Are Medical Malpractice Damages Caps Constitutional? An Overview of State Litigation

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The United States is in its fifth year of what is now widely referred to as "the new medical malpractice crisis." Although some professional liability insurers have begun to report improvements in their overall financial margins,[1] there are few signs that the trend toward higher costs is reversing itself – particularly for doctors and hospitals. In 2003-2004, the presidential election and tort reform proposals in Congress brought heightened public attention to the need for some type of policy intervention to ease the effects of the crisis.

The darling of tort reformers at both the federal and state levels has been legislation to limit, or "cap," damages awarded to plaintiffs in malpractice cases. Health care provider groups, liability insurers, and the Bush Administration have all seized on the example of California's MICRA law, which since 1975 has capped noneconomic damages in malpractice cases at a flat $250,000, as the path to financial recovery. Caps proposals were even taken direct-to-public in 2004 with voter referenda in several states. As states around the country, and the Congress, continue to propose and debate proposals for caps, one recurrent question with which they must grapple is whether hard-fought battles for caps legislation may result in Pyrrhic victories, as courts rule that caps violate state or federal constitutional provisions.

The constitutionality issue, largely dormant since the late 1980s, resurfaced in 2004 with legal challenges to caps laws in West Virginia, Florida, Ohio, and Utah.[2] In November 2004, the Utah Supreme Court upheld the state's $400,000 (previously $250,000) noneconomic damages cap against a barrage of constitutional challenges.[3] Litigation against the noneconomic damages caps laws in West Virginia, Florida, and Ohio is still pending.

The constitutionality of damages caps is an important issue for all those affected by the malpractice crisis. Policymakers expect liability insurers to respond to the passage of caps by reducing premiums in response to their improved risk exposure and ability to predict their payouts. However, the experience of California and other early adopters of caps demonstrates that although caps are typically passed as an emergency response to a malpractice crisis that has reached critical levels, if

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there is uncertainty as to whether they will be upheld in the courts, liability insurers may not move immediately to reduce premiums. Rather, the relief doctors and hospitals expect may be delayed until constitutionality questions are settled.

In this article, we address this uncertainty by reviewing existing case law concerning the constitutionality of medical malpractice damages caps passed by state legislatures. After providing some basic information about the nature of damages caps and existing state laws, we analyze the five most common constitutional challenges that caps legislation has faced: claims based on access to courts provisions, right to jury-trial provisions, equal protection guarantees, due process protections, and separation of powers principles.[4] We conclude that damages caps passed as a response to documented strains in the liability insurance market are generally upheld against constitutional challenges, except in a small minority of states in which they are judged to implicate interests important enough to trigger heightened judicial scrutiny. We note that most state courts have been hesitant to overturn damages caps, even in the face of judicial doubt about their efficacy. This underscores the important responsibility that state legislators have to thoroughly evaluate the evidence supporting damages caps before adopting legislation, since state courts are not likely to assume this role.

We focus our analysis on challenges to state caps legislation. In the concluding section of the paper, however, we briefly comment on the constitutional issues that a federal cap would raise. At the time of this writing (April 2005), the prospects for passage of a federal cap, previously bleak, appear to have been buoyed by the Republicans' gain of 4 Senate seats and President Bush's vocal commitment to pursuing tort reform in his second term. However, the legislation continues to face the prospect of a Democratic filibuster, and most of the legislative action continues to be in the states. In addition to focusing on state litigation, we focus our analysis on caps on noneconomic damages, for reasons articulated below.

Malpractice Damages Awards

Medical malpractice verdicts are composed of three types of damages. First, compensatory ("economic") damages cover the patient's economic losses, such as lost wages (both past and future), medical expenses, and long-term care. Economic damages are intended to put the plaintiff in the same financial position as he would have been in had the malpractice not occurred.

The second component, noneconomic damages, are intended to compensate the plaintiff for the non-pecuniary harm caused by the malpractice, such as pain and suffering, inconvenience, loss of consortium (i.e., marital companionship), and decreased quality of life. There is no clear method for determining the amount of noneconomic damages; they are generally left to the complete discretion of the jury, which seeks again to "make the plaintiff whole." Although they vary widely from case to case, on average noneconomic damages comprise about one third of malpractice awards.

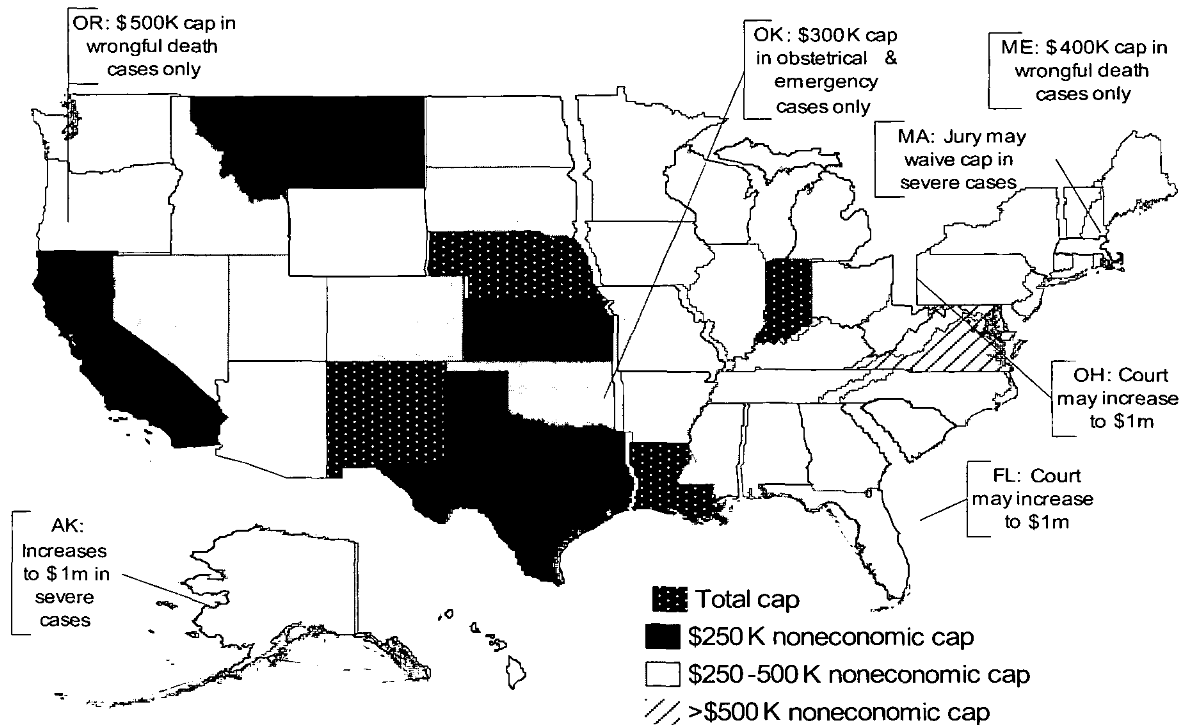
Punitive ("exemplary") damages are the final component of a medical malpractice award. Punitive damages are meant to punish the defendant for wrongful conduct and to deter others from engaging in similar behavior. As such, they are not tethered to the severity of the plaintiff's injury, but to the culpability of the defendant's conduct. Many states have enacted laws that restrict punitive damages in all types of personal injury cases, including medical malpractice actions. For example, North Carolina only allows punitive damages to be awarded in tort actions upon a showing of fraud, malice, or willful and wanton misconduct.[5] Other states have restricted the availability of punitive damages in medical malpractice cases specifically. In Oregon, for example, punitive damages may not be awarded against a licensed or registered health care professional acting within the scope of their employment and without malice.[6] In practice, punitive damages are very rarely awarded in medical malpractice cases, even in states without such laws. A review of empirical studies determined that punitive damages are awarded in less than 1.5 percent of malpractice verdicts, less than a third the rate at which they are awarded in other tort cases.[7]

Damages Caps Strategies

Damages caps are applied in malpractice cases by allowing the jury to calculate damages in the usual way and then reducing jury awards that exceed the ceiling of the cap. Juries are theoretically "blinded" as to the existence of the cap – they are not informed of it, and may be instructed not to consider it if they are aware of it. However, jurors may be well aware that components of their awards will be reduced by the judge, and may compensate by awarding higher damages in components (such as economic damages) that are not subject to a cap.[8]

As of April 2005, more than half the states had passed legislation imposing some kind of limit on noneconomic damages awards (Figure 1). Noneconomic damages have been the primary target of cap initiatives for a variety of reasons. It is politically unpopular to suggest that injured persons should not be fully compensated for their economic losses, even though in some of the highest-value cases, such as those involving devastating injury to newborns, it is economic damages that make up the majority of the award. Noneconomic damages are also an easier focus because of the intangible

Figure 1
Noneconomic and Total Damages Caps by State



† Where applicable, state dollar amounts have been adjusted for inflation as required by state law. This chart does not reflect states that waive damages caps in cases involving intentional harm and/or willful and wanton misconduct.

nature of noneconomic losses and the difficulties in valuation. The lack of anchoring guidelines for juries has led to wide heterogeneity in noneconomic awards in cases of similar injury, raising questions of horizontal equity.[9] Some critics assert that noneconomic damages awards are heavily influenced by juror emotion, and thus frequently result in unfairly large awards.[10] Medical liability insurance companies point to excessively large verdicts as the primary reason for increasing malpractice insurance premiums, and most of the lay public tends to associate "jackpot" awards with high noneconomic damages awards, due in no small part to media publicity about cases involving relatively trivial injuries but huge pain-and-suffering awards.

While the primary area of legislative concern has been noneconomic damages, some states have taken other approaches (Table 1). Some limit only punitive damages; some limit a plaintiff's total damages, including economic losses; some limit the liability of each defendant named in a case; and some impose a cap on all elements of damages except medical expenses and related expenses.

States also vary in the flexibility of the caps they adopt. Most states impose an absolute ceiling on damages that does not change over time. For example, in California, noneconomic damages in health care malpractice actions have been capped at $250,000 since 1975,[11] even though the real value of that amount has declined to about $70,000 over the last 30 years. Similarly, in Arkansas, punitive damages in medical malpractice lawsuits are capped at $1 million.[12] In response to concerns about inflation, some states have elected to automatically adjust their cap upwards on an annual basis. For example, Idaho adjusts its $250,000 noneconomic damages cap yearly based on average annual wage data.[13]

Damages caps are frequently criticized because of their potential to deny compensation to severely injured patients who may deserve money in excess of the cap. To address this critique, several states have tried to build some flexibility into their damages caps to distinguish among injuries of varying severity. Alaska caps noneconomic damages at the greater of $400,000 or $8,000 times the plaintiff's life expectancy years, but in cases of severe permanent physical impairment, the cap is increased to the greater of $1 million or $25,000 times the plaintiff's life expectancy years.[14] Other states, such as Massachusetts and Nevada, allow the judge or jury to waive the damages cap whenever aggravating circumstances exist to justify a higher award.[15]

Some states have given physicians, rather than patients, the added protection from the costs of severe malpractice injuries. In Nevada, for example, noneconomic damages can never exceed the amount of money remaining under the defendant's professional liability policy after economic damages are awarded to the plaintiff.[16] Indiana has enacted an even more extreme protection by capping total medical liability damages (compensatory, noneconomic, and punitive) at $1.25 million.[17] Paradoxically, this means that the patients with the largest compensatory damages claims will be the least likely to collect anything for their pain and suffering, and in some extreme situations these patients may even be denied the full amount of their actual medical expenses and lost wages.

At the federal level, there has been interest in capping both noneconomic and punitive damages, but legislators have shied away from the idea of a cap that would limit economic damages either explicitly or implicitly (by capping total damages). In 2003, legislation that would have imposed a federal cap of $250,000 on noneconomic and punitive damages in malpractice cases passed the U.S. House of Representatives,[18] but stalled in the Senate.[19] A new version of the legislation was introduced in 2004 and passed the House, but it too faltered in the Senate.[20] Similar bills have been introduced in the 109th Congress.[21]

Constitutional Attacks on Damages Caps Laws

The different structures of state damages caps, and particularly the preference for capping only noneconomic or punitive damages, can to some extent be attributed to legislative attempts to draft laws that will withstand state constitutional attack. Caps legislation has been subject to constitutional challenge in at least twenty-five states. Most of these lawsuits have been based on state rather than federal constitutional provisions. Interestingly, damages caps have been upheld under some state constitutions, while at the same time being struck down in other states with almost identical constitutional provisions. This lack of uniformity may pose difficulties for state legislators trying to predict the likelihood that proposed caps legislation would survive legal challenge and could impact the willingness of multi-state medical liability insurance companies to reduce premium rates even after tort reform legislation is enacted.

At this point, it is useful to remember that the U.S. Supreme Court will not review state supreme court decisions on questions of state law.[22] Unless a state malpractice law is alleged to violate the U.S. Constitution or another federal law, the U.S. Supreme Court has no authority to review the state court's decision. Although state malpractice reforms are occasionally challenged using the Fourteenth Amendment due process and equal protection guarantees or Seventh Amendment right to jury-trial provisions, the U.S. Supreme Court has never granted certiorari to review a state medical malpractice decision. Thus, federal jurisprudence offers little structure or guidance to state judges struggling to interpret the equal protection and due process provisions in their own state constitutions.

There have been five major constitutional grounds for challenging medical liability reform at the state level. We discuss these in order of importance. First, damages caps have been challenged using the open-courts guarantee contained in many state constitutions. Second, damages caps have been said to violate the right to trial by jury. Third, damages caps have been alleged to violate both federal and state equal protection guarantees. Fourth, damages caps have been challenged using federal and state due process provisions. Finally, damages caps are occasionally challenged under a separation of powers theory.

Access to Courts

Thirty-nine state constitutions contain a provision guaranteeing citizens access to the court system for civil lawsuits.[23] The Missouri Constitution provides a typical example of the wording of this guarantee: "[t]hat the courts of justice shall be open to every person, and certain remedy afforded for every injury to person, property or character, and that right and justice shall be administered without sale, denial or delay."[24] There is no equivalent open-courts provision in the U.S. Constitution. (Some commentators have argued that state open-courts provisions are analogous to federal due process guarantees, but challenges under the open-courts provisions of state constitutions should be viewed as a distinct constitutional strategy.[25])

Although open-courts provisions in state constitutions tend to be worded similarly, there are considerable differences in interpretation among state courts. Some state courts have construed them as simple procedural guarantees of the availability of a judicial process. Damages caps have been upheld against open-courts challenges in these states because they do not actually prevent litigants from filing their case.[26] Alternatively, courts may characterize them as a mere modification to an existing cause of action, which is a constitutionally-permissible legislative act in most states.[27]

In other states, courts have interpreted the open-courts guarantee as imposing substantive constraints on the legislature's discretion to restrict established causes of action and remedies.[28] The balancing analysis that courts conduct in considering the reasonableness of such restrictions also varies. The toughest open-courts challenges have been in states where case law

requires courts to inquire into the public necessity for a statute that limits access to courts, or whether the statute provides plaintiffs with some replacement remedy or "commensurate benefit," or both.

To date, noneconomic damages caps have been upheld against open-courts challenges in 6 states (Table 2). As we discuss below, one of these states, Florida, upheld a cap that was part of a statute encouraging arbitration of malpractice claims, but struck down another that was not connected to an alternative remedy. Caps on total damages have been subjected to open-courts challenges in 7 states and have survived in 4 (Table 2).

The majority approach of state courts has been to define the rights protected by open-courts provisions relatively narrowly and hold that they are not significantly impinged by damages caps. For example, in *Adams v. Children's Mercy Hospital,*[29] the Missouri Supreme Court held that open-courts provisions barred legislatures from erecting procedural barriers to accessing the judicial process, but did not affect their ability to modify or even eliminate causes of action. Damages caps plainly fall within the latter category of legislative actions, and thus, in the court's view, were not unconstitutional. Further, because the open-courts guarantee did not implicate substantive rights, the legislature was not obliged to offer a replacement remedy or other offsetting benefit to those whose recovery it chose to limit.

Cases from Texas and Florida are illustrative of the minority position that caps violate open-courts provisions. In 1986, a federal district court, adjudicating claims under the U.S. and Texas constitutions, held that a Texas law capping a provider's liability for malpractice damages other than medical expenses at $500,000 violated the open-courts provision of the Texas constitution because it denied catastrophically injured patients the right to collect their full damages award without creating any replacement remedy.[30] Two years later, the Texas Supreme Court reached a similar decision in *Lucas v. United States.*[31] The court's analysis in that case emphasized two major considerations: First, was an adequate substitute remedy provided to those whose right to recover damages had been limited? Second, how effective was the cap likely to be in achieving its intended purpose?

In considering the substitute remedy question, the court declined to consider the potential benefits of caps to society as evidence of a countervailing benefit of the statute. It required a particularized showing of offsetting benefits to claimants themselves, citing as an example the creation in other states of a patient compensation fund through which patients could obtain redress for malpractice injuries. Thus, the Texas court considered it crucial to provide an individual "quid pro quo" to claimants when limiting rights held at common law – an approach the dissent in Lucas claimed was unsupported by judicial precedent.[32]

The Texas court further criticized the law as both arbitrary and unreasonable because it limited severely injured patients' ability to recover damages based on speculative data that damages caps might reduce malpractice insurance rates.[33] Although it acknowledged that a malpractice insurance crisis existed in Texas, the court closely scrutinized the evidence that caps would be efficacious in stabilizing insurance rates. It noted that even the legislature that passed the law expressed uncertainty about whether caps would have an effect, and cited an independent study finding that caps would affect less than 1% of all malpractice claims filed in Texas. It concluded that caps were "a speculative experiment" that imposed impermissible burdens on the severely injured.

Lucas is an unusual case, in terms of the level of constitutional scrutiny applied, because the court was not

Table 2
Constitutional Litigation Outcomes Tally

Claim	Caps on Noneconomic Damages† No Violation	Caps on Noneconomic Damages† Violation	Caps on Total Damages‡ No Violation	Caps on Total Damages‡ Violation
Access to courts	AK, FL (arbitration statute), KS, MO, UT, WV	FL	ID, IN, LA, NE	KS, SD, TX
Right to jury trial	AK, CA, FL, ID, KS, MD, MI, MO, UT, WV, WI	AB, OH, OR (n/a to wrongful death cases)	CO, IN, LA, NE, VA	AB, KS, SD
Equal protection	AK, CA, FL (arbitration statute), MI, MO, OH, UT, WI, WV	AB, NH	CO, ID, IN, LA, NE, VA	AB, IL, ND, SD, TX
Due process	AK, CA, CO, FL (arbitration statute), MD, MO, UT, WV, WI	OH	CO, ID, IN, LA, NE, TX, VA	ND, SD
Separation of powers	AK, ID, IL, UT, WV	--	NE, VA	--

† Including caps on general damages.
‡ Including caps on all damages other than medical expenses.

presented with a legislative finding that caps were effective. Indeed, the Texas legislature had made no such finding. However, the court was willing to disturb the legislature's overall judgment that, notwithstanding the uncertainty about the effectiveness of caps, the legislation was worth a try. The key issue in the case appears to have been the lack of an adequate substitute remedy.

Texas citizens unhappy with the *Lucas* ruling passed Proposition 12 in 2003, amending the state constitution to expressly permit the legislature to limit noneconomic damages in actions against health care providers.[34] This measure paved the way for the adoption of a $250,000 cap in 2004.[35]

An interesting line of cases in Florida further illustrates the tough scrutiny applied in the minority approach to open-courts cases.[36] Case law from the 1970s established that the Florida state constitution's access to courts provision[37] prohibited the legislature from abolishing rights to access judicial redress for particular injuries that were in existence at the time of adoption of the Declaration of Rights of the Florida state constitution, unless the legislature provided a reasonable replacement remedy or showed "an overpowering public necessity" for its action and the unavailability of any alternative means of meeting that necessity.[38] In 1986, in response to a crisis in the property and casualty insurance market, Florida passed a general tort reform act that capped noneconomic damages for all tort claimants at $450,000.[39] The statute was subsequently challenged on a variety of constitutional grounds. In adjudicating the access to courts claim, the Florida Supreme Court reaffirmed the need for the state to make the showing described above and concluded that the state had not even attempted to do so.[40]

Caps were revived in Florida in 1988, when the legislature adopted limitations on noneconomic damages in medical malpractice cases in which the claim was arbitrated or in which the defendant had offered to go to arbitration and the plaintiff had refused.[41] This statute, too, was challenged, with an open-courts claim forming the backbone of the case. Applying the same standard as before, the state supreme court reached a different conclusion: it upheld the statute because it offered claimants a commensurate benefit in conjunction with the retraction of their right to recover unlimited damages[42] and was the only method likely to be effective in addressing a matter of overwhelming public necessity, the medical malpractice insurance crisis of the mid-1980s. The commensurate benefit lay in the advantages of arbitration for plaintiffs, which included a relaxed evidentiary standard and mechanisms for ensuring the prompt payment of damages. With regard to public necessity, the court noted that the legislature had made specific factual findings, supported by the work of a special task force on the malpractice crisis, that insurance costs had risen sharply, were driving up health care costs, and had left some physicians unable to find insurance at any price. The court deferred to the legislature's conclusion that other possible reforms would not address these problems effectively.

This line of cases suggests that in states in which courts have interpreted open-courts provisions to impose substantive restrictions on legislatures' ability to restrict common law rights, defenders of caps legislation must make a persuasive showing that damages caps are effective in achieving their intended purpose of reducing insurance costs – or at least that they are more effective than alternative reforms. They must establish, first, that a serious problem exists in the state's insurance markets (not a difficult showing to make in most states that are seriously considering caps); second, that the instability in the market has direct adverse effects on plaintiffs or potential plaintiffs; and third, that the caps legislation addresses those effects and provides affirmative benefits to plaintiffs. In states such as Florida that do not require physicians to carry liability insurance, one line of argument on the benefits side is that caps will constrain the growth of insurance premiums, thereby encouraging physicians to insure themselves and make funds available to compensate injured patients. In states where all physicians do carry insurance, because the state and/or hospital credentialing processes require it, the benefits argument would need to be couched in terms of ameliorating the effects of the liability crisis on the supply and cost of health services in the state.

We emphasize, however, that in most states this showing of effectiveness will not be required. The majority approach continues to view open-courts guarantees as procedural guarantees only, leaving legislatures free to limit or abolish remedies and causes of action. West Virginia, where a constitutional challenge to caps legislation is now pending, is one such state. This underscores the important responsibility that state legislatures have to thoroughly investigate the potential effectiveness of the tort reform measures that they enact.

Right to Trial by Jury

The right to trial by jury is frequently invoked in efforts to invalidate medical malpractice damages caps. The Seventh Amendment to the U.S. Constitution guarantees a jury trial in suits at common law.[43] It also guarantees that no fact tried by a jury can be re-examined in any court. The U.S. Supreme Court has declined to make the Seventh Amendment binding on states.[44] However, forty-eight states have comparable jury trial guarantees in their own constitutions.[45]

Jury-trial challenges have been brought against

noneconomic damages caps laws in 14 states, and the claim has failed in 11 of those (Table 2). In 8 states, litigants have brought jury-trial challenges to laws capping total damages. Their success rate has been somewhat higher, but still poor: the cap survived in 5 of 8 cases (Table 2).

When damages caps are challenged under state jury-trial provisions, courts typically apply the precept that such provisions preserve jury-trial rights in cases in which such a right existed at common law at the time the state constitution was adopted. In some cases, judges have focused on whether the cause of action at issue existed at the time of constitutional adoption. For example, the Oregon Supreme Court held that the state's $500,000 cap on noneconomic damages could be applied to statutorily-created causes of action such as wrongful death suits, but not to common law medical malpractice personal injury claims, which were in existence in 1857 when the state's constitution was adopted.[46]

In other cases, courts have focused more on the scope of the jury-trial right as it was understood at the time of constitutional adoption. In *Etheridge v. Medical Center Hospitals*, for example, the Virginia Supreme Court upheld legislation capping total damages at $750,000 on the basis that the jury-trial right never contained an implied right to unlimited damages.[47] The jury's function is limited to fact-finding, the court held, and while this includes damages determinations, caps are applied only after the jury has completed its damages assessment. Thus, caps lay safely outside the boundary of the jury-trial guarantee.

Crucial to the holding in *Etheridge* was the court's characterization of the application of damages caps as a matter of law rather than fact. "Once the jury has ascertained the facts and assessed the damages," the court opined, "the constitutional mandate is satisfied. Thereafter, it is the duty of the court to apply the law to the facts. The [damages cap] does nothing more than establish the outer limits of a remedy provided by the General Assembly. A remedy is a matter of law, not a matter of fact."[48] The Utah Supreme Court has expressed a similar view, analogizing damages caps to jury instructions and noting that juries are always "guided and constrained by the court" in carrying out their duties.[49] Certain other state courts, such as Missouri's and Idaho's, take the view that caps do not implicate the jury-trial right because they are applied after the jury's verdict,[50] or because caps simply modify a common law cause of action, something that legislatures have well-established authority to do.[51]

Other courts, however, such as Alabama's, appear to find it problematic to hold that juries must be permitted to determine an appropriate damages award but their determinations need not be given legal effect.[52] Interestingly, the jury-trial provisions of the Alabama and Missouri constitutions are identically worded.[53] The Washington Supreme Court, too, has struck down a cap on noneconomic damages pursuant to a jury-trial challenge, holding that the jury's province includes not only the factual assessment of their amount, but also the actual awarding of damages.[54] Thus, although the general approach of state courts to jury-trial challenges to caps is similar – look to the scope of claimants' rights at the time of constitutional adoption – there are variations in how this analysis plays out, and the outcomes cannot be predicted from the breadth of the jury-trial provision on its face. This circumstance has not escaped judges' notice: a majority in the key Washington case and dissenters in the recent Utah case noted that in "states that have found the damages limit unconstitutional, the operative language of the right to jury trial provisions in those states' constitutions is nearly identical to our own."[55]

Interestingly, some state courts have upheld statutory damages caps by justifying them as a form of pre-established remittitur.[56] Remittitur is a procedure through which a judge may reduce the amount of damages awarded on the basis that it is grossly excessive.[57] A trial judge may remit the jury's verdict, or an appellate court may remit a trial court judge's verdict. In *Dimick v. Schiedt*, the U.S. Supreme Court held that remittitur did not violate the Seventh Amendment right to jury trial because judicial reduction of excessive damages awards was practiced at the time of the adoption of the federal Constitution.[58] However, the Court cautioned that remittitur should be applied on a case by case basis, and should only be used to reduce jury verdicts that are palpably and grossly excessive.[59] Although state courts are not obligated to follow *Dimick* when interpreting their own constitutions, the Supreme Court's discussion about the proper use of remittitur could potentially influence state court decisions about the constitutionality of damages caps. *Dimick* also creates a potential platform for defending a federal damages cap, should one ever be enacted by Congress.

Equal Protection

The Fourteenth Amendment to the U.S. Constitution prohibits states from denying citizens equal protection under the law.[60] Most state constitutions also contain a similar provision. In general, any state law that has the effect of dividing people up into different "classifications" will be susceptible to an equal protection challenge. Courts are more likely to find that a state law violates equal protection if it creates divisions based on a "suspect" class, such as race, or if the classification involves a "fundamental" right, such as voting.[61]

Challenges to damages caps based on equal protection principles assert that caps laws create one or more of three types of classification systems.[62] First, when damages caps are applied only to medical malpractice cases, they effectively divide all personal injury plaintiffs into two classes: medical malpractice plaintiffs and all others. Second, caps offer persons sued for medical negligence a unique form of damages protection that is not available to other types of tort defendants. Third, caps divide malpractice plaintiffs into two groups, allowing those whose injuries are valued below the cap to collect their full damages, while barring those with damages in excess of the cap (typically the most severely injured) from recovering a portion of their losses.

Most state courts follow the federal framework when evaluating equal protection challenges that are brought under their state constitution. Under federal equal protection doctrine, classifications are examined using one of three levels of review: strict scrutiny, intermediate or "heightened" scrutiny, or rational-basis review. The level of review is based on the nature of the classification and the type of rights involved in the division. Under rationality review, a state law will be upheld as long as the classification has a rational relationship to a legitimate government objective.[63] Laws subject to this level of review are almost always upheld, even if the classification is not the best method for accomplishing the law's stated goal.[64]

State supreme courts are not, however, required to apply the federal review framework when analyzing equal protection challenges brought exclusively under the state's constitution. This was demonstrated in the 1985 case of *Sibley v. Board of Supervisors of Louisiana State University,* in which the Louisiana Supreme Court formulated its own intermediate standard of review to evaluate a cap on total damages in malpractice cases under the state's equal protection clause, noting, "The federal three level system is in disarray and has failed to provide a theoretically sound framework for constitutional adjudication."[65] This difference in review standards makes it theoretically possible for a state caps law to withstand a federal equal protection challenge while still failing a challenge under an analogous state constitutional provision, or vice versa.

State courts have evaluated damages caps using rational-basis review, holding that these laws do not involve a fundamental right or a suspect class. A minority of jurisdictions have applied a higher level of scrutiny that most closely resembles the intermediate category. As in other areas of equal protection law, the choice of scrutiny level tends to be dispositive.

The type of cap at issue also tends to predict the outcome in equal protection cases. Noneconomic damages caps have been challenged on equal protection grounds in 11 states and have survived in all but 2. Challenges to caps on total damages have been brought in 11 states, but total caps have been upheld in only 6 of those states (Table 2). We discuss some illustrative cases.

The California Supreme Court's decision in *Fein v. Permanente Medical Group,* upholding California's Medical Injury Compensation Reform Act ("MICRA"), is one of the earliest and most frequently cited opinions to address the classifications created by medical liability damages caps.[66] The plaintiff in *Fein* was awarded total damages of $1,287,783, including $500,000 for noneconomic losses.[67] After the verdict, the trial court reduced the noneconomic award to $250,000 to comply with the MICRA cap.[68] The plaintiff subsequently challenged MICRA on federal and state equal protection grounds, arguing that the cap created a discriminatory classification between medical malpractice victims and other tort victims, and between medical malpractice victims with claims above and below the statutory limit.[69]

In a decision that blended the federal and state claims together, the California Supreme Court held that the MICRA caps did not violate the plaintiff's equal protection rights.[70] The court concluded that there was no fundamental property right to collect an unlimited amount of tort damages, so rational-basis review was the correct standard to apply.[71] The Court held that the MICRA caps met this standard, noting that the legislature was responding to a medical malpractice insurance crisis and that it was "obvious" that a $250,000 noneconomic damages cap was rationally related to the legitimate state interest of reducing the malpractice costs of providers and their insurers.[72] Based on this conclusion, the court dismissed the plaintiff's state and federal equal protection claims.[73] Notably, the U.S. Supreme Court dismissed the appeal in the *Fein* case for want of a substantial federal question.[74] One might infer from this disposition that the Supreme Court found no federal equal protection infringement by the MICRA caps.[75]

Aside from making California one of only two states to uphold damages caps at the time, the *Fein* decision is notable for the cursory nature of the court's inquiry into the statute's means/ends fit. Other courts have also employed the rational-basis standard but have engaged in a more meaningful review of the legislative record in support of the caps law. For example, in the 2004 Utah case, the court catalogued a series of reports by government agencies, academic researchers, and non-governmental organizations attesting to the effects of high malpractice insurance costs on the availability of health care, the effects of high-end jury awards in driving up insurance costs, and the efficacy of caps in addressing the problem of the unpredictability of dam-

ages. The opinion in that case evinces the court's skepticism as to the accuracy and prudence of the legislature's judgments – it noted, for example, that there was "little indication" in the record that Utah was suffering health care availability problems due to liability costs, that the influence of large damages awards on health care costs was "debatable," and that the court had "concerns about the wisdom of depriving a few badly injured plaintiffs of full recovery."[76] However, as is appropriate under rational-basis analysis, the court did not view these concerns as erecting a constitutional barrier to the legislature's action.

In other states, courts have explicitly or implicitly applied a higher standard of scrutiny. In the 1991 case of *Moore v. Mobile Infirmary Association,* the Alabama Supreme Court invalidated a $400,000 cap on noneconomic damages based on the conclusion that the state had failed to show a reasonable means/ends fit between caps and the asserted purpose of alleviating the effects of the mid-1980s malpractice crisis. The court formally declined to state what standard of review it was applying, but its analysis goes beyond typical rational-basis review. Reviewing available empirical studies, the court held that there was insufficient evidence that the enactment of medical malpractice damages caps leads to a decrease in insurance premiums or an improvement in the availability of health care services.[77] Relying heavily on a U.S. General Accounting Office report that showed a remote connection between damages caps and the total cost of health care, the court held that there was no rational reason for denying relief to the most catastrophically injured patients, while still allowing those who were less severely injured to receive full compensation.[78] The court was also troubled that damages caps created a form of negligence protection for health care providers that was not generally available to other types of tortfeasors.[79]

In *Carson v. Maurer,* the New Hampshire Supreme Court applied this heightened scrutiny more explicitly to invalidate a noneconomic damages cap for medical malpractice plaintiffs.[80] In rejecting the rational-basis standard, the *Carson* court held that although no fundamental right or suspect class was implicated, the rights affected by damages caps were of sufficient importance that any classifications created by damages caps must be "reasonable" and must have a "fair and substantial" relation to the object of the legislation.[81] The court recognized that medical malpractice damages caps serve an important societal goal, but held that it was still "unfair" to force a class of the most severely injured patients to support the entire medical industry through a reduction in damages awards.[82] Moreover, it expressed skepticism that caps could achieve their intended purpose of stabilizing insurance risks and premiums. Rather than examining evidence concerning statistical associations between caps and premiums, the court simply made the commonsense observation that premiums were influenced by factors other than claims payouts and that only a small proportion of cases would have damages high enough to implicate the cap. Further, it noted, caps did not address the problem of nonmeritorious malpractice cases.

Overall, the case law suggests that damages caps will survive equal protection challenges where the court employs a true rational-basis analysis, which will nearly always be the case. The evidence that caps reduce claim severity and have a modest stabilizing effect on premiums is almost certainly sufficient to support a judicial holding under rational-basis review that a reasonable legislature could have concluded that caps would advance an objective of stabilizing insurance premiums.[83] Caps are vulnerable, however, in the few jurisdictions in which heightened scrutiny is applied, because it is less clear that the empirical evidence shows the required "substantial" connection.

Due Process

Due process challenges have been brought against noneconomic damages caps in 10 states, and against total damages caps in 9 states. Courts have rejected these claims in 9 of the 10 noneconomic caps cases and 7 of the 9 challenges to total damages caps.

Due process challenges come in two flavors. First, caps can be challenged as a violation of procedural due process guarantees. The procedural due process argument rests on the assumption that plaintiffs have a vested property interest in whatever damages award a jury delivers, and that the application of a standard damages cap deprives them of this full amount without any opportunity to present evidence as to why the full award amount is justified. For example, in the Virginia case of *Etheridge vs. Medical Center Hospitals,* the plaintiff contended that Virginia's $750,000 damages cap deprived her of an effective opportunity to be heard, since the damages cap purported to "preordain the result of the hearing" and created "a conclusive presumption that no plaintiff's damages exceed $750,000."[84]

The procedural due process theory has never been successfully used to defeat damages caps legislation in any federal or state court. The theory that damages caps unconstitutionally deprive plaintiffs of their property has been rejected by state courts. As explained by the Virginia Supreme Court in *Etheridge:* "Procedural due process guarantees a litigant the right to reasonable notice and a meaningful opportunity to be heard. The procedural due process guarantee does not create constitutionally-protected interests; the purpose of the guarantee is to provide procedural safeguards against

a government's arbitrary deprivation of certain interests."[85] This sentiment was echoed by the Colorado Supreme Court in *Scholz v. Metropolitan Pathologists, P.C.*: "The constitutional guarantee of due process is applicable to rights, not remedies. Although a vested cause of action is property and is protected from arbitrary interference, [appellants have] no property, in the constitutional sense, in any particular form of remedy; all that [they are] guaranteed...is the preservation of their substantial rights to redress by some effective procedure."[86]

A second avenue of attack is to assert a substantive due process violation. When damages caps are challenged as a violation of substantive due process, they are usually evaluated with the same framework as equal protection questions. As explained earlier, this typically consists of a rational-basis analysis in which the court will evaluate whether the cap is rationally related to a legitimate legislative purpose.[87] It is not uncommon for a state court decision to blend the equal protection and substantive due process questions into a single reasonableness test in order to dispense with both questions in the same analysis.[88]

As in equal protection discussions, state courts will normally uphold damages caps against substantive due process challenges as long as there is some evidence that the caps were enacted to address a malpractice crisis in the state. However, there is some variation in outcomes even among cases in which the rational-basis test was employed. One distinctive case is the Ohio Supreme Court's decision in *Morris v. Savoy*.[89] The court explicitly applied rational-basis review, yet found insufficient evidence in the legislative record to sustain Ohio's general damages cap against a due process challenge. The legislature had made no specific, explicit findings about the efficacy of caps. Moreover, it had asked the state insurance commissioner to prepare a report on the effectiveness of 15 of 36 specific malpractice reforms the state had adopted in decreasing malpractice insurance premiums, but had not listed caps among the 15. The court inferred that caps were not "among the statutes that the legislature obviously believed would have an impact on insurance premiums."[90] This inference is difficult to credit: why would the legislature have passed malpractice caps, if not to calm insurance rates? The court also considered external reports and the Texas Supreme Court's decision in the *Lucas* case in concluding that the evidence was not sufficient even to satisfy the rational basis standard. Morris is unusual in that the legislature failed to document its findings about caps, but is an important case because it remains the law in Ohio, where a constitutional challenge to a newly adopted cap is pending.

One due process question that remains unresolved in many states is the "quid pro quo" or "replacement remedy" question that has also arisen in the context of open -courts analyses.[91] When the U.S. Supreme Court declined to review the Fourteenth Amendment questions raised in the California Supreme Court decision in *Fein*, Justice White wrote a spirited dissent urging the Court to resolve the question of whether federal due process requires a substitute quid pro quo compensation scheme in order to implement a cap on tort damages.[92] Justice White noted that this question was left unresolved by the Court's decision in *Duke Power Co. vs. Carolina Environmental Study Group, Inc.*, where the Court upheld the provisions of a federal statute that placed a dollar limit on the liability that would be incurred by power plants in the event of a nuclear accident. One of the objections raised against the liability limitations discussed in *Duke Power* was the contention that the limited liability provisions violated due process by failing to provide those who were severely injured by a nuclear accident with any remedy to replace the law's elimination of the common law right to sue.[93] Although the U.S. Supreme Court upheld the liability limitations in *Duke Power*, the Court expressly declined to resolve the quid pro quo question.[94] As Justice White urged: "Whether due process requires a legislatively enacted compensation scheme to be a quid pro quo for the common-law or state-law remedy it replaces, and if so, how adequate it must be, appears to be an issue unresolved by this Court...Moreover, given the continued national concern over the 'malpractice crisis,' it is likely that more States will enact similar types of limitations, and that the issue will recur."[95]

As alluded to by Justice White, state supreme courts have struggled with the quid pro quo question in the due process context, leading several states to resolve the substitute remedy issue using other constitutional arguments. For example, in *Arneson v. Olson*, the North Dakota Supreme Court expressed some doubt that a quid pro quo is required in order to enact damages caps. However, the court ultimately opted to resolve the due process questions raised by the litigants from a more "procedural" due process angle, holding that the elimination of a preexisting right may not be arbitrarily imposed.[96] Notably, when state courts discuss a quid pro quo requirement, it is more frequently done in the open-courts context, rather than on due process

The procedural due process theory has never been successfully used to defeat damages caps legislation in any federal or state court.

grounds.[97] In fact, no damages caps opinion within the past 15 years has even addressed the quid pro quo issue in the due process context, leading one to question whether the issues that Justice White raised in 1985 have now become irrelevant to the states. Thus, it appears that the "split" in judicial opinion that worried Justice White may have resolved itself as the majority of state courts continue to reject any quid pro quo requirement in the due process context.

Separation of Powers

Finally, medical malpractice legislation is occasionally challenged under a separation of powers theory. Many state constitutions contain provisions that vest judicial powers exclusively in the court system, similar to Article III of the U.S. Constitution.[98] Arguably, the legislative branch infringes on judicial power and "determine[s] judicial controversies" when it enacts laws that alter or affect court or jury procedures.[99] For example, the Illinois Supreme Court concluded that the Illinois legislature had unconstitutionally encroached on the judiciary's remittitur powers by passing a $500,000 cap on noneconomic damages in tort actions.[100] This type of reasoning has led some legal scholars to conclude that policies and procedures related to jury verdicts should only be created by judges and members of the bar, rather than by state legislatures.[101]

From another perspective, one could argue that damages caps are a larger public policy problem, rather than a question of legal procedure. If this is the case, then tort reform measures would be in the constitutional province of the legislative branch. Most state courts have adopted this view, holding that damages caps are an extension of the legislature's right to modify or eliminate a common law cause of action, rather than an unconstitutional encroachment on the courts' right to administer justice.[102] As the Utah Supreme Court has explained, "[t]he power to declare what the law shall be is legislative. The power to declare what is the law is judicial."[103]

Some scholars have gone further by arguing that state lawmakers are in the best position to evaluate the wisdom of damages caps, since unlike judges, legislators are able to hold public hearings and can collect and analyze data on the potential effects of damages caps before voting on legislation.[104] Judges who endorse this separation of powers philosophy may be less likely to scrutinize the legislature's justifications for enacting damages caps in the context of equal protection and due process challenges as well.

It is important to stress that even if a court rules that it is constitutionally proper to entrust the legislature to enact statutes that cap tort damages, it is still a violation of the separation of powers doctrine for a legislature to take away the court's jurisdiction over individual medical malpractice cases. This became an issue in Ohio, where the legislature tried to circumvent judicial review of a damages caps law by entirely removing the court's jurisdiction over cases involving damages in excess of the cap. The Ohio Supreme Court invalidated this law, holding that a legislature may not limit a court's jurisdiction if the only motivation behind the law is a desire to circumvent the court's ability to overturn the legislation.[105] However, this case was unique in that it involved a wholesale revocation of jurisdiction rather than a limitation on remedies.

Overall, separation of powers arguments have been a uniformly unsuccessful strategy for challenging damages caps. Courts have rejected such claims in all cases, whether they involve caps on noneconomic damages or total damages (Table 2).

Implications for State and Federal Tort Reform

Our review of the outcomes of state litigation suggests that caps on noneconomic damages have generally been upheld. Constitutional challenges have been successful in a handful of states in which courts have applied heightened levels of judicial scrutiny, but the overall scorecard, as described in Table 2, shows that most challenges fail. Caps on total damages have been struck down more often – likely one reason such caps have not been pursued in the latest round of tort reform.

The outcomes of the pending cases in Ohio, Florida, and West Virginia are uncertain, but some predictions might be ventured. Although the Ohio Supreme Court struck down a previous damages cap in the state in the *Morris* case, there would seem to be ample opportunity for the current cap to survive challenge, because the *Morris* decision appeared to turn on the legislature's failure to document its findings about the effectiveness of caps. This is a mistake the legislature is unlikely to have repeated. The Ohio Supreme Court applied rational-basis analysis in *Morris,* and it will likely do so again, but with different results.

There is nothing in the West Virginia case law to suggest that its newly adopted cap will be held invalid. The new law caps damages at a much lower level than the $1 million cap that was previously upheld (Table 1), and the court in the earlier constitutional challenge was careful to limit its holding to the $1 million cap. Indeed, it explicitly acknowledged that: "A reduction of non [economic] damages to a lesser cap at some point would be manifestly so insufficient as to become a denial of justice."[106] However, given the prevalence of $250,000 caps among the states today, it seems very unlikely that the court would consider a cap at that level to be grossly insufficient.

The prospects in Florida are more uncertain, in part because its constitutional guarantee of access to courts is atypically strong. Florida requires a showing of "overpowering public necessity" in order to abolish a common law right without providing an adequate substitute remedy.[107] Making this showing will presumably involve proof both that the high malpractice insurance rates in Florida are affecting the availability of health care and that the cap Florida has adopted will be efficacious in stabilizing insurance rates. Both of these claims are hotly contested, and the Florida court has already shown itself to be more likely than many state courts to actively scrutinize the evidence supporting different types of medical malpractice reform.

Although our review of litigation outcomes leads us to conclude that noneconomic damages caps are generally deemed constitutional, it is important to note that there is a degree of selection bias in examining the constitutionality of caps through the lens of litigation. States in which caps are patently unconstitutional have not passed caps legislation at all, and therefore are not represented in our analysis of litigation.

The most prominent example of such a state is Pennsylvania, one of the states hit hardest by rising liability costs over the past several years. All parties to the debate over malpractice reform in Pennsylvania understand that legislation capping damages cannot be passed unless the state first amends its constitution to allow it. Article 3, section 18 of the Pennsylvania constitution prohibits the General Assembly from enacting any law that would limit the amount to be recovered for injuries resulting in death, or for injuries to persons or property.

This can easily become an onerous (and often impossible) process. For example, Pennsylvania requires a proposed state constitutional amendment to be passed in two consecutive legislative sessions, followed by voter approval in a statewide referendum.

In Wyoming and Arizona, too, caps initiatives have been precluded by a clear constitutional mandate. In November 2004, Wyoming citizens considered and narrowly rejected "Amendment D," a ballot measure that would have amended the state constitution to permit the legislature to pass a law capping noneconomic damages in malpractice cases. Article 10, section 4 of the Wyoming constitution bars laws that limit damages in actions for wrongful death or personal injury. Arizona citizens did the same in 1994 by a much larger margin, rejecting "Proposition 103," which would have removed the constitutional prohibition on laws limiting the damages one may recover for personal injury or death. Texas has demonstrated that constitutional amendments are possible given the right combination of amendment procedures and political will, but reformers in other states, such as Florida, are extremely pessimistic about the prospects.

Owing in no small measure to state constitutional problems, provider groups and other tort reform advocates have turned their efforts in recent years towards the enactment of federal damages caps. It is not our purpose to comprehensively evaluate the prospects for such legislation before the federal courts, but a few observations can be briefly made. A federal cap would be subject to constitutional challenges only under the U.S. Constitution. Federal action in this area could be challenged as an impermissible exercise of the national government's commerce-clause authority, though such a challenge would be unlikely to succeed. On the other hand, because some state constitutional provisions on which challenges to state caps have been based have no analogs in the U.S. Constitution, the range of constitutional claims available against a federal cap would be somewhat narrower.

The HEALTH Acts of 2003 and 2004 both contained provisions specifying that the federal law would preempt conflicting state laws, unless the state law provided greater liability protection for health care providers or specified a different damages limit.[108] Thus, an enterprising state legislature that wanted to bypass the effects of the HEALTH Act and preserve a full range of remedies for malpractice plaintiffs presumably could pass a damages cap in an extremely high amount. For example, a one billion dollar state cap on noneconomic damages, although basically meaningless, would still allow a state to circumvent the $250,000 HEALTH Act cap.

Constitutional concerns aside, there are some prudential reasons to question a federal tort reform law. Bills such as HEALTH depart from the tradition, dating back to the earliest days of medical negligence litigation in the U.S., that personal injury actions for malpractice are a matter of state law. The rationales for keeping the locus there are compelling: providers' litigation risk varies dramatically from state to state (quite independent of whether there are tort reforms in place), and so does the salience of medical malpractice as a public issue. Interest groups, insurance markets, the supply of health care providers, and public views about lawsuits and compensation of injured persons also vary widely. Furthermore, much of health care quality regulation, such as licensure and provider disciplinary proceedings, is conducted at the state level. Medical malpractice is not an area that cries out for federal regulation either because state-level regulation is inefficient or because state legislatures have failed to act on an important issue.

Of course, one drawback to having the medical liability issue resolved at the state level is the persistent

uncertainty, whether realistic or not, about whether medical malpractice damages caps are constitutional. Although caps have survived constitutional litigation in the majority of states where they have been challenged, the political volatility of this issue undoubtedly leaves many lawmakers and liability insurers with doubts about the stability of caps legislation. As some scholars have pointed out, state court judges are elected officials in many states, and therefore may be more susceptible to political and public influence when rendering decisions on ambiguous constitutional questions.[109] Without the protection of life tenure, some critics have questioned whether state judges are even equipped to take minority interests into account when rendering judicial decisions on controversial issues.[110] Additionally, as was recently seen in Texas, the state constitution itself can be a fluid document, particularly in "referendum" states where a single state-wide election can change the legality of damages caps literally overnight based on the political whim of voters.[111] These factors, among others, make the entire body of state constitutional law more unstable than its federal counterpart.

In her study of state constitutional decisions, Helen Hershkoff observed that state court judges seem more likely than federal judges to take localized concerns into account when ruling on the constitutional propriety of legislation. Hershkoff speculated that this may be partly due to the fact that, unlike federal judges, state court judges do not have to worry about the potential nationwide impact of their decisions.[112] This could help explain why some state courts, such as Utah's, have been willing to uphold damages caps legislation, even after expressing some doubt about whether caps are an effective way to resolve the problems associated with the medical liability insurance market.

Hershkoff argued that state court judges play a unique and important role as "common law generalists" with broad experience at articulating constitutional frameworks for state legislators to use in resolving complex social and economic issues.[113] She explained: "[I]n difficult cases, the state court's most appropriate stance may be to acknowledge openly the limits of the judicial process – to 'face up to indeterminacy' – and to use its power of review to encourage the coordinate branches to work together to develop conditional responses to constitutional questions. The state court can [do this by] encouraging, and insisting upon, the gathering of information, the testing of methods, and the 'learning by monitoring' that commentators associate with improved decisionmaking."[114]

Proponents of a federal damages cap might argue that the instability of state constitutional law offers a compelling reason for enacting national-level reform legislation. However, given the local nature of both the health care delivery system and the medical liability insurance industry, it is logical to expect that states would approach these issues in different ways. Rather than focusing on the judicial branch, perhaps a more important issue is whether state legislators are thoroughly evaluating the potential effectiveness of damages caps before enacting legislation.

One potential compromise, proposed by James Blumstein, would be to enact federal legislation authorizing states to conduct "pilot programs" to address the medical liability problems in their state. This legislation could include a provision preempting conflicting state laws, so as to avoid the constitutional barriers currently plaguing states like Pennsylvania. This approach to reform would have an advantage over a national damages cap in that it would continue to allow individual state legislatures to draft reform laws that were specifically tailored to the insurance market problems and health care quality concerns unique to the state.[115] A "states as laboratories" approach to the medical liability crisis has the added benefit of allowing states to experiment with new and innovative solutions to reform that, if successful, could be replicated in other states.

In conclusion, constitutional concerns have been a bugaboo for damages caps legislation in the past. In California and other states, the hoped-for effects of caps legislation on insurance premiums were delayed for years as constitutional challenges worked their way through the courts. Constitutional challenges continue to be brought against caps passed as part of the latest round of tort reform; however, reformers can face those challenges with greater confidence today. Over the years, the scales in state courts have increasingly tipped toward upholding noneconomic damages caps. Legislatures have also learned to avoid the more problematic caps on total damages and to make and document findings about the effects of high liability insurance costs on health care in their state and the effectiveness of caps in stabilizing those costs. Some states, like Pennsylvania, remain barred from adopting damages caps due to constitutional provisions that explicitly prohibit them. But others face a much clearer path than was the case during previous malpractice crises. For them, the primary obstacle to implementing caps is not legal but political.

The now-widespread judicial acceptance of caps should not be interpreted as proof that they are efficacious, or good public policy. Rational-basis review sets the bar very low. The evidence about the caps' effectiveness remains mixed, and concerns about their equity implications persist.[116] Our review suggests that these matters ought to be scrupulously considered by legislatures, for they will not be by the courts.

Table 1
Damages Caps Laws and Constitutional Challenges†

State	Damages Caps Applicable to Medical Malpractice Cases	Constitutional Challenges
Alabama	No limits	$400,000 limit on noneconomic damages was held to violate equal protection and the right to a jury trial. *Moore v. Mobile Infirmity Ass'n*, 592 So. 2d 156 (Ala. 1991). $1 million limit on total damages was also struck down as violating equal protection and the right to a jury trial. *Smith v. Schulte*, 671 So. 2d 1334 (Ala. 1995).
Alaska	Noneconomic damages are capped at $400,000, or $8,000 times the years of the plaintiff's life expectancy, whichever is greater. In cases of severe permanent physical impairment or severe disfigurement, damages are limited to the greater of $1 million or $25,000 times the years of the plaintiff's life expectancy. Alaska Stat. § 09.17.010. Punitive damages in most cases are limited to the greater of three times the award of compensatory damages or $500,000. 50% of punitive damages awards must be paid to the state treasury. Alaska Stat. § 09.17.020.	Medical malpractice damages caps did not violate the right to a jury trial, the right to equal protection, or the right to substantive due process in the state or federal constitutions, the separation of powers doctrine, or the right of access to the courts, or the ban on "special legislation" in the state constitution. *Evans v. State*, 56 P.3d 1046 (Alaska 2002).
Arizona	No limits	Article 2, § 31 of the Arizona constitution prohibits the enactment of any law limiting the damages one may recover for personal injury or death.
Arkansas	Punitive damages are capped at $1 million in medical malpractice and personal injury lawsuits. Ark. Code § 16-55-208.	Unchallenged on constitutional grounds
California	Noneconomic damages in medical liability cases are limited to $250,000. Cal. Civ. Code § 3333.2.	The $250,000 limit on noneconomic damages in medical liability actions does not violate the equal protection or due process provisions of the state or federal constitutions. *Fein v. Permanente Med. Group*, 695 P.2d 665 (Cal. 1985), appeal dismissed, 474 U.S. 892 (1985).
Colorado	$1 million limit for total damages (including past and future damages and noneconomic damages) against a hospital or physician, unless court finds clear justification to exceed, of which no more than $300,000 can be for noneconomic damages ($250,000 for cases before July 1, 2003). Colo. Rev. Stat. § 13-64-302. Punitive damages may not exceed the amount of actual damages awarded. Colo. Rev. Stat. § 13-21-102.	The $250,000 limit on noneconomic damages in medical liability actions is constitutional and does not violate equal protection or due process guarantees. *Scholz v. Metropolitan Pathologists, P.C.*, 851 P.2d 901, 906-907 (Colo. 1993).
Connecticut	No limits	N/A
Delaware	Punitive damages may only be awarded if the medical injury was maliciously intended or the result of wanton and willful misconduct. Del. Code tit. 18, § 6855.	Unchallenged on constitutional grounds
District of Columbia	No limits	N/A
Florida	Noneconomic damages awards for physician malpractice are capped at $500,000, but this cap may be increased to $1 million at the court's discretion. Fla. Stat. § 766.118. If a plaintiff rejects a physician's offer to use binding arbitration in lieu of a trial, then noneconomic damages are capped at $350,000. Fla. Stat. § 766.209. Noneconomic damages are capped at $250,000 in arbitration proceedings. Fla. Stat. § 766.207. Punitive damages may not be awarded by arbitration panels. Fla. Stat. § 766.107.	Capping noneconomic damages at $250,000 in binding arbitration hearings for medical malpractice claims did not violate the equal protection, due process, or takings provisions of the state or federal constitutions, nor did it violate the right to jury trial, single subject requirement, or nondelegation doctrine under the Florida constitution. *Univ. of Miami v. Echarte*, 618 So. 2d 189 (Fla. 1993). An earlier law capping noneconomic damages for all tort claimants at $450,000 was held unconstitutional under the Florida constitution's open-courts provision (Art. I, § 21). Unlike in Echarte, the state had not made a colorable argument that the caps law offered a commensurate benefit to claimants or was the only available means of responding to an overpowering public necessity. *Smith v. Dep't of Insurance*, 507 So. 2d 1080 (Fla. 1987).

† Current as of April 2005. We do not include caps that apply only to the liability of government-employed health care providers.

State	Damages Caps Applicable to Medical Malpractice Cases	Constitutional Challenges
		A constitutional challenge to the recently adopted $500,000 cap (Fla. Stat. § 766.118) is pending. *Berges v. Lambkin-Alexander* (Fla. Cir. Ct., no citation available).
Georgia	General law limiting punitive damages in all tort actions to $250,000 unless defendant acts with specific intent to harm or demonstrates other aggravating circumstances that would justify a higher award. Ga. Code § 51-12-5.1. In 2005, the state passed a $350,000 cap on noneconomic damages ($700,000 if judgment involves more than one medical facility). Ga. Code § 51-13-1.	Unchallenged on constitutional grounds
Hawaii	General law placing a $375,000 limit on pain and suffering awards in tort actions. Cap does not apply to intentional torts. Haw. Rev. Stat. § 663-8.7.	Unchallenged on constitutional grounds
Idaho	$250,000 cap on noneconomic damages per claimant in personal injury and wrongful death actions. Cap adjusted annually based on average annual wage data. Cap does not apply to injuries caused by willful or reckless misconduct, or felonious actions. Idaho Code § 6-1603. Punitive damages in personal injury actions are capped at the greater of $250,000 or three times compensatory damages. Idaho Code § 6-1604.	Cap on noneconomic damages in personal injury and wrongful death actions did not violate the right to jury trial, constitute special legislation, or violate the separation of powers doctrine under the state constitution. *Kirkland v. Blaine Co. Med. Ctr.*, 4 P.3d 1115 (Idaho 2000).
Illinois	No punitive damages are allowed in tort or contract cases arising from medical, hospital or other healing art malpractice. 735 Ill. Comp. Stat. 5/2-1115.	Prior law capping noneconomic damages in tort actions to $500,000 was held to violate the special legislation and separation of powers provisions in the Illinois constitution. *Best v. Taylor Machine Works, Inc.*, 689 N.E.2d 1057 (Ill. 1997). Previous cap on total damages was held to violate the Illinois equal protection provision. *Wright v. Central Du Page Hosp. Assoc.*, 347 N.E.2d 736 (Ill. 1976). Current cap on punitive damages in medical malpractice cases remains unchallenged on constitutional grounds.
Indiana	The total amount recoverable in medical liability cases is limited to $750,000 for acts that occurred before July 1, 1999, and to $1,250,000 for acts that occurred after July 1, 1999. Defendant healthcare providers are responsible for paying the first $250,000 of the damage award. Any amount in excess of this limit is paid from the Indiana Patient's Compensation Fund. Ind. Code Ann. § 34-18-14-3.	Cap on total damages does not violate equal protection, due process, or right to trial by jury under either the federal or Indiana constitutions. *Johnson v. St. Vincent Hosp.*, 404 N.E.2d 585 (Ind. 1980), aff'd, *Indiana Patient's Compensation Fund v. Wolfe*, 735 N.E. 2d 1187 (Ind. Ct. App. 2000).
Iowa	No limits. The Iowa House and Senate passed a $250,000 cap on noneconomic damages in 2004 (HB 2440) but the measure was vetoed by Governor Tom Vilsack.	N/A
Kansas	Noneconomic damages in personal injury cases are capped at $250,000. Kan. Stat. Ann. § 60-19a02.	An earlier Kansas statute that established a total damages cap of $1 million in medical malpractice actions was held to violate the right to jury trial and right to remedy (open-courts) provisions of the Kansas constitution. *Kansas Malpractice Victims Coalition v. Bell*, 757 P.2d 251 (Kan. 1988). However, the Kansas Supreme Court has upheld the current statute as constitutional based on the fact that the $250,000 cap is limited to noneconomic damages. *Samsel v. Wheeler Transport Serv., Inc.*, 789 P.2d 541 (Kan. 1990) (holding that the cap does not violate state constitutional guarantees of jury trial and open-courts); see also *Leiker v. Gafford*, 778 P.2d 823 (Kan. 1989) (holding that a similar $100,000 cap on non-pecuniary losses in wrongful death actions did not violate the equal protection, due process, or right to jury trial provisions of the federal or Kansas constitutions).
Kentucky	No limits	Article 54 of the Kentucky constitution prohibits the legislature from passing any law that would limit recovery in a personal injury or wrongful death action.

State	Damages Caps Applicable to Medical Malpractice Cases	Constitutional Challenges
Louisiana	The total amount of damages for injuries or death due to medical malpractice is capped at $500,000. Each provider is liable for $100,000, and the state's patient compensation fund pays any excess award above that level. La. Rev. Stat. Ann. § 1299.42.	$500,000 cap in medical liability actions did not violate the equal protection provisions of the state or federal constitutions. *Butler v. Flint Goodrich Hosp. of Dillard Univ.*, 607 So.2d 517 (La. 1989).
Maine	$400,000 noneconomic damages cap applies to wrongful death cases only. 24-A M.R.S.A. § 4313.9.	Unchallenged on constitutional grounds
Maryland	In December 2004, the Maryland legislature passed the "Maryland Patients' Access to Quality Health Care Act of 2004" (H.B. 2) which capped noneconomic damages in medical malpractice actions at $812,500 if they involve a patient's death, and at $650,000, in all other cases. The legislation was vetoed by Governor Robert Ehrlich, but the Maryland legislature subsequently overrode this veto in January 2005.	The medical liability legislation has not been challenged on constitutional grounds. In an earlier decision, the Maryland Supreme Court held that a statute capping damages in personal injury cases did not violate the right to jury trial or due process clauses in the Maryland constitution. *Murphy v. Edmonds*, 601 A.2d 102 (Md. 1992).
Massachusetts	In a medical malpractice case, the jury is not to award the plaintiff more than $500,000 for noneconomic damages unless it determines that the loss or impairment is so severe that the damages cap would deprive the plaintiff of just compensation for the injuries sustained. Mass. Gen. Laws ch. 231, § 60H.	Unchallenged on constitutional grounds
Michigan	Noneconomic damages are capped at $280,000, adjusted annually for inflation. The noneconomic damages cap is increased to $500,000 in cases where the plaintiff is hemiplegic, paraplegic, or quadriplegic due to an injury to the brain or spinal cord, where the plaintiff has permanently impaired cognitive capacity, or where the plaintiff has permanent damage to a reproductive organ. Mich. Comp. Laws § 600.1483.	There are no Michigan supreme court cases ruling on the constitutionality of these caps. One Michigan appellate court ruled that the caps were constitutional and did not infringe on the right to jury trial or right to equal protection. *Zdrojewski v. Murphy*, 657 N.W.2d 721 (Mich. Ct. App. 2002). Subsequent decisions have followed Zdrojewski in applying the cap, but at least one Michigan appellate court issued an opinion which strongly criticized this earlier holding. *Wiley v. Henry Ford Cottage Hosp.*, 668 N.W.2d 402, 509 (Mich. Ct. App. 2003).
Minnesota	No limits	N/A
Mississippi	Noneconomic damages are limited to $500,000 in cases involving malpractice or breach of the standard of care. In all other cases, noneconomic damages are capped at $1,000,000. Miss. Code Ann. § 11-1-60. Punitive damages are only awarded upon a showing of actual malice or gross negligence. Miss. Code Ann. § 11-1-65.	Unchallenged on constitutional grounds
Missouri	Noneconomic damages in tort actions based on improper healthcare are capped at $350,000. This amount is adjusted annually based on inflation data. Punitive damages are only awarded upon a showing of willful, wanton, or malicious conduct. Mo. Ann. Stat. § 538.210.	Noneconomic damages caps do not violate the due process, equal protection, right to jury trial, or open-courts provisions of either the federal or Missouri constitutions. *Adams v. Children's Mercy Hosp.*, 832 S.W.2d 898 (Mo. 1992).
Montana	Noneconomic damages in medical malpractice actions are limited to $250,000. Mont. Code Ann. § 25-9-411. Punitive damages are capped at the lesser of $3 million or three percent of the defendant's net worth. Mont. Code Ann. § 27-1-220.	Unchallenged on constitutional grounds
Nebraska	The total amount recoverable by a plaintiff in a medical liability action may not exceed $1,750,000. Provider liability is capped at $500,000; damages above this amount are paid from the state's Excess Liability Fund. Neb. Rev. Stat. § 44.2825.	Caps on total damages do not violate the right to trial by jury, equal protection, separation of powers or open-courts provisions of the Nebraska constitution. *Gourley v. Neb. Methodist Health Sys., Inc.*, 663 N.W.2d 43 (Neb. 2003); see also *Prendergast v. Nelson*, 256 N.W.2d 657 (1977) (upholding the total damages cap against equal protection and due process challenges).
Nevada	$350,000 cap on noneconomic damages is applied to medical malpractice actions unless the defendant's conduct constitutes gross malpractice, or the court determines by clear and convincing evidence that a higher award is justified. Noneconomic damages may not exceed the amount of money remaining under the	Unchallenged on constitutional grounds

State	Damages Caps Applicable to Medical Malpractice Cases	Constitutional Challenges
	defendant's professional liability insurance policy after subtracting the economic damages awarded to the plaintiff. Nev. Rev. Stat. § 41A.031.	
New Hampshire	Punitive damages may not be awarded in any action unless specifically provided by statute. N.H. Rev. Stat. Ann. § 507:16.	A prior $250,000 cap on noneconomic damages in medical liability cases was held to violate the equal protection provision in the New Hampshire constitution. *Carson v. Maurer*, 424 A.2d 825 (N.H. 1980). A similar $875,000 cap on noneconomic damages in personal injury accidents was also held to violate state equal protection law. *Brannigan v. Usitalso*, 587 A.2d 1232 (N.H. 1980).
New Jersey	Punitive damages in civil actions are capped at the greater of five times the compensatory damages or $350,000. N.J. Stat. Ann. § 2A:15-5.14.	Unchallenged on constitutional grounds
New Mexico	$600,000 cap on all medical malpractice damages, excluding punitive damages and medical care and related costs. Healthcare providers are liable for $200,000. Awards in excess of this amount are paid from the state patient compensation fund. N.M. Stat. Ann. § 41-5-6.	Unchallenged on constitutional grounds
New York	No Limits	N/A
North Carolina	Punitive damages are only awarded for acts of fraud, malice, or willful or wanton conduct. N.C. Gen. Stat. § 1D-15. Punitive damages are capped at the greater of $250,000 or three times compensatory damages. N.C. Gen. Stat. § 1D-25.	Statute capping punitive damages did not violate the right to a jury trial, separation of powers principle, open-courts guarantee, prohibition against special legislation, or the principles of due process, equal protection or the right to enjoy the fruits of one's labor under the state constitution, and was not void for vagueness. *Rhyne v. K-Mart Corp.*, 594 S.E.2d 1 (N.C. 2004).
North Dakota	Noneconomic damages in healthcare malpractice actions are capped at $500,000. N.D. Cent. Code § 32-42-02.	Current law unchallenged on constitutional grounds. However, a prior North Dakota cap on total damages (later repealed) was held to be a violation of the equal protection and substantive due process rights guaranteed in the North Dakota constitution. *Arneson v. Olson*, 270 N.W.2d 125 (N.D. 1978).
Ohio	Noneconomic damages in medical liability cases are capped at the greater of $250,000 or three times the amount of economic loss, up to $350,000 per plaintiff and $500,000 per occurrence. This cap is increased to $500,000 per plaintiff and $1 million per occurrence when permanent physical or function deformities are involved. Ohio Rev. Code Ann. § 2323.43.	An earlier law capping general damages in medical liability actions was held to be unconstitutional under the due process clause of the Ohio constitution. *Morris v. Savoy*, 576 N.E.2d 765 (Ohio 1991). An earlier cap on punitive damages was also held to violate the jury trial provision of the Ohio constitution. *Crowe v. Owens Corning Fiberglass*, 718 N.E.2d 923 (Ohio 1999). More than a dozen cases challenging the current cap are pending at the trial court level.
Oklahoma	Noneconomic damages are capped at $300,000 in medical malpractice cases involving pregnancy or emergency care. Okla. Stat. tit. 63, § 1-1708.1F. The cap also applies to other malpractice cases if the defendant made a settlement offer and the verdict awarded to the plaintiff is less than 1.5 times the amount of the final offer. Okla. Stat. tit. 63, § 1-1708.1F-1. Punitive damages are limited to $100,000 in cases of reckless disregard of the rights of others. In cases of intentional and malicious acts, they are limited to the greater of $500,000, twice compensatory damages, or the benefit derived by defendant from his conduct. If the judge finds beyond a reasonable doubt that the intentional and malicious act threatened human life, then the cap does not apply. Okla. Stat. Ann. tit. 23, § 9.1.	Unchallenged on constitutional grounds
Oregon	Noneconomic damages are capped at $500,000 in civil lawsuits that are based on statutorily-created causes of action. Or. Rev. Stat. § 31.710. Punitive damages are only allowed upon a showing of malice or reckless and outrageous indifference to a highly unreasonable risk of harm. Or. Rev. Stat. § 31.730. Punitive damages may not be	$500,000 cap on noneconomic damages was found to violate the right to trial by jury in the Oregon constitution. *Lakin v. Senco Products*, 987 P.2d 463 (Or. 1999). However, the court stipulated that this case did not overrule an earlier case which upheld the constitutionality of the cap when applied to wrongful death cases, since the wrongful death statute was a creation of the legislature and not based on Oregon common law as it existed at

State	Damages Caps Applicable to Medical Malpractice Cases	Constitutional Challenges
	awarded against licensed or registered healthcare professionals acting within the scope of their employment. Or. Rev. Stat. § 31.740.	the time the Oregon constitution was enacted. *Greist v. Phillips*, 906 P.2d 789 (Or. 1995).
Pennsylvania	No limits	Art. 3, § 18 of the Pennsylvania constitution prohibits the General Assembly from enacting any law that would limit the amount to be recovered for injuries resulting in death, or for injuries to persons or property.
Rhode Island	No Limits	N/A
South Carolina	As of July 1, 2005, noneconomic damages are capped at $350,000 per provider; plaintiff may recover no more than $1.05 million in noneconomic damages in cases involving multiple defendants. Cap is adjusted annually for inflation. Cap does not apply if defendant was grossly negligent. S.C. Code § 15-32-320.	Unchallenged on constitutional grounds
South Dakota	General (noneconomic) damages in medical malpractice actions may not exceed $500,000. There is no limit on the total of special (economic) damages. S.D. Codified Laws § 21-3-11.	A prior version of this statute provided for a cap of $1,000,000 on all damages, whether economic or noneconomic. This law was found to violate the substantive due process, equal protection, jury trial, and open-courts guarantees in the South Dakota constitution. *Knowles v. U.S.*, 544 N.W.2d 183 (S.D. 1996). The current version of the cap, which is limited to noneconomic damages, has not been challenged on constitutional grounds.
Tennessee	No Limits	N/A
Texas	Noneconomic damages in medical malpractice actions are capped at $250,000 per physician. Noneconomic damages are also capped at $250,000 per hospital, with an additional cumulative hospital liability cap of $500,000 when multiple hospitals are involved. Tex. Civ. Pract. & Rem. § 74.301. Punitive damages in all tort cases are limited to the greater of $200,000 or two times the amount of economic damages, plus any noneconomic damages up to $750,000. Tex. Civ. Prac. & Rem. § 41.008.	The Texas Supreme Court held a prior version of the medical malpractice damages cap to be unconstitutional, except when applied to wrongful death cases. *Lucas v. U.S.*, 757 S.W.2d 687 (Tex. 1988) (holding medical malpractice damages caps violated the open-courts provision of the Texas constitution); see also *Rose v. Doctors Hosp.*, 801 S.W.2d 841 (Tex. 1990) (holding caps could be applied to causes of action not based in common law, such as an action for wrongful death). In order to ensure that the current legislation will be upheld, Texas voters passed Proposition 12 in 2003, which amended the Texas constitution to expressly permit the legislature to limit noneconomic damages in actions against healthcare providers. Tex. Const. art. 3, § 66.
Utah	Noneconomic damages in medical malpractice actions are capped as follows: (1) actions arising prior to July 1, 2001 at $250,000; (2) actions arising after July 1, 2001, and before July 1, 2002 at $400,000; and (3) actions arising after July 1, 2002 at $400,000, adjusted annually for inflation. Utah Code Ann. § 78-14-7.1.	Caps do not violate state constitutional guarantees of open-courts, equal protection, due process, jury trial, or separation of powers. *Judd v. Drezga*, 103 P.3d 135 (Utah 2004).
Vermont	No limits	N/A
Virginia	Total damages in medical liability actions were capped at $1.5 million in 2000. This cap increases $50,000 annually through 2007, until it reaches a final cap of $2 million in 2008. Va. Code Ann. § 8.01-581.15. Punitive damages in tort actions are capped at $350,000. Va. Code Ann. § 8.01-38.1.	Total damages cap does not violate right to jury trial, due process, separation of powers, prohibition against special legislation, or the federal equal protection clause. *Etheridge v. Med. Ctr. Hosps.*, 376 S.E.2d 525 (Va. 1989). Punitive damages limits do not violate the due process provisions in either the state or federal constitutions. *Wackenhut Applied Tech. Ctr. v. Sygnetron Prot. Sys.*, 979 F.2d 980 (4th Cir. 1992).
Washington	A cap on noneconomic damages for personal injury and wrongful death claims remains on the books. Wash. Rev. Code § 4.56.250. However, this provision has been declared unconstitutional and is no longer enforced.	Although a cap on noneconomic damages remains on the books, this statute was found to violate the right to trial by jury and was declared unconstitutional. *Sofie v. Fireboard Corp.*, 771 P.2d 711 (Wash. 1989).

State	Damages Caps Applicable to Medical Malpractice Cases	Constitutional Challenges
West Virginia	In medical liability actions, noneconomic damages are capped at $250,000 per occurrence. This cap increases to $500,000 when there is a permanent and substantial physical deformity, loss of use of a limb or bodily organ system, or a permanent physical or mental injury that prevents the person from being able to independently care for himself. These limits are adjusted annually for inflation, and only apply to defendants who have at least $1,000,000 per occurrence in medical liability insurance. The statute also stipulates that if the limits are found to be unconstitutional, then the cap on noneconomic damages will automatically increase to $1 million. W.Va. Code § 55-7B-8.	A prior $1 million cap on noneconomic damages in medical malpractice actions was held to be constitutional and not in violation of equal protection, substantive due process, jury trial, or right to remedy guarantees in the state constitution. *Robinson v. Charleston Area Med. Ctr.*, 414 S.E.2d 877 (W.Va. 1991). A constitutional challenge to the current cap is pending. *Boggs v. Camden-Clark Mem'l Hosp.* (W.Va. S. Ct., no citation available).
Wisconsin	Noneconomic damages are limited to $350,000, adjusted annually for inflation. Wis. Stat. § 893.55. In wrongful death cases, the noneconomic damages limit is increased to $500,000 for the death of a child and $350,000 for the death of an adult. Wis. Stat. § 895.04.	There are no Wisconsin Supreme Court decisions ruling on the constitutionality of this legislation. However, a Wisconsin appellate court held that the $350,000 cap on noneconomic damages did not violate the right to trial by jury, separation of powers, equal protection, or due process provisions of the state constitution. *Guzman v. St. Francis Hosp., Inc.*, 623 N.W.2d 776 (Wis. Ct. App. 2000).
Wyoming	No Limits	Article 10, § 4 of the Wyoming constitution prohibits the legislature from enacting any law that would cap damages in an action involving wrongful death or personal injury.

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3. *Judd ex rel. Montgomery v. Drezga,* 103 P.3d 135 (Utah 2004).
4. Claims have also been brought alleging that caps legislation violates state constitutional provisions prohibiting "special laws," or laws that apply to only particular persons or things of a class. See, e.g., *Lucas v. United States,* 757 S.W.2d 687 (Tex. 1988). Such challenges have not been successful.
5. N.C. GEN. STAT. § 1D-15 (2004).
6. OR. REV. STAT. § 31.740 (2003).
7. D. M. Studdert and T. A. Brennan, "The Problems with Punitive Damages in Lawsuits Against Managed-Care Organizations," *N. Engl. J. Med.* 342 (2000): 280-284.
8. D. M. Studdert, Y. T. Yang and M. M. Mello, "Are Damages Caps Regressive? A Study of Malpractice Jury Verdicts in California," *Health Affairs* 23 (2004): 54-67.
9. See Studdert, Yang and Mello, *supra* note 8.
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14. ALASKA STAT. § 09.17.010 (2004).
15. MASS. GEN. LAWS ch. 231, § 60H (2004) (allows the jury to waive a $500,000 cap on noneconomic damages if it determines that the patient's injuries are so severe that the cap would deprive the patient of just compensation); NEV. REV. STAT. § 41A.031 (2004) (allows the judge to waive a $350,000 cap on noneconomic damages in cases of gross malpractice or where the court determines by clear and convincing evidence that an award in excess of $350,000 is justified).
16. NEV. REV. STAT. § 41A.031 (2004).
17. BURNS IND. CODE ANN. § 34-18-14-3 (2004).
18. Help Efficient, Accessible, Low-Cost Timely Healthcare (HEALTH) Act of 2003, H.R. 5.
19. Patients First Act of 2003, S. 11.
20. Help Efficient, Accessible, Low-cost, Timely Healthcare (HEALTH) Act of 2004, H.R. 4280, 108th Cong. This bill was subsequently attached to H.R. 4279, which passed the House on May 12, 2004.
21. A bill to improve patient access to health care services and provide improved medical care by reducing the excessive burden the liability system places on the health care delivery system, S. 354, 109th Cong.; A bill to improve patient access to health care services and provide improved medical care by reducing the excessive burden the liability system places on the health care delivery system, H.R. 534, 109th Cong.
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23. D. Schuman, "The Right to a Remedy," *Temple Law Review* 65 (1992): 1197-1227, at 1201.
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26. See *Evans v. State,* 56 P.3d 1046, 1056 (Alaska 2002).
27. See *Gourley v. Nebraska Methodist Health Sys.*, 663 N.W.2d 43, 74 (Neb. 2003); *Adams v. Children's Mercy Hosp.*, 832 S.W.2d 898, 905 (Mo. 1992).
28. Lucas, 757 S.W.2d, at 715 (Culver, J., concurring).
29. Adams, 832 S.W.2d, at 905.
30. *Waggoner v. Gibson,* 647 F. Supp. 1102 (N.D. TX. 1986).
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38. *Kluger v. White,* 281 So.2d 1 (Fla. 1973); *Lasky v. State Farm Ins.* Co., 296 So.2d 9 (FL. 1974).
39. Tort Reform and Insurance Act of 1986, Laws of Florida ch. 86-160.
40. *Smith v. Dep't of Insurance,* 507 So.2d 1080 (FL. 1987).
41. FLA. STAT. § 766.207, 209 (2004).
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43. U.S. CONST. amend. VII.
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45. P. B. Weiss, Comment, "Reforming Tort Reform: Is there Substance to the Seventh Amendment?" *Catholic University Law Review* 38 (1989): 737-767, at 744-745.
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47. *Etheridge v. Med. Ctr. Hosps.,* 376 S.E.2d 525, 529 (VA. 1989).
48. *Id.*
49. Judd, 103 P.3d, at 143.
50. Adams, 832 S.W.2d, at 907.
51. *Kirkland v. Blain Co. Med. Ctr.,* 4 P.3d 1115, 1119-1120 (ID 2000).
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55. *Id.* at 723, quoted in Judd, 103 P.3d, at 146.
56. *Kansas Malpractice Victims Coalition v. Bell,* 757 P.2d 251, 260; but see Evans, 56 P.3d, at 1055 (Alaska Supreme Court holding that damages caps are not remittur, but a constitutionally-allowable limitation of a cause of action).
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60. U.S. CONST. amend. XIV § 1.
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66. *Fein v. Permanente Med. Group,* 695 P.2d 665, 682 (CA. 1985).
67. *Id.* at 670.
68. *Id.* at 671 (citing Medical Injury Comprehensive Reform Act, CAL. CIV. CODE § 3333.2).
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78. *Id.* at 169.
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81. *Id.* at 831.
82. *Id.* at 837.
83. D. M. Studdert, M. M. Mello and T. A. Brennan, "Medical Malpractice," *N. Engl. J. Med.* 350 (2004): 283-292.
84. Etheridge, 376 S.E.2d, at 530.
85. *Id.*
86. *Scholz v. Metropolitan Pathologists,* P.C., 851 P.2d 901, 907 (CO. 1993).
87. As with equal protection challenges, some state courts have opted to use a higher standard of review. See *Knowles v. U.S.,* 544 N.W.2d 183, 189 (S.D. 1996) (holding that the damages caps must bear a "real and substantial relation" to the objective to be attained).
88. See Evans, 56 P.3d, at 1055 (holding that the substantive due process question was dispensed with once the court found that the damages caps did not violate equal protection guarantees).
89. *Morris v. Savoy,* 576 N.E.2d 764 (Ohio 1991).
90. *Id.* at 770.
91. See Bell, 757 P.2d, at 259; Lucas, 757 S.W.2d, at 690 (holding that statutory caps were unreasonable under the state open-courts provision of the Texas constitution because they failed to provide a substitute redress for the victim).
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100. *Best v. Taylor Mach. Works, Inc.,* 689 N.E.2d 1057, 1078-1080 (Ill. 1997).
101. Scherlinck, *supra* note 98, at 340.
102. For example, see Kirkland, 4 P.3d, at 1121 (holding that a noneconomic damages cap did not violate separation of powers because the Idaho constitution allows the legislature to "modify or abolish common law causes of action"); *Pulliam v. Coastal Emergency Servs. of Richmond, Inc.,* 509 S.E.2d 307, 319 (VA. 1999) (holding that a medical malpractice damages cap did not violate separation of powers, because the legislature "has the power to provide, modify, or repeal a remedy"); *Verba v. Ghaphery,* 552 S.E.2d 406, 411 (W.Va. 2001) (holding that a medical malpractice damages cap did not violate separation of powers because the legislature has the power to limit common law remedies).
103. Judd, 103 P.3d, at 145, quoting *Ritchie v. Richards,* 47 P. 670, 675 (UT. 1896) (Bartch, J., concurring).
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112. *Id.* at 1168.
113. *Id.* at 1181.
114. *Id.* at 1182.
115. J. F. Blumstein, "A Perspective on Federalism and Medical Malpractice," *Yale Journal on Regulation* 14 (1996): 411-427, at 425-426.
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