impede actual access to the courts."⁴⁷ Both arguments are valid. Caps do not provide some plaintiffs a complete remedy, but neither do they completely deny access to the courts.

D. Special Legislation Challenges

A special legislation clause, limiting legislation, may appear in a state constitution. For example, Idaho's special legislation clause, in pertinent part, states: "The legislature shall not pass local or special laws in any of the following enumerated cases, that is to say: . . . Releasing or extinguishing, in whole or in part, the indebtedness, liability or obligation of any person or corporation in this state, or any municipal corporation therein."⁴⁸ In *Kirkland v. Blaine County Medical Center*,⁴⁹ the Idaho Supreme Court had an opportunity to analyze whether a noneconomic damages statute violated this clause.⁵⁰

The court stated that a classification is "special [if it] is arbitrary, capricious, or unreasonable."⁵¹ The plaintiffs contended that the

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41. *Smith v. Dep't of Ins.*, 507 So. 2d 1080 (Fla. 1987).
 42. *Id.* at 1086.
 43. *Id.* at 1087.
 44. *Id.* at 1088.
 45. *Id.*
 46. *Id.* at 1089-90.
 47. *Evans ex rel. Kutch v. State*, 56 P.3d 1046, 1057 (Alaska 2002).
 48. IDAHO CONST. art. III, § 19, cl. 16.
 49. *Kirkland v. Blaine County Med. Ctr.*, 4 P.3d 1115 (Idaho 2000).
 50. *See id.* at 1117-22.
 51. *Id.* at 1120.

noneconomic damages cap was arbitrary and capricious because it “arbitrarily discriminate[d] between slightly and severely injured plaintiffs.”⁵² The court, however, concluded that the statute was a “reasonable attempt by the legislature to address and solve important societal and economic concerns.”⁵³ The court ultimately upheld the statute against the special legislation challenge because the classification was reasonable and the state’s concerns were legitimate.⁵⁴

E. Separation of Powers Challenges

The separation of powers argument against caps asserts that a legislature, by enacting the cap statute, takes away the power of remittitur⁵⁵ from the judiciary.⁵⁶ This power is used by the judiciary only when “the jury verdict is contrary to the manifest weight of the evidence.”⁵⁷ Obviously, this function is one requiring analysis of the particular facts of each case.⁵⁸ The Alaska Supreme Court, rejecting a separation of powers challenge, stated that the action by the legislature was simply a “modification and limitation of causes of action, which is an activity that falls squarely within the legislature’s competence” and therefore the caps

52. *Id.*

53. *Id.*; *see also id.* at 1121 (explaining “that large noneconomic damage awards could drive up the cost of liability insurance” and “[t]hat, in turn, would create a situation where defendants would be unable to respond to judgments for either economic or noneconomic damages,” leaving citizens injured by negligence “with little or no recourse for their injuries”).

54. *Id.*

55. Under the doctrine of remittitur, a trial judge may correct an excessive jury verdict. *Best v. Taylor Mach. Works*, 689 N.E.2d 1057, 1079 (Ill. 1997).

56. *See Evans ex rel. Kutch v. State*, 56 P.3d 1046, 1055 (Alaska 2002) (discussing plaintiff’s argument “that the power of remittitur . . . is an exclusive power of the judiciary that cannot be usurped by the legislature”); *Best v. Taylor Mach. Works*, 689 N.E.2d at 1080-81 (holding that the statutory cap on noneconomic damages is unconstitutional because it infringes on the judicial power of remittitur). The separation of powers argument also generally asserts that a damages cap “usurps judicial power in violation of [a state’s] constitutional doctrine of separation of powers.” *State ex rel. Ohio Acad. of Trial Lawyers v. Sheward*, 715 N.E.2d 1062, 1097 (Ohio 1999).

57. *Omni-Vest, Inc. v. Reichhold Chemicals, Inc.*, 352 So. 2d 53, 54 (Fla. 1977).

58. *E.g.*, *Best v. Taylor Mach. Works*, 689 N.E.2d at 1080 (holding “the application of remittitur should be considered on a case-by-case basis because the evidence and circumstances supporting verdicts must be carefully examined before a jury’s assessment of damages is reduced”).

could not be considered a form of remittitur.⁵⁹ This idea that caps are limitations on causes of action makes little sense: they clearly are limitations on the remedy, not the cause of action.

F. Jurisdictional Split

Courts are split on whether noneconomic damages caps are constitutional. This lack of uniformity extends far beyond determinations of the validity of the statutes; courts finding the cap statutes to be unconstitutional have done so on many different grounds. Currently, the highest courts in Alaska,⁶⁰ Idaho,⁶¹ Maine,⁶² Maryland,⁶³ Missouri,⁶⁴ South Carolina,⁶⁵ Virginia,⁶⁶ West Virginia,⁶⁷ and Wisconsin⁶⁸ have upheld

59. *Evans ex rel. Kutch v. State*, 56 P.3d at 1055 (internal quotation marks omitted).

60. *See id.* at 1049-57 (holding that the challenged noneconomic damages statute was facially valid, despite challenges based on the right to a trial by jury, equal protection, substantive due process, separation of powers, access to courts, and a "special legislation" challenge).

61. *See Kirkland v. Blaine County Med. Ctr.*, 4 P.3d 1115, 1117-22 (Idaho 2000) (holding that the statutory cap on noneconomic damages did not violate the right to a jury trial or separation of powers, and did not constitute special legislation).

62. *See Peters v. Saft*, 597 A.2d 50, 53-54 (Me. 1991) (upholding damages cap against constitutional challenges of equal protection, the right to trial by jury, and the right to a remedy).

63. *See Murphy v. Edmonds*, 601 A.2d 102, 114-18 (Md. 1992) (holding that a \$350,000 cap on noneconomic damages does not violate equal protection or the right to trial by jury).

64. *See Adams ex rel. Adams v. Children's Mercy Hosp.*, 832 S.W.2d 898, 905-08 (Mo. 1992) (holding that a statutory cap on noneconomic damages is constitutional against challenges based on equal protection, open courts, trial by jury, and due process).

65. *See Wright v. Colleton County Sch. Dist.*, 391 S.E.2d 564, 569-70 (S.C. 1990) (holding that the limitation on damages was constitutional against challenges of the right to a trial by jury, separation of powers, equal protection, and the right of a remedy for wrongs sustained).

66. *See Pulliam v. Coastal Emergency Servs., Inc.*, 509 S.E.2d 307, 311-19 (Va. 1999) (upholding the damages caps despite challenges based on the right to a trial by jury, special legislation, the Takings Clause, due process, equal protection, separation of powers, or province of the judiciary).

67. *See Robinson v. Charleston Area Med. Ctr.*, 414 S.E.2d 877, 886-88 (W. Va. 1992) (upholding a damages cap against challenges on equal protection, substantive due process, and the right to a certain remedy).

68. *See Guzman v. St. Francis Hosp., Inc.*, 623 N.W.2d 776, 785-90 (Wis. Ct. App. 2000) (ruling on remand by an equally divided supreme court that a statute capping damages in medical malpractice suits was constitutional and did not violate the

noneconomic damages caps. In contrast, Alabama,⁶⁹ Florida,⁷⁰ Illinois,⁷¹ North Dakota,⁷² Ohio,⁷³ Oregon,⁷⁴ and Washington⁷⁵ have found the caps to be unconstitutional. On September 13, 2003, Texas voters passed an amendment to the Texas Constitution, which effective January 1, 2005, enables the Texas legislature to statutorily limit noneconomic damages awarded in civil suits against health care providers.⁷⁶

The current thrust across the United States towards enacting new and even reintroducing old tort reform statutes, is a cause of concern for many. Obviously, there is a distinct split in the jurisdictions on whether caps on noneconomic damages should be allowed.⁷⁷ Much like it divides the courts, tort reform is an issue that divides the political parties in America.⁷⁸ Focus

right to trial by jury, separation of powers, equal protection, substantive due process, or the right to a remedy clause of the Wisconsin Constitution).

69. See *Moore v. Mobile Infirmary Ass'n*, 592 So. 2d 156, 159-71 (Ala. 1991) (holding a cap on noneconomic damages unconstitutional because it violated equal protection and the right to a jury trial).

70. See *Smith v. Dep't of Ins.*, 507 So. 2d 1080, 1087-89 (Fla. 1987) (holding a noneconomic damages cap unconstitutional because it denied plaintiffs access to the courts and because the Florida Constitution provides "a right to sue on and recover noneconomic damages of any amount").

71. See *Best v. Taylor Mach. Works*, 689 N.E.2d 1057, 1066-81 (Ill. 1997) (holding a noneconomic damages cap unconstitutional under the Illinois Constitution because the statute was "special legislation" and also violated the separation of powers clause by stripping the judiciary of the power of remittitur).

72. See *Arneson v. Olson*, 270 N.W.2d 125, 135-36 (N.D. 1978) (holding a damages cap unconstitutional under the North Dakota Constitution because it did not provide adequate compensation for seriously injured plaintiffs, and, thus, violated equal protection principles).

73. See *State ex rel. Ohio Acad. of Trial Lawyers v. Sheward*, 715 N.E.2d 1062, 1096, 1102 (Ohio 1999) (holding a statute capping noneconomic damages unconstitutional because it usurps judicial power in violation of the doctrine of separation of powers and because the statute violated a constitution provision requiring each bill passed by the state legislature to contain a single subject).

74. See *Lakin v. Senco Prods., Inc.*, 987 P.2d 463, 474-75 (Ore. 1999) (holding a noneconomic damages statute unconstitutional because it removes the "inviolable" right to trial by jury).

75. See *Sofie v. Fibreboard Corp.*, 771 P.2d 711, 716-19 (Wash. 1989) (holding a noneconomic damages statute unconstitutional under the Washington Constitution because the measure of damages is a question of fact that should be decided by the jury and limiting these damages violates the right to trial by jury).

76. TEX. CONST. art. 3, § 66. Legislative exercise of this amendment "requires a three-fifths vote of all the members elected to each house." *Id.* § 66(e).

77. See cases cited *supra* notes 59-76 and accompanying text.

78. See *U.S. Senate Says No to Tort Reform Bill*, MED. MALPRACTICE L. & STRATEGY (L.J. Newsletters, Phila., Pa.) July 2003, at 6, 6 (indicating that the vote in

will now be shifted to analyze how the Iowa courts would react to a cap on noneconomic damages, taking into consideration a sampling of other Iowa tort reform cases.

III. WOULD A NONECONOMIC DAMAGES STATUTE BE HELD CONSTITUTIONAL IN IOWA?

Legislatures across the nation that have enacted caps on noneconomic damages seem to use very similar language. An example of such a statute follows:

[I]n any civil action seeking damages arising out of bodily injury, including emotional injury or distress, death or property damage of any one person including claims for loss of care, comfort, companionship and society and loss of consortium, the amount awarded for noneconomic damages shall not exceed \$500,000.⁷⁹

The major difference in the statutes of various states is the monetary amount that damages may not exceed.⁸⁰

Legislatures give many reasons for enacting damages caps. These reasons include assuring the availability of competent medical and hospital services to the public at a reasonable cost, providing prompt and efficient methods for eliminating the expense of nonmeritorious claims, encouraging physicians to enter and remain in the practice of medicine as long as qualified, attracting insurers by making damage awards more predictable, making liability insurance more available and less expensive, and promoting the general business climate within a state.⁸¹

the Senate over HR 4600 which sought to cap noneconomic damages in medical malpractice lawsuits at \$250,000 was largely voted along party lines with Republicans favoring the cap and Democrats opposing it).

79. OR. REV. STAT. § 18.560(1) (1998), *held unconstitutional* by *Lakin v. Senco Prods., Inc.*, 987 P.3d 436 (Or. 1999).

80. *Compare* *Moore v. Mobile Infirmary Ass'n*, 592 So. 2d 156, 157 (Ala. 1991) (noneconomic damages cap of \$400,000 permitted in Alabama), *with* *Murphy v. Edmonds*, 601 A.2d 102, 104 (Md. 1992) (noneconomic damages cap of \$350,000 permitted in Maryland).

81. *See, e.g.*, *Murphy v. Edmonds*, 601 A.2d 102, 114-16 (Md. 1992) (identifying the reasons for the damages cap statute at issue as “a legislatively perceived crisis concerning the availability and cost of liability insurance in [Maryland], . . . resulting in excessive insurance premiums for doctors and declining services for patients,” as well as “to assure the availability of sufficient liability insurance, at a reasonable cost, in order to cover claims for personal injuries to members of the public”); *Arneson v. Olson*, 270 N.W.2d 125, 127 (N.D. 1978) (stating that the purpose

Since 1983, Iowa has not overturned a tort reform statute as against the Iowa Constitution.⁸² Ten of Iowa's tort reform statutes have not even been challenged.⁸³ Four cases provide a good look at how Iowa courts would evaluate a constitutional challenge to a noneconomic damages statute. Three involved statutory challenges: a statute of limitations for medical liability lawsuits,⁸⁴ a statute directing seventy-five percent of punitive damages awards be given to a civil reparation trust fund,⁸⁵ and a statute of repose for defective improvements to real property.⁸⁶ The fourth case reinterprets the discovery rule pertaining to the statute of limitations for medical negligence claims.⁸⁷

of the statute at issue was "to assure the availability of competent medical and hospital services to the public in North Dakota at reasonable costs; to provide prompt and efficient methods for eliminating the expense involved in nonmeritorious malpractice claims; to provide adequate compensation to patients with meritorious claims; and to encourage physicians to enter the practice of medicine in North Dakota and remain in such practice as long as they are qualified to do so" (internal quotation marks omitted); *see also* Iowa Dep't of Econ. Dev., *Iowa Values Fund*, at <http://www.iowasmartidea.com/ivfboards.html> (last visited Mar. 14, 2005) (showing that the goal of the Iowa Values Fund, which includes HF 692, was to promote and grow the Iowa economy).

82. *See* AM. TORT REFORM ASS'N, *Iowa Reforms*, at <http://www.atra.org/states/index.php?state=IA&display=bychallenged> (last visited Mar. 14, 2005) (stating that "[t]he Supreme Court of Iowa has not struck down any of the state's civil justice reform laws" since 1983).

83. *See id.*

84. *Koppes v. Pearson*, 384 N.W.2d 381, 384 (Iowa 1986) (holding the statute of limitations valid under both the Iowa Constitution and the United States Constitution). The Iowa Supreme Court declined to follow *Koppes* in *Christy v. Miulli*, holding that the discovery rule and a fraudulent concealment defense were "separate and distinct" with respect to the tolling of a statute of limitations. *Christy v. Miulli*, 692 N.W.2d 694, 701 (Iowa 2005).

85. *Shepherd Components, Inc. v. Brice Petrides-Donohue & Assocs., Inc.*, 473 N.W.2d 612, 618-19 (Iowa 1991) (holding that because plaintiff has no vested right to damages prior to judgment, the trial court's award of 25% to the plaintiff and 75% to the civil reparation trust fund did not violate Iowa or United States Constitutions).

86. *Bob McKiness Excavating & Grading, Inc. v. Morton Bldgs., Inc.*, 507 N.W.2d 405, 409-10 (Iowa 1993) (holding that the discovery rule did not apply to Iowa Code § 614.1(11) and defendant had no existing property right at the time the statute was enacted).

87. *Schlote v. Dawson*, 676 N.W.2d 187, 192-94 (Iowa 2004) (interpreting Iowa Code § 614.1(9) to apply to the occurrence or discovery of the injury, not upon discovery that the injury was wrongful).

A. *Six-Year Statute of Repose in Medical Malpractice Suits Challenged*

In *Koppes v. Pearson*⁸⁸ the Iowa Supreme Court upheld a six-year statute of limitations on medical malpractice lawsuits.⁸⁹ The plaintiffs challenged the statute on equal protection, access to courts, and due process grounds.⁹⁰ The plaintiffs attempted to persuade the court to apply the strict scrutiny test to the statute because their fundamental right to access the courts had been violated.⁹¹ The plaintiffs claimed this violated the Iowa Constitution.⁹² The court instead employed the rational basis test because “[s]tatutes of limitation do not implicate or affect fundamental rights.”⁹³ The plaintiffs continued by alleging that health care providers were accorded different treatment than other tortfeasors.⁹⁴ The court then outlined Iowa’s rational basis test:

“Under the rational basis test, a legislative classification is upheld if any conceivable state of facts reasonably justify it. Additionally, the guarantee of equal protection does not exact uniformity of procedure. The legislature may classify litigants and adopt certain procedures for one class and different procedures for other classes, so long as the classification is reasonable. All that is required is that similarly situated litigants be treated equally.”⁹⁵

The court then looked to determine the purpose of the legislation.⁹⁶ The court stated “that the deferential treatment accorded health care providers was reasonably related to the legislature’s goal of reducing malpractice premiums.”⁹⁷ The court concluded by stating that the equal

88. *Koppes v. Pearson*, 384 N.W.2d 381.

89. *Id.* at 384.

90. *Id.* at 384-85.

91. *Id.* at 384.

92. *Id.*; *see also* IOWA CONST. art. I, § 6 (“All laws of a general nature shall have a uniform operation; the general assembly shall not grant to any citizen, or class of citizens, privileges or immunities, which, upon the same terms shall not equally belong to all citizens.”).

93. *Koppes v. Pearson*, 384 N.W.2d at 384.

94. *Id.*

95. *Id.* (quoting *Bishop v. E. Allamakee Cmty. Sch. Dist.*, 346 N.W.2d 500, 505 (Iowa 1984)).

96. *See id.*

97. *See id.* The court also determined that the legislation in question “was prefaced with the statement, ‘a critical situation exists because of the high cost and impending unavailability of medical malpractice insurance,’” thus making the purpose of the legislation very clear. *Id.* (quoting 1995 Iowa Acts ch. 239, § 1).

protection analysis employed would be the same under the United States Constitution.⁹⁸

The court then briefly shifted its focus to the plaintiffs' due process challenge.⁹⁹ The court stated that the federal and Iowa due process provisions are considered "identical in scope, import, and purpose."¹⁰⁰ Because the statute in question had already survived attack in the federal courts, it was upheld as constitutional.¹⁰¹ The court concluded that the plaintiffs' challenges did "not overcome the strong presumption of constitutionality."¹⁰²

The strong presumption of constitutionality will make it very difficult for an Iowa court to find a statute capping noneconomic damages unconstitutional.¹⁰³ It would be imperative for opponents of such a statute to make a strong case that a fundamental right is being violated. Without such an argument, the court would be forced to utilize the rational basis test.¹⁰⁴ Under the rational basis test, if some "conceivable state of facts [can] reasonably justify" the damages cap, the statute passes constitutional muster.¹⁰⁵ As the *Koppes* court noted, the Iowa legislature could justify a damages cap by simply stating a goal to reduce insurance premiums.¹⁰⁶

B. *Directing Seventy-five Percent of Punitive Damage Awards to the Civil
Reparation Trust Fund Challenged*

Five years later, in 1991, the Iowa Supreme Court again upheld tort reform legislation.¹⁰⁷ In *Shepherd Components, Inc. v. Brice Petrides-*

98. *Id.* at 385.

99. *Id.*

100. *Id.* (quoting *Shearer v. Perry Cmty. Sch. Dist.*, 236 N.W.2d 688, 691-92 (Iowa 1975)).

101. *See id.* (noting that the court in *Fitz v. Dolyak*, 712 F.2d 330, 333 (8th Cir. 1983), upheld the Iowa six-year statute of limitation in medical malpractices cases against a due process challenge).

102. *Id.*

103. *See* *Bob McKiness Excavating & Grading, Inc. v. Morton Bldgs., Inc.*, 507 N.W.2d 405, 410 (Iowa 1993) (noting the presumption of constitutionality a duly enacted statute carries); *Koppes v. Pearson*, 384 N.W.2d at 385 (same).

104. *See* *Koppes v. Pearson*, 384 N.W.2d at 384 (applying the rational basis test after concluding that "[s]tatutes of limitation do not implicate or affect fundamental rights").

105. *Id.* (quoting *Bishop v. E. Allamakee Cmty. Sch. Dist.*, 346 N.W.2d 500, 505 (Iowa 1984)).

106. *Id.*

107. *See* *Shepherd Components, Inc. v. Brice Petrides-Donohue & Assocs.*,

Donohue & Associates, Inc.,¹⁰⁸ the jury awarded the plaintiff \$26,000 in punitive damages because the defendant's "conduct constituted willful and wanton disregard for the rights or safety of others."¹⁰⁹ However, the jury also concluded that the conduct was not specifically directed at the plaintiff.¹¹⁰ Because of this finding, and pursuant to Iowa Code section 668A.1, seventy-five percent of the punitive damage award was directed into a civil reparation trust fund, while only twenty-five percent was given to the plaintiff.¹¹¹

The validity of this statute was challenged on appeal.¹¹² The plaintiff claimed that the punitive damage award constituted property and that by allowing a court to direct a portion of that award into a reparation fund, the statute violated the plaintiff's equal protection and due process rights.¹¹³ The court recognized that a "plaintiff has no vested right in a particular measure of damages."¹¹⁴ Thus, "a statutory provision limiting a punitive damage award may be applied . . . without violating due process or equal protection."¹¹⁵ The court further noted that in the past it had held that punitive damages were discretionary.¹¹⁶ In addition, the court stated that "punitive damages are not intended to be compensatory and that a

Inc., 473 N.W.2d 612, 617-19 (Iowa 1991) (upholding a statute requiring 75% of a punitive damages award to be directed to a civil reparation trust fund).

108. *Shepard Components, Inc. v. Brice Petrides-Donohue & Assocs., Inc.*, 473 N.W.2d 612.

109. *Id.* at 617.

110. *Id.* at 618.

111. *Id.* The statute provides that if the jury finds that the conduct was not specifically aimed at the plaintiff then

after payment of all applicable costs and fees, an amount not to exceed twenty-five percent of the punitive or exemplary damages awarded may be ordered paid to the claimant, with the remainder of the award to be ordered paid into a civil reparations trust fund administered by the state court administrator.

IOWA CODE § 668A.1(2)(b) (2005).

112. *See* *Shepherd Components Inc. v. Brice Petrides-Donohue & Assocs., Inc.*, 473 N.W.2d at 617-19.

113. *Id.* at 619. The plaintiff argued that the Fourteenth Amendment of the United States Constitution and Article I, § 6 and § 9 of the Iowa Constitution provided protection. *Id.*

114. *Id.* (citing *Samsel v. Wheeler Transp. Servs.*, 789 P.2d 541, 555 (Kan. 1990); *Am. Bank & Trust Co. v. Cmty. Hosp.*, 683 P.2d 670, 676 (Cal. 1984)).

115. *Id.* (citing *Jaspersen v. Purolator Courier Corp.*, 765 F.2d 736, 739-40 (8th Cir. 1985); *Am. Bank & Trust Co. v. Cmty. Hosp.*, 683 P.2d at 675-77).

116. *Id.* (citing *Berryhill v. Hatt*, 428 N.W.2d 647, 656 (Iowa 1988)).

plaintiff is a fortuitous beneficiary of a punitive damage award simply because there is no one else to receive it.”¹¹⁷ The court concluded by upholding the statute allowing distribution of the punitive damages.¹¹⁸

This case creates a serious hurdle for opponents of damages caps. The Iowa Supreme Court specifically held that a damages cap did not violate due process or equal protection.¹¹⁹ However, a distinction between punitive damages and noneconomic damages can be made using language from *Shepherd*. The court in *Shepherd* claimed that the plaintiff was a “fortuitous beneficiary of [the] award . . . because there [was] no one else to receive it.”¹²⁰ Noneconomic damages, on the other hand, compensate the victim. Clearly, no court could conclude that tort victims are fortuitous receivers of their personal noneconomic damage awards.

C. Fifteen-Year Statute of Repose on Real Property Challenged

At issue in *Bob McKiness Excavating & Grading, Inc. v. Morton Buildings, Inc.*,¹²¹ was a fifteen-year statute of repose on the improvements of real property.¹²² The Iowa Supreme Court once again upheld this piece of tort reform legislation, citing the “strong presumption of constitutionality” afforded to acts of the state legislature.¹²³ The disputed statute states in pertinent part:

In addition to limitations contained elsewhere in this section, an action arising out of the unsafe or defective condition of an improvement to real property based on tort and implied warranty and for contribution and indemnity, and founded on injury to property, real or personal, or injury to the person or wrongful death, shall not be brought more than fifteen years after the date on which occurred the act or omission of the defendant alleged in the action to have been the cause of the injury or death.¹²⁴

The plaintiff in *Morton* was the owner of property who had a building

117. *Id.* (citing *Berenger v. Frink*, 314 N.W.2d 388, 391 (Iowa 1982)).

118. *Id.*

119. *See id.*

120. *Id.*

121. *Bob McKiness Excavating & Grading, Inc. v. Morton Bldgs., Inc.*, 507 N.W.2d 405 (Iowa 1993).

122. *Id.* at 409 (discussing IOWA CODE § 614.1(11) (1991)).

123. *Id.* at 410 (citing *Koppes v. Pearson*, 384 N.W.2d 381, 385 (Iowa 1986)).

124. IOWA CODE § 614.1(11), *quoted in* *Bob McKiness Excavating & Grading, Inc. v. Morton Bldgs., Inc.*, 507 N.W.2d at 409.

erected by the defendant in order to store equipment.¹²⁵ More than fifteen years after the building's construction, it collapsed and damaged equipment the plaintiff was storing in the building.¹²⁶ The district court granted the defendant's motion for summary judgment because the plaintiff's lawsuit was time-barred due to the statute of repose.¹²⁷ On appeal, the plaintiff challenged the constitutionality of the statute.¹²⁸ The plaintiff asserted a due process challenge, claiming that the statute impermissibly cut off an existing property right.¹²⁹ The court explained, however, that the statute was enacted in 1986 and the plaintiff's property right did not accrue until the discovery of the cause of action in 1991, and thus, "[the plaintiff] had no existing property right at the time the statute was enacted."¹³⁰

The court then looked to other jurisdictions for guidance in making its ultimate decision to uphold the constitutionality of this piece of tort reform legislation.¹³¹ The court cited the United States Supreme Court's decision in *Duke Power Co. v. Carolina Environmental Study Group, Inc.*¹³² for the proposition that "[t]he [federal] Constitution does not forbid . . . the abolition of old [rights] recognized by the common law, to attain a permissible legislative object."¹³³ The court reasoned that "if the legislature can abolish a cause of action for a legitimate purpose, it [can] prevent a cause of action from arising by enacting a statute of repose."¹³⁴ The court found no discrimination in affirming the statute of repose, illustrating that it treats each and every claim the same.¹³⁵ In short, the court found a rational basis for the legislature's decision, and held the statute of repose constitutional.¹³⁶

125. Bob McKiness Excavating & Grading, Inc. v. Morton Bldgs., Inc., 507 N.W.2d at 407.

126. *Id.*

127. *Id.* at 407-08.

128. *See id.* at 408-10.

129. *Id.* at 410.

130. *Id.*

131. *See id.*

132. *Duke Power Co. v. Carolina Env'tl. Study Group, Inc.*, 438 U.S. 59 (1978).

133. *Bob McKiness Excavating & Grading, Inc. v. Morton Bldgs., Inc.*, 507 N.W.2d at 410 (second alteration in original) (citing *Duke Power Co. v. Carolina Env'tl. Study Group, Inc.*, 438 U.S. at 88 n.32).

134. *Id.*

135. *See id.* (reasoning that the statute did not "discriminate between the just and unjust claim, or the avoidable and unavoidable delay") (quoting *Schulte v. Wageman*, 465 N.W.2d 285, 287 (Iowa 1991)).

136. *Id.*

Morton is another example for opponents to caps on damages, illustrating the importance of persuading the court not to apply the rational basis test.¹³⁷ Also discouraging to opponents of damages caps is the idea that “[t]he Constitution does not forbid . . . the abolition of old [rights] recognized by the common law, to attain a permissible legislative object.”¹³⁸ Thus, if a damages cap is not discriminatory and the rational basis test is used, it appears that such a cap would survive constitutional scrutiny if a permissible legislative objective is present.

Morton does illustrate an additional aspect a court will examine in making its ultimate decision. In *Morton*, the court considered what actions other states had taken.¹³⁹ However, considering the severe jurisdictional split on damages caps, other jurisdictions would provide at best mixed guidance, forcing an Iowa court to deeply analyze the constitutionality of such a statute.

D. Reinterpretation of the Iowa Discovery Rule

The court in *Schlote v. Dawson*¹⁴⁰ reinterpreted the Iowa discovery rule as it pertains to the statute of limitations in medical negligence suits. In *Schlote*, the plaintiffs sued, alleging a physician acted negligently by performing excessive surgery.¹⁴¹ Dr. Dawson, the defendant, removed the voice box of one of the plaintiffs on May 21, 1996, without informing the plaintiff of less intrusive alternative options.¹⁴² The defendant was arguably negligent, as his license was suspended by the Iowa Board of Medical examiners “for, among other things, excessive surgery.”¹⁴³ Following the suspension of Dr. Dawson’s license, the plaintiffs filed suit on February 17, 2000.¹⁴⁴ The Iowa Supreme Court held that the plaintiffs’ claim was barred

137. See *id.*; see also *Koppes v. Pearson*, 384 N.W.2d 381, 384 (Iowa 1986) (showing two tort reform cases before the Iowa Supreme Court both upholding the disputed legislation under the rational basis test).

138. *Bob McKiness Excavating & Grading, Inc. v. Morton Bldgs., Inc.*, 507 N.W.2d at 410 (second alteration in original) (quoting *Duke Power Co. v. Carolina Env’tl. Study Group, Inc.*, 438 U.S. at 88 n.32).

139. See *id.* (analyzing other states’ courts’ decisions regarding similar statutes).

140. *Schlote v. Dawson*, 676 N.W.2d 187 (Iowa 2004).

141. *Id.* at 189.

142. *Id.* Dr. Dawson did not suggest radiation or “a more conservative surgery that might avoid a complete removal of the voice box.” *Id.*

143. See *id.*

144. *Id.*

by the statute of limitations.¹⁴⁵ In barring the claim, the court recognized that it was “eliminat[ing] the discovery rule for medical malpractice claims as we have known it.”¹⁴⁶

The pertinent part of the statute required medical malpractice claims to be brought “within two years after the date on which the claimant knew, or through the use of reasonable diligence should have known . . . [of] the injury or death for which damages are sought in the action.”¹⁴⁷ The dispute centered on whether the injury was the loss of the patient’s natural voice, as the defendant asserted, or whether the injury “was the excessive surgery resulting in the unnecessary removal of Schlote’s voice box” as the plaintiffs asserted.¹⁴⁸ The court determined “that the legislature had in mind physical harm when using the word ‘injury’ rather than the wrongful act that caused the injury.”¹⁴⁹ As a result, the court deemed the injury to be the removal of the voice box, and therefore, the plaintiffs’ claim was time-barred.¹⁵⁰ The court realized the injustice caused, recognizing “that the statute severely restricts the rights of unsuspecting patients who may be injured because of unnecessary and excessive surgery.”¹⁵¹ The court then expressed that the legislature should deal with the problem brought about by this holding.¹⁵²

The dissent recognized that this holding was an “unnecessary judicial alteration to the statute” which absurdly “overprotect[s] . . . potential causes of action.”¹⁵³ The effects of this holding are not yet known. Presumably, this holding will protect negligent doctors and insurance company profits while further injuring those already wronged by the negligence of others. The rule from this case will seriously restrict the rights of wrongfully injured victims by limiting their ability to bring claims. This ultimately acts as judicial tort reform.

145. *Id.* at 194.

146. *Id.*

147. *Id.* at 189 (alteration in original) (emphasis added by the *Schlote* court) (quoting IOWA CODE § 614.1(9) (2003)).

148. *Id.*

149. *Id.* at 193.

150. *Id.* at 194.

151. *Id.*

152. *See id.* (“[I]t is up to the legislature and not this court to address this problem.”).

153. *Id.* at 196 (Cady, J., dissenting).

E. Summary

Tort reform legislation, when challenged in Iowa, is treated very favorably.¹⁵⁴ Iowa courts have repeatedly stated that there is a strong presumption of constitutionality afforded to legislative enactments.¹⁵⁵ In addition, Iowa tort reform legislation has only been tested under the easy-to-satisfy rational basis test.¹⁵⁶ The Iowa legislature has many rationales to choose from if it decides to pass a damages cap.¹⁵⁷ It appears that unless opponents persuade the court that a fundamental right has been infringed, the legislation will likely pass constitutional scrutiny. If a tort reform damages cap statute were passed and challenged, however, it would be an issue of first impression in Iowa.¹⁵⁸ Iowa would be forced to look to other jurisdictions for guidance. The dramatic jurisdictional split on the issue¹⁵⁹ would likely require a very thorough analysis.

The best argument opponents to such a cap could make is that it infringes upon the fundamental right to a trial by jury.¹⁶⁰ In the other tort reform cases heard in Iowa, there has been no claim that the right to trial by jury has been taken away.¹⁶¹ Therefore, if the court could be persuaded

154. See *supra* notes 83-84 and accompanying text.

155. See cases cited *supra* note 104 and accompanying text.

156. See, e.g., *Bob McKiness Excavating & Grading, Inc. v. Morton Bldgs., Inc.*, 507 N.W.2d 405, 409-410 (Iowa 1993) (applying rational-basis review to test the constitutionality of a statute of repose limiting the time period in which a plaintiff could sue for damage caused by an “unsafe or defective condition of an improvement to real property”).

157. See discussion *supra* Part II. A-D (outlining various rationales for upholding analogous tort reform measures).

158. See *supra* notes 80, 85-88 and accompanying text (describing the numerous challenges to tort reform statutes in Iowa and the grounds on which each respective statute was challenged).

159. See *supra* notes 60-76 and accompanying text.

160. See *Moore v. Mobile Infirmary Ass’n*, 592 So. 2d 156, 164 (Ala. 1991) (holding that an Alabama statute’s cap on damages impairs the right to a trial by jury because the statute automatically and absolutely fixes damages if the jury’s verdict exceeds the cap); *Smith v. Dep’t of Ins.*, 507 So. 2d 1080, 1088-89 (Fla. 1987) (finding that a damages cap is violative of the right to trial by a jury because it can arbitrarily cap a plaintiff’s recovery); *State ex rel Ohio Acad. of Trial Lawyers v. Sheward*, 715 N.E.2d 1062, 1091 (Ohio 1999) (holding Ohio’s damages cap violates the right to trial by a jury because it replaces the jury’s assessment of damages with the legislature’s assessment).

161. E.g., *Bob McKiness Excavating & Grading, Inc. v. Morton Bldgs., Inc.*, 507 N.W.2d at 409 (challenging a tort reform statute only on due process grounds); *Shepherd Components, Inc. v. Brice Petrides-Donohue & Assocs., Inc.*, 473 N.W.2d 612, 619 (Iowa 1991) (challenging a punitive damages cap on equal protection and due

that a noneconomic damages cap infringed upon this fundamental right, it would likely have to employ stricter scrutiny than the rational basis test.¹⁶² Interestingly, it is nearly impossible to determine how the Iowa Supreme Court justices would come down on such a case, especially considering that the dynamic of the court has changed considerably since the last time a tort reform statute was challenged.¹⁶³ However, given the recent decision limiting the discovery rule, it appears as if the current justices would have no problem upholding additional tort reform.¹⁶⁴

IV. IS A NONECONOMIC DAMAGES STATUTE NECESSARY GIVEN THE CURRENT LITIGATION CLIMATE IN IOWA?

In the face of potential new tort reform statutes being passed by the 2003 Iowa Legislature, including a cap on punitive damages, the Iowa Trial Lawyers Association and the Iowa Citizen Action Network claimed, “[d]on’t fix what isn’t broken.”¹⁶⁵ Those in favor of the now-vetoed legislation claimed it was necessary because the “current regulations [were] harming business growth in the state.”¹⁶⁶ In contrast, opponents of the legislation, including Scott Brown, executive director of the Iowa Trial Lawyers Association, referenced a survey conducted by the United States Chamber of Commerce ranking state liability systems.¹⁶⁷

The goal of the United States Chamber of Commerce survey “was to explore how reasonable and fair the tort liability system is *perceived* to be by corporate America.”¹⁶⁸ Interestingly, eighty-two percent of those polled

process grounds); *Koppes v. Pearson*, 384 N.W.2d 381, 384-85 (Iowa 1986) (challenging a tort reform statute on equal protection, access to courts, and due process grounds).

162. See *supra* notes 21-22 and accompanying text.

163. See Iowa Judicial Branch, *Supreme Court Justices*, at <http://www.judicial.state.ia.us/judges/supreme.asp> (last visited Mar. 14, 2005) (Justices Marsha K. Ternus, Mark S. Cady, Michael J. Streit, and David Wiggins all joined the court after 1993, the date of the most recent case discussed relating to tort reform legislation).

164. See *Schlote v. Dawson*, 676 N.W.2d 187, 196 (Iowa 2004) (Cady & Streit, JJ., dissenting) (showing that at least two justices on the Iowa Supreme Court feel that “[the Iowa Supreme Court] should not interpret statutes to provide absurd results, and constru[ing] a statute in a way that fosters overprotection of potential causes of action creates an absurd result”).

165. Bret Hayworth, *Lawyers Group Opposes Tort, Regulatory Reform*, SIOUX CITY J., Apr. 25, 2003, at A4.

166. *Id.*

167. *Id.*; see U.S. CHAMBER INST. FOR LEGISLATIVE REFORM, *supra* note 11, at 1-5.

168. U.S. CHAMBER INST. FOR LEGISLATIVE REFORM, *supra* note 11, at 1.

reported “that the litigation environment in a state could affect important business decisions at their company, such as where to locate [the company] or do business.”¹⁶⁹ Corporations were asked to rank states in many categories, including overall treatment of tort and contract litigation, treatment of class actions, punitive damages, timeliness of summary judgment and dismissal, discovery, scientific and technical evidence, judges’ impartiality, judges’ competence, juries’ predictability, and juries’ fairness.¹⁷⁰

Corporations gave the Iowa judiciary a very positive endorsement. Iowa judges ranked third in both the impartiality and competence categories.¹⁷¹ In perhaps the most important category, overall treatment of tort and contract litigation, Iowa ranked an impressive second.¹⁷² This speaks volumes in regard to the necessity of a damages cap in Iowa. Clearly, by ranking Iowa second, corporations across America felt that liability awards are fair and among the lowest. North Dakota, a state which declared a damages cap unconstitutional on the grounds that it was *not needed*, ranks below Iowa at fourth.¹⁷³

Iowa also ranked second in the category of juries’ fairness.¹⁷⁴ Corporate America thinks the damage awards handed down by Iowa juries are reasonable. Why then, given this perception, should the decision of damages, historically a jury function, be taken away from the people by a legislative enactment?¹⁷⁵ Lastly, Iowa’s overall ranking, taking into account

169. *Id.*

170. *Id.* at 3-4.

171. *Id.* at 4.

172. *Id.* at 3.

173. *Id.*; see *Arneson v. Olson*, 270 N.W.2d 125, 135-36 (N.D. 1978) (holding the capping an award at \$300,000 violates the equal protection clause of the North Dakota Constitution).

174. U.S. CHAMBER INST. FOR LEGISLATIVE REFORM, *supra* note 11, at 4.

175. *People v. Bigge*, 297 N.W. 70, 76 (Mich. 1941) (“[T]he right of trial by jury is too firmly established in American jurisprudence to allow it to be whittled away by the legislature”); *Fox*, *supra* note 14, at 1396 n.78 (citing THE FEDERALIST NO. 83 (Alexander Hamilton)); see also *Moore v. Mobile Infirmary Ass’n*, 592 So. 2d 156, 159 (Ala. 1991) (overturning a noneconomic damages statute while emphasizing that it is undisputed that juries are in place to assess “damages for pain, suffering, and other noneconomic loss” in personal injury cases); *Lakin v. Senco Prods., Inc.*, 987 P.2d 463, 469 (Or. 1999) (“Maintenance 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.”) (quoting *Dimick v. Schiedt*, 293 U.S. 474, 486 (1935)).

every category, was third.¹⁷⁶ This ranking increased from a ranking of fifth in the previous year, despite no new Iowa tort reform legislation.¹⁷⁷

The number of civil jury trials in Iowa is remarkably low. "Between 1992 and 2002 an average of 475 civil jury trials were tried each year in the entire state of Iowa."¹⁷⁸ In addition, statistics taken from January through June 2003 "indicate[d] there will be fewer than 350 civil jury trials in Iowa in 2003."¹⁷⁹ In 2001, "34 Iowa counties did not hold a single civil jury trial."¹⁸⁰ Civil case filings, not trials, have been steady for the past twenty years.¹⁸¹ In Polk County, the most populous Iowa county,¹⁸² from August of 1993 until June of 2002, only thirty four verdicts were handed down greater than or equal to \$250,000.¹⁸³ These verdicts include damages other than noneconomic damages, making the number of verdicts awarded exceeding \$250,000 in only noneconomic damages even smaller.¹⁸⁴

The necessity of additional tort reform is summed up nicely by Kevin Collins, President of the Iowa State Bar Association:

Thomas Jefferson was of the opinion that the right to trial by a jury of fellow citizens was a more important safeguard of personal liberty than the right to vote. With a jury, the rights and duties of each of us will be decided by our fellow citizens, not by some bureaucrat or governmental functionary. Periodically, special interests initiate campaigns in an effort to dismantle the jury system. As lawyers, we have a responsibility to work for the preservation of the jury system. One thing we can do is get involved in the legislative process. . . . We can calmly and accurately explain that Iowa does not need tort reform.

176. U.S. CHAMBER INST. FOR LEGAL REFORM, *supra* note 11, at 2.

177. *Id.* at 8.

178. Kevin Collins, *What Happened to Trial by Jury?*, IOWA LAWYER, Nov. 2003, at 4, 4 (footnote omitted).

179. *Id.*

180. *Id.*

181. *See id.* (showing that in 1981, 30,020 civil cases were filed; in 1989, 25,024 civil cases were filed; in 2001, 33,531 civil cases were filed; and in 2002, 27,489 civil cases were filed).

182. Digital Map Store, Iowa County Map, at <http://county-map.digital-topo-maps.com/iowa.shtml> (last visited Mar. 14, 2005).

183. *See* DIANE COX, POLK COUNTY JURY VERDICTS: JURY VERDICTS FROM AUGUST, 1993 TO JUNE, 2002, at 2-108 (2002) (compiling jury verdicts in civil cases in Polk county from August 1993 to June 2002).

184. *See, e.g., id.* at 11-12 (showing that one jury verdict handed down November 30, 1998 was for \$258,679, but past medical expenses alone constituted \$23,679, showing that noneconomic damages did not exceed \$250,000).

If we don't, the only litigation crisis Iowa is likely to face is the lack of experienced trial lawyers. Get involved—if you don't you may be asking, *What ever happened to trial by jury?*¹⁸⁵

V. CONCLUSION

President Bush's statement in his 2003 State of the Union address is true.¹⁸⁶ No one ever has been *healed* by a frivolous lawsuit. However, meritorious civil lawsuits for medical malpractice and personal injury are heard every day in this country, and victims in these lawsuits also are not *healed*. Large personal injury and medical negligence verdicts are generally associated with permanent injuries, disfigurement, and unimaginable pain.

The debate over caps on noneconomic damages has already made its way to the steps of the Iowa capitol.¹⁸⁷ On consecutive days in March of 2004, doctors, victims of negligence, and lawyers rallied, attempting to sway the legislature to vote either for or against caps.¹⁸⁸ Both sides have valid arguments.¹⁸⁹

The medical community has a legitimate concern with rising malpractice insurance premiums. The public also has a concern with the availability of affordable healthcare. However, an arbitrary cap on damages is not the answer, and jury verdicts are not the cause of high premiums. A cap clearly is not necessary in Iowa. The constitutionality of a cap in Iowa is also questionable. The answer is to have trust in the judicial system and “work together to reduce medical errors and reform the way insurance rates are set,”¹⁹⁰ not to cap damages. The decision on damages should remain where it has always been, with the jury.

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185. Collins, *supra* note 178, at 5.

186. See *supra* note 4 and accompanying text.

187. See Jonathan Ross, *Malpractice Bill Sparks Rival Events*, DES MOINES REG., Mar. 2, 2004, at 2B (noting that those for and against legislation limiting malpractice awards were planning events at the capitol).

188. *Id.*

189. See *id.* (showing that medical professionals are concerned about rising insurance premiums while lawyers and victims believe that “legal protections for patients should not be compromised”).

190. *Id.*

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