PENN STATE LAW REVIEW

State Damage Caps and Separation of Powers

Jeffrey A. Parness[1]

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I. INTRODUCTION

In 2010, the Illinois Supreme Court invalidated certain statutory caps on noneconomic damages in medical cases because they "unduly"[2] infringed "upon the inherent power of the judiciary"[3] theretofore recognized (albeit in judicial dictum).[4] Such judicial authority originated within the separation of powers clause of the Illinois Constitution.[5] The caps were deemed to "encroach" on the judiciary's "sphere of authority"[6] because they impeded "the courts in the performance of their function."[7]

Elsewhere, American state statutory damage caps have also been challenged on state constitutional separation of powers grounds. These challenges included setting where the caps operate for nonmedical cases

1. Professor Emeritus, Northern Illinois University College of Law. An earlier draft was presented in November, 2010 at the First Loyola Constitutional Law Colloquium at the Loyola University of Chicago Law School. Thanks to Russ Kazda for his research help.
2. Lebron v. Gottlieb Mem'l Hosp., 930 N.E.2d 895, 907 (Ill. 2010).
3. *Id.* at 908.
4. *Id.* at 907.
5. *Id.* at 914.
6. *Id.* at 908.
7. *Id.*

and where the limits extend beyond noneconomic damages.[8]

Are there core separation of powers principles guiding all American state statutory damage caps? If so, do they apply similarly to all types of cases and all forms of damage caps? With or without such core principles, are there other doctrines that better speak to damage caps when conflicts arise between the legislative and judicial branches?

This paper first explores the Illinois precedents on damage caps and separation of powers. It then explores other state precedents, finding they usually involve state constitutional allocations of procedural lawmaking powers. It also finds that caps on "statutory causes of action" or during "special proceedings" are often treated differently, as are caps on punitive damages. The paper then posits that separation of powers analyses should usually be replaced in damage cap cases with judicial rulemaking analyses. It finds no core principles involving separation of powers provisions that implicate damage caps. Interstate differences in constitutional allocations of procedural rulemaking authority (and, at times, justiciable matters) should be recognized more often in damage cap settings. These observations have implications beyond damage caps. Other civil litigation issues prompt tensions between the judicial and legislative branches, such as evidence privileges. Here, too, separation of powers analyses should generally not be employed, and often should be replaced by judicial rulemaking analyses.[9]

8. Special damage caps often operate when public entities or officials, rather than private parties, are sued. Here too there can be state constitutional challenges. But separation of powers (and individual rights) issues differ in public settings because there are sovereign immunity defenses for certain entities that can be waived, but with conditions, and official immunity defenses for certain officials, which again can prompt conditions unseen in private claim settings. This paper will examine only damage caps in private recovery settings. *See, e.g.*, Tindley v. Salt Lake City Sch. Dist., 116 P.3d 295 (Utah 2005) (damage caps in Governmental Immunity Act, as applied to school district, are valid); Clarke v. Or. Health Sciences Univ., 175 P.3d 418 (Or. 2007) (damage cap in Oregon Tort Claims Act, as applied to acts in public hospital, is valid as to hospital but invalid, under the state constitutional right to a remedy, as to individual hospital employees). This paper will not address whether damage caps serve worthy goals. For such an exploration, see, *for example*, Andrew F. Popper, *Capping Incentives, Capping Innovation, Courting Disaster: The Gulf Oil Spill and Arbitrary Limits on Civil Liability*, 60 DEPAUL L. REV. (forthcoming), *available at* http://ssrn.com/abstract=1805134 (finding no worthwhile purposes to caps).

9. *See, e.g.*, Commonwealth v. Chauvin, 316 S.W.3d 279, 302-307 (Ky. 2010) (Abramson, J., dissenting) (reviewing procedural and substantive aspects of evidentiary privilege laws via a judicial rulemaking analysis); Lear v. Fields, 245 P. 3d 911, 915 (Ariz. Ct. App. 2011) (in assessing a statute altering Supreme Court rule on admissible expert testimony, reference to both general separation of powers and high court constitutional procedural rulemaking power).

II. DAMAGE CAPS IN ILLINOIS

With *Lebron v. Gottlieb Memorial Hospital*,[10] the Illinois high court in 2010 invalidated certain statutory caps on noneconomic damages in medical cases. The court primarily relied on *Best v. Taylor Machine Works*,[11] a 1997 opinion where it had invalidated, in part on separation of powers grounds, statutory caps on noneconomic damages in a broad array of civil cases, including statutory, common law negligence, and product liability claims involving "death, bodily injury, or physical damage to property."[12] As in *Best*,[13] the caps in *Lebron* were imposed after determinations by jurors, who were not informed of the caps.[14] Thus, in both cases there was said to be "a legislative remittitur" even though the prevailing plaintiff "objects or does not consent."[15] And in both cases the caps were deemed to "unduly" encroach upon "the fundamentally judicial prerogative of determining whether a jury's assessment of damages is excessive within the meaning of law."[16]

The *Lebron* court distinguished *Unzicker v. Kraft Food Ingredients Corp.*,[17] its 2002 decision upholding a statute modifying the common law rule of joint and several liability by establishing only several liability for nonmedical damages for any tortfeasor whose percentage of total attributable fault was less than twenty five percent.[18] It deemed the statute in *Unzicker* "did not set a cap on damages"[19] and did not require a trial judge to consider entering a judgment "at variance with the jury's determination and without regard to the court's duty to consider, on a case-by-case basis, whether the jury's verdict is excessive."[20]

The *Lebron* court also distinguished its own precedents sustaining certain statutory prohibitions on punitive damages. It reasoned that punitive damages are "allowed in the interest of society, and not to recompense solely the individual."[21] As to existing statutes that "limit

10. *Lebron*, 930 N.E.2d at 914.
11. Best v. Taylor Mach. Works, 689 N.E.2d 1057 (Ill. 1997).
12. *Lebron*, 930 N.E.2d at 903.
13. *Best*, 689 N.E.2d at 1081.
14. *Id.* at 1081; *Lebron*, 930 N.E.2d at 902.
15. *Best*, 689 N.E.2d at 1080; *Lebron*, 930 N.E.2d at 908.
16. Unzicker v. Kraft Food Ingredients Corp., 783 N.E.2d 1024 (Ill. 2002), *cited in Best*, 689 N.E.2d at 1080, *Lebron*, 930 N.E.2d at 908.
17. *Unzicker*, 783 N.E.2d at 1024, 1029.
18. *Id.* at 1029.
19. *Lebron*, 930 N.E.2d at 910.
20. *Id.* at 911.
21. *Id.* at 912. Perhaps analogous is the Illinois high court allowance of a mandatory criminal sentence upon conviction. *Compare* People v. Taylor, 464 N.E.2d 1059, 1061-1063 (Ill. 1984) (stating that mandatory life imprisonment via statute for certain murderers does not violate separation of powers clause as there is no "invasion of the

common law liability" by eliminating negligence claims against certain defendants, like emergency providers of medical services, the *Lebron* court declined to comment.[22] It did suggest that a statutory cap on compensatory damages against certain defendants might survive if it "allows parties to contract around the statutory limit."[23]

Long before *Best*, *Unzicker*, and *Lebron* in Illinois, there were significant tensions involving the shared General Assembly and Supreme Court duties regarding civil trial practices.[24] Illinois constitutional history from 1818 to 1970 recognizes an increased judicial responsibility for procedural law.[25] Yet the tensions between the branches continued after the 1970 constitution. The current Illinois Constitution says nothing explicit about who makes trial practice laws though it expressly recognizes significant Illinois Supreme Court rulemaking authority over appellate practices.[26] The Supreme Court has, however, long recognized inherent judicial rulemaking authority for itself on civil trial practices, which it shares with the General Assembly in limited settings.[27]

The continuing tensions between legislators and justices are reflected in written non-constitutional law. The Illinois Civil Procedure Code says that, other than proceedings regulated by statutes outside the Code, the Civil Practice Law (Article II of the Code) governs "matters of procedure" in proceedings covered by Articles III through XIX of the Code.[28] The Code recognizes Supreme Court civil procedure rulemaking authority, but limits it to rules "supplementary to, but not inconsistent with" the Code.[29] The Code says very little about appellate practices, which is not surprising given the explicit constitutional high court authority.[30]

By contrast, Illinois Supreme Court Rule 1 only says that the rules and the Civil Practice Law "shall govern all proceedings in the trial

inherent power of the judiciary to impose sentences") *with* People v. Davis, 442 N.E.2d 855 (Ill. 1982) (holding that statute requiring court to state its reasons for a criminal case sentence unduly infringes upon the exercise of a judicial function).

22. *Lebron*, 930 N.E.2d at 913.

23. *Id.* at 913.

24. *See, e.g.*, O'Connell v. St. Francis Hosp., 492 N.E.2d 1322, 1336 (Ill. 1986) (holding that statutes on voluntary dismissal without prejudice and refiling within one year could not deprive trial court of Rule 103 power to consider motions seeking involuntary dismissals with prejudice for failures to secure timely service of process).

25. *See, e.g.*, Jeffrey A. Parness and Bruce Keller, *Increased and Accessible Illinois Judicial Rulemaking*,8 N. ILL. U. L. REV. 817 (1988).

26. ILL. CONST. art. VI, §§ 4, 6, 9.

27. Parness and Keller, *supra* note 25.

28. 735 ILL. COMP. STAT. 5/1-108 (2010).

29. 735 ILL. COMP. STAT. 5/1-104(a).

30. ILL. CONST. art. VI, §§4, 6, 9.

court, except to the extent that the procedure in a particular kind of action is regulated by a statute other than the Civil Practice Law."[31] Rule 1 also notes that only "rules on appeals shall govern all appeals,"[32] presumably a recognition of the express constitutional high court authority. While these appellate procedure powers do not expressly exclude matters involving administrative review,[33] other Illinois constitutional provisions specifically authorize General Assembly lawmaking regarding administrative review.[34]

High court deference to civil procedure lawmaking by the Illinois General Assembly outside the Civil Practice Law seemingly was recognized in *Lebron*. There, the court observed that statutory prohibitions on punitive damages could be sustained. The court recalled the *Best* decision where it had acknowledged that "the legislature may limit certain types of damages, such as damages recoverable in statutory causes of action."[35]

In his dissent in *Lebron*, Justice Karmeier may have invoked this deference. He warned that, should the elimination of the noneconomic damage caps "imperil the availability of medical care,"[36] the General Assembly might then eliminate all noneconomic damages in medical malpractice cases or replace such circuit court cases with "a claims system comparable to . . . workers compensation."[37] While Justice Karmeier saw no separation of powers or other state constitutional problems with such initiatives, he again may be in the minority among the members of the Illinois Supreme Court. Noneconomic damages are typically compensatory, not punitive.[38] Further, it is unclear whether medical negligence claims may be subject to special statutes in Illinois as are employer negligence claims,[39] now guided, as in most states, by a workers' compensation scheme operating outside of constitutional

31. ILL. SUP. CT. R. 1.

32. *Id.*

33. ILL. CONST. art. VI, §§ 4, 6, 9.

34. ILL. CONST. art. VI, § 6 (Appellate Court review); Ill. Const. art. VI, § 9 (Circuit Court review).

35. *Lebron*, 930 N.E.2d 895, 906 (Ill. 2010).

36. *Id.* at 933 (Karmeier, J., concurring in part and dissenting in part).

37. *Id.* at 933 (Karmeier, J., concurring in part and dissenting in part).

38. *See, e.g.*, Murphy v. Mancari's Chrysler Plymouth, Inc., 948 N.E.2d 233, 236 (Ill. App. Ct. 2011) (finding conflict between Illinois and Michigan laws "regarding compensatory damages" as "Illinois does not have a statutory cap on compensatory damages for noneconomic injuries" while Michigan does).

39. 820 ILL. COMP. STAT. 305/1 *et seq.* (Workers' Compensation Act). *See, e.g.*, Kolacki v. Verink, 893 N.E.2d 717 (Ill. App. Ct. 2008) (illustrating the exclusivity of workers' compensation remedies under statute); Mier v. Staley, 329 N.E.2d 1 (Ill. App. Ct. 1975) (upholding Worker's Compensation Act when challenged on due process, equal protection, special legislation and right to a remedy grounds).

Judicial Article courts.[40]

Special statutory proceedings in Illinois today, where General Assembly civil procedure lawmaking dominates, include matters that did not exist, or had no counterpart, in the common law.[41] At times they are deemed sui generis.[42] They include marriage dissolution,[43] adoption,[44] domestic violence protection orders,[45] juvenile delinquency,[46] post-conviction relief[47] wrongful death,[48] and property tax objection cases.[49]

Civil procedure lawmaking by the Illinois General Assembly within and outside the Civil Practice Law should continue after *Lebron*. As noted earlier, Rule 1 expressly recognizes the operation of the Civil Practice Law in "proceedings in the trial court."[50] Seemingly, notwithstanding the legislative declaration that high court rules should only supplement, but not conflict with the Civil Procedure Code, rules in direct conflict with statutes after *Lebron* should continue to supersede.

40. *See*, *e.g.*, Putnam v. Wenatchee Valley Med. Ctr., 216 P.3d 374, 378 (Wash. 2009) (describing medical malpractice claims as "fundamentally negligence claims, rooted in the common law tradition," that claims can only constitute "special proceedings" where "the legislature has exercised its police power and entirely changed the remedies available (such as the workers' compensation system)"); Governale v. Lieberman, 250 P.3d 220, 224 (Az. Ct. App. 2011) (stating that as medical malpractice claims originate in the common law, they cannot be abrogated by the legislature under Art. 18, § 6 of the state constitution providing that damage recovery amounts "shall not be subject to any statutory limitation").

41. *See*, *e.g.*, Strukoff v. Strukoff, 389 N.E.2d 1170, 1171-72 (Ill. 1979) (describing that proceedings entirely statutory in origin and nature originate in equity, where powers depended largely upon statutory grants).

42. *See*, *e.g.*, People v. Clements, 230 N.E.2d 185, 187 (Ill. 1967) (holding that proceedings under Post-Conviction Hearing Act are "civil in nature" and "sui generis," so Civil Practice Act often does not apply).

43. *See*, *e.g.*, *Strukoff*, 389 N.E.2d at 1170 (holding that bifurcated hearing mandated by Illinois Marriage and Dissolution of Marriage Act did not infringe upon judicial authority because divorce proceedings are wholly statutory in origin).

44. *See*, *e.g.*, *In re* Adoption of Scraggs, 532 N.E.2d 244, 246 (Ill. 1988) (holding that the Adoption Act procedures apply though in conflict with Civil Practice Law and Supreme Court Rules).

45. *See*, *e.g.*, 750 ILL. COMP. STAT. 60/201.

46. *See*, *e.g.*, People v. P.H., 582 N.E.2d 700, 705-07 (Ill. 1991) (describing that there is "neither a common law nor a constitutional right to adjudication" of wrongs by a juvenile in a delinquency proceeding); *In re* S.G., 677 N.E.2d 920, 929 (Ill. 1997).

47. *See*, *e.g.*, People *ex rel.* Daley v. Fitzgerald, 526 N.E.2d 131 (Ill. 1988) (holding that civil discovery rules inapplicable in proceedings under Post-Conviction Hearing Act).

48. *See*, *e.g.*, Leiker v. Gafford, 778 P.2d 823, 847-50 (Kan. 1989) (finding no cause of action at common law for wrongful death and sustaining a Kansas cap on nonpecuniary loss comparable to the statutory caps in Illinois and New Hampshire).

49. *See*, *e.g.*, Madison Two Assoc. v. Pappas, 884 N.E.2d 142, 147 (Ill. 2008) (explaining that in circuit courts, property tax objection complaints are chiefly governed by Property Tax Code).

50. ILL. SUP. CT. R. 1.

Illinois precedents demand this result, as perhaps does the high court's constitutionally recognized "general administrative and supervisory authority over all courts."[51]

Illinois precedents also indicate that even where statutes do not directly conflict with rules, they may still fall. Areas of nearly (if not absolutely) exclusive high court procedural lawmaking authority include not only appellate procedures outside administrative review, but also the admission, regulation, and discipline of lawyers.[52] Exceptions appear, though line drawing is difficult. Thus, a statute limiting contingency fees in medical malpractice cases was sustained in 1986 when challenged on separation of powers grounds because it permitted judges to allow fees beyond the statutory limits when "fairness" dictates.[53] More absolute recovery caps on attorney fees may also survive separation of powers scrutiny in special statutory settings such as worker's compensation.

After *Lebron*, other major constraints on civil procedure lawmaking by the Illinois General Assembly remain which could also invalidate statutory damage caps. One significant limit, raised but not addressed in *Lebron*, is the constitutional right to a trial by jury.[54] State jury trial rights elsewhere have served to invalidate statutory damage caps.[55] Another limit involves the Illinois constitutional guarantee of equal protection.[56] The Wisconsin Supreme Court struck down as irrational a state statutory cap on noneconomic damages in medical malpractice cases not involving wrongful death on state constitutional equal protection grounds.[57] Additional Illinois constitutional limits, raised but

51. ILL. CONST. art. VI, § 16. *See, e.g.*, People v. Jackson, 371 N.E.2d 602 (Ill. 1977) (describing a court rule on how judges, not lawyers, voir dire prospective jurors "was a product of this court's supervisory and administrative responsibility, another reason the legislature was without authority to determine how a voir dire examination of prospective jurors should be conducted," so that a statute allowing attorney voir dire questioning was unconstitutional).

52. *See generally* Parness and Keller, *supra* note 25. Cases include *People ex rel. Brazen v. Finley*, 519 N.E.2d 898, 902 (Ill. 1988) (recognizing judiciary's "inherent and exclusive power to regulate the practice of law").

53. Bernier v. Burris, 497 N.E.2d 763 (Ill. 1986) (construing 735 ILL. COMP. STAT. 5/2-1114 and observing that "whether the provision would fail if it did not contain the allowance for larger fees is not before us").

54. ILL. CONST. art. I, § 13, *noted in Lebron*, 930 N.E.2d at 900.

55. *See, e.g.*, Atlanta Oculoplastic Surgery, P.C. v. Nestlehutt, 691 S. E. 2d 218 (Ga. 2010) (holding that a statute limiting noneconomic damages in medical malpractice cases violated state constitutional right to trial by jury).

56. Ill. Const. art. I, § 2, *noted in Lebron*, 930 N.E.2d at 900.

57. Ferdon v. Wisconsin Patients Compensation Fund, 701 N.W.2d 440 (Wis. 2005). *Compare* Oliver v. Magnolia Clinic, 51 So.3d 874 (La. App. 3d 2010) (holding that a general damage cap on medical malpractice claims against nurse practitioners violated state equal protection rights), *with* DRD Pool Service, Inc. v. Freed, 5 A.3d 45 (Md. 2010) (holding that a statutory cap on noneconomic damages, in cases involving personal

unaddressed in *Lebron*, include special legislation laws,[58] due process,[59] and the right to a certain and complete remedy.[60]

Whether the General Assembly employs tort reform, healthcare crisis, or other substantive law phrases, statutes altering Illinois civil trial practices should continue to prompt Illinois constitutional analyses involving both allocation of governmental authority and individual rights. While unclear at times, the reaches of civil procedure lawmaking by the General Assembly will be assessed after *Lebron*, much as before, with special judicial scrutiny of statutes limiting jury decision making.

After *Lebron*, judicial resolutions of state constitutional challenges to new Illinois civil practice statutes, including new statutory damage caps, should eschew general separation of powers analyses for particular judicial rulemaking analyses. The Illinois constitutional dimensions of the "inherent power of the judiciary"[61] should only be assessed upon consideration of judicial rulemaking authority, whether recognized specially in the constitution itself, as with appellate practices, or in precedents.[62] Further, particular judicial rulemaking analyses should only be undertaken after individual constitutional rights, as jury trial, are fully considered. Such rights limit both legislative and judicial lawmaking. Findings of individual rights infringements, such as violations of the right to trial by jury, within statutes or court rules will

injury or wrongful death, does not violate state constitutional equal protection).

58. ILL. CONST. art. IV, § 13 (*used in Best*, 689 N.E.2d 1057, 1069 (Ill. 1997)), *noted in* Lebron v. Gottlieb Mem'l Hosp., 930 N.E.2d 895, 900 (Ill. 2010).

59. ILL. CONST. art. I, § 2, *noted in Lebron*, 930 N.E.2d at 900. Besides state constitutional due process issues, for statutory damage caps there may also be federal constitutional due process issues. *See, e.g.*, Duke Power Co. v. Carolina Envtl. Study Group, Inc., 438 U.S. 59, 87-88 (1978) ("The remaining due process objection to the liability-limitation provision is that it fails to provide those injured by a nuclear accident with a satisfactory *quid pro quo* for the common law rights of recovery which the Act abrogates. Initially, it is not at all clear that the Due Process Clause in fact requires that a legislatively enacted compensation scheme either duplicate the recovery at common law or provide a reasonable substitute remedy. However, we need not resolve this question here since the Price-Anderson Act does, in our view, provide a reasonably just substitute for the common-law or state tort law remedies it replaces."); Fein v. Permanente Med. Group, 474 U.S. 892 (1985) (White, J., dissenting) (dissenting from dismissal "for want of a substantial federal question" and stating that the issue left open in Duke Power Co. is "one dividing the appellate and highest courts of several States").

60. ILL. CONST. art. I, § 12, *noted in Lebron*, 930 N.E.2d at 900. While in Lebron, many constitutional issues were avoided due to the separation of powers analysis in *Best*, the court in *Best* resolved the separation of powers issue even though it could have been avoided since the statute in *Best* also fell on special legislation grounds. Best v. Taylor Mach. Works, 689 N.E.2d 1057, 1059 (1997).

61. *Lebron*, 930 N.E.2d at 914.

62. *See, e.g.*, People *ex rel.* Brazen v. Finley, 519 N.E.2d 898, 901-02 (Ill. 1988) (holding that as to attorney misconduct, high court has "sole" authority, arising from "inherent power" and thus its rulemaking is "exclusive").

avoid the need to resolve conflicts about the proper allocations of procedural lawmaking.

Unfortunately, outside of Illinois, state constitutional separation of powers analyses of statutory damage caps also often overlook the import of constitutional judicial rulemaking. There too, rulemaking and individual right analyses should be preferred over generalized separation of powers analyses.

III. DAMAGE CAPS OUTSIDE ILLINOIS

Damage cap cases outside Illinois are sometimes resolved with only generalized references to separation of powers, accompanied by little or no analyses of relevant judicial rulemaking authority.[63] As in Illinois, damage caps elsewhere are assessed differently for common law and other civil claims, suggesting jury trial rights—not governmental structure—are key. As with the federal constitution, state constitutions typically recognize jury trial rights only for common law actions. Finally, the legitimacy of statutory caps varies elsewhere, as in *Lebron*, for compensatory and punitive awards.

A. General Separation of Powers Analyses

A generalized separation of powers analysis was employed by the Nebraska high court[64] in 2003 to sustain a provision in the state's Hospital-Medical Liability Act that limited recoverable damages in medical malpractice actions to $1,250,000.[65] There, the court simply summarized very briefly other state precedents on separation of powers barriers to caps under their own state constitutions.[66] The Nebraska court did not review the varying constitutional separation of powers clauses, or other relevant clauses, including those addressing civil practice lawmaking.[67] The court also did not describe the types of claims or damages at issue in the other state cases.

63. Federal courts hearing state constitutional separation of powers challenges to state damage caps may refer those challenges to the state courts. *See, e.g.*, Estate of McCall *ex rel.* McCall v. U.S., 642 F.3d 944, 952 (11th Cir. 2011) (referring challenge to Florida statutory cap on noneconomic medical malpractice damages to the Florida Supreme Court).

64. Gourley v. Neb. Methodist Health Sys., Inc., 663 N.W.2d 43 (Neb. 2003).

65. NEB. REV. STAT. § 44-2825(1) (2010).

66. *Gourley*, 663 N.W.2d at 76-77.

67. An even simpler analysis of separation of powers appears in *Estate of McCall v. U.S.*, 663 F. Supp. 2d 1276, 1306-07 (N.D. Fla. 2009) (upholding Florida statute capping noneconomic damages in medical malpractice cases, FLA. STAT. § 766.118 (2008), when challenged, *inter alia*, on separation of powers grounds), *followed in M.D. v. U.S.*, 745 F. Supp. 2d 1274 (M.D. Fla. 2010).

The Nebraska court specifically rejected the Illinois court's outcome in the *Best* case, the opinion utilized in *Lebron*.[68] It also expressly rejected Washington Supreme Court dicta that damage caps might violate separation of powers.[69] That dicta was pronounced in 1989 in a case involving a statutory cap on noneconomic damages that was tied to a multiplier involving "average annual wage" and "life expectancy" in "personal injury or death" cases.[70] There, the Washington court simply said that a damages cap would violate the Washington separation of powers doctrine if it mandated a "legal conclusion."[71] The court hinted that a statutory limit on damages would be such a conclusion as it would constitute an improper attempt to deem jury damage findings "unsupported by the evidence."[72] The court also said that the legislature was unable to make "such case-by-case determinations."[73]

In 1989, the Virginia Supreme Court reviewed its own state statute limiting total recoverable damages for malpractice claims against health care providers.[74] This court actually referenced particular constitutional provisions beyond separation of powers in sustaining the law, including provisions allowing the General Assembly to determine trial court jurisdiction[75] and to alter the common law at the time the Constitution took effect.[76]

Ten years later, the Virginia high court again validated the same damage cap, chiefly relying on the 1989 precedent.[77] This time, however, the court also spoke of judicial rulemaking authority on civil practice matters as the plaintiff had urged that the cap violated the constitutional provision authorizing the high court to establish "rules

68. *Gourley*, 663 N.W.2d at 76.

69. *Id.* (*referencing* Sofie v. Fireboard Corp., 771 P.2d 711 (Wash. 1989), *amended by*, 780 P.2d 260 (Wash. 1989)).

70. *Sofie*, 771 P.2d at 713 (citing WASH. REV. CODE ANN. § 4.56.250(2) (West 1986)).

71. *Sofie*, 771 P.2d at 721.

72. *Id.*

73. *Id.* (citing Tacoma v. O'Brien, 534 P.2d 114 (Wash. 1975)). In *Tacoma*, the court declared unconstitutional an act allowing for government contracts to be cancelled due to "economic impossibility," reasoning this necessarily involved a judicial determination that could not be made by the legislature. *Tacoma*, 534 P.2d at 116.

74. Etheridge v. Med. Ctr. Hosps., 376 S.E.2d 525 (Va. 1989).

75. *Etheridge*, 376 S.E.2d at 532 (citing VA. CONST. art. VI, § 1 (West)). The court added that a damages cap could be seen as "establishing the jurisdiction of the courts in specific cases." *Etheridge*, 376 S.E.2d at 532.

76. *Etheridge*, 376 S.E.2d at 532 (citing VA. CONST. art. XII, § 3). The court noted that a damages cap statute may simply be a common law modification. *Etheridge*, 376 S.E.2d at 532.

77. Pulliam v. Coastal Emergency Servs., Inc., 509 S.E.2d 307 (Va. 1999) (examining VA. CODE ANN. § 8.01-581.25 (West 2011)).

governing . . . the practice and procedures to be used in the courts of the Commonwealth."[78] The court found dispositive that under the same provision, any such rules "shall not be in conflict with the general law as the same shall, from time to time, be established by the General Assembly."[79]

In 2002, the Alaska Supreme Court upheld[80] as facially valid statutes capping noneconomic damages in tort actions for personal injury and wrongful death[81] and limiting punitive damages, with half of such limited damages going to the state treasury.[82] The plurality opinion found no separation of powers violation, simply siding with other state courts recognizing that the General Assembly power "to modify or abolish the common law . . . includes the power to set reasonable limits on recoverable damages" in claims recognized by the Assembly.[83] The plurality also referenced only generally the Alaska constitutional provision on "the separation of governmental powers."[84]

Similarly, in 2004 the Utah Supreme Court upheld, in a separation of powers challenge, a statute limiting noneconomic damages in medical malpractice actions.[85] The court found that there was "a legitimate and long-established role for legislative involvement in jury trials," including statutes on "standards of proof, elements of torts and crimes, and . . . much of the law upon which jury instructions are based."[86] Here too, reference was only made to "the separation of powers provision" of the state constitution.[87] There was no mention of a statute recognizing the primary authority of the Utah high court in civil procedure lawmaking.[88]

78. *Pulliam*, 509 S.E.2d at 319 (citing VA. CONST. art. VI, § 5).

79. *Pulliam*, 509 S.E.2d at 319 (citing VA. CONST. art. VI, § 5). The court also cited VA. CODE ANN. § 8.01-3, a provision recognizing the General Assembly's power to "modify or annul" any high court rules. *Pulliam*, 509 S.E.2d at 319.

80. Evans *ex rel.* Kutch v. State, 56 P.3d 1046 (Alaska 2002) (plurality opinion) (citing ALASKA STAT. ANN. §§ 09.17.010, 09.17.020(f), (h), (j) (West 2011)). Caps define eligible noneconomic losses and are guided by absolute amounts and multipliers. ALASKA STAT. ANN. § 09.17.010.

81. ALASKA STAT. ANN. § 09.17.010 (describing that caps define eligible noneconomic losses and are guided by absolute amounts, multipliers, and whether the defendant is an employee charged with an unlawful employment practice).

82. ALASKA STAT. ANN. § 09.17.020(f)-(h) and (j).

83. *Evans*, 56 P.3d at 1055-56.

84. *Id.* at 1055 (citing ALASKA CONST. art. IV, § 1 (West)).

85. Judd v. Drezga, 103 P.3d 135 (Utah 2004) (citing UTAH CODE ANN. § 78-14-7.1 (West 1953) (current version at UTAH CODE ANN. § 78B-3-410 (West 2008)).

86. *Id.* at 145.

87. *Id.* (citing UTAH CONST. art. V, § 1).

88. UTAH CODE ANN. § 78A-3-103(1) (West 2008) (providing that the "Supreme Court shall adopt rules of procedure and evidence," though amendments by the legislature are allowed upon a two-third vote of "all members of both houses").

By contrast, judicial rulemaking authority was referenced in a 2002 Michigan Court of Appeals case involving a separation of powers challenge to a state statute limiting noneconomic damages in medical malpractice claims.[89] The court cited the state constitutional provision on Supreme Court procedural rulemaking.[90] The court then found the statute to "reflect legislative policy considerations other than court practice and procedure."[91]

B. Common Law and Other Civil Actions

In *Lebron*, the Illinois Supreme Court recognized that "the legislature may limit certain types of damages, such as damages recoverable in statutory causes of action."[92] The majority did not elaborate on what distinguishes statutory (or other) claims where damage caps can be sustained.[93] In his separate opinion, however, Justice Karmeier opined that the General Assembly could eliminate all noneconomic damages in medical malpractice cases,[94] a questionable proposition given their compensatory nature, their resolution in Judicial Article courts, and the state constitutional right to jury trial on common law claims.[95] Justice Karmeier also notes that medical malpractice cases could be replaced with "a claims system comparable to . . . workers compensation."[96] Here, economic and noneconomic damages might be capped, if not dramatically altered. Outside of Illinois, separation of powers principles have been more significantly analyzed when challenges to damage caps have been considered regarding both "statutory causes" and alternative claims systems, as now described.

1. Statutory Causes of Action

In 2009, the Washington Supreme Court explored which civil

89. Zdrojewski v. Murphy, 657 N.W.2d 721 (Mich. Ct. App. 2002) (discussing MICH. COMP. LAWS ANN. § 600.1483 (West 1994)).

90. *Id.* at 739 (citing MICH. CONST. art. 6, § 5).

91. *Id.* at 739.

92. Lebron v. Gottlieb Mem'l Hosp., 930 N.E.2d 895, 906 (Ill. 2010). By contrast, statutory limits on attorney fee recoveries may be comparably assessed in settings involving representations of both common law and statutory causes of action, as the high court claims exclusive authority over lawyer conduct. *See* Bernier v. Burris, 497 N.E.2d 763, 778-79 (Ill. 1986).

93. *Lebron*, 930 N.E.2d at 906.

94. *Id.* at 933 (Karmeier, J., concurring in part and dissenting in part).

95. ILL. CONST. art. I, § 13 ("The right of trial by jury as heretofore enjoyed shall remain inviolate.").

96. *Lebron*, 930 N.E.2d at 933 (Karmeier, J., concurring in part and dissenting in part).

actions are "special proceedings" and thus bound to statutory pleading procedures in conflict with high court rules.[97] In Washington, as in Illinois, a court rule states that high court rules govern civil proceedings "except where inconsistent with rules or statutes applicable to special proceedings."[98] Recognizing that high court rules did not necessarily control "special proceedings" and that the court otherwise had not "set out a rule for determining whether a proceeding is ordinary or special,"[99] Washington courts have "identified certain actions as special proceedings, including lien foreclosures, sexually violent predator petitions, garnishment, will contests, and unlawful detention actions."[100] The court described special actions as not including all statutes regulating civil claim procedures, but rather all procedural statutes addressing "actions unknown to common law (such as attachment, mandamus, or certiorari)."[101] As for common law actions, special proceedings come into play when legislation "entirely" changes the "remedies available," such as in workers' compensation.[102]

As to the basis for the high court's primary authority over civil practices in common law cases, the court simply referenced the "presumed" separation of powers, which embodies the "fundamental" function of the judicial branch "to promulgate rules" involving court practices.[103]

For common law actions, the Washington court did recognize room for some procedural statutes. As to the special medical malpractice pleading statute before it, the court explored whether it conflicted with high court rules and, if so, whether it was a procedural law.[104] As to conflicts, the court noted its disposition to "attempt to harmonize" arguably conflicting rules and statutes so as to be able to "give effect to both."[105] When conflicts are found, rules govern as long as statutes impacting civil procedure in common law actions are not "substantive."[106] In recognizing a secondary role for the General

97. Putnam v. Wenatchee Valley Med. Ctr., 216 P.3d 374, 377-78 (Wash. 2009).

98. Scheib v. Crosby, 249 P.3d 184 (Wash. Ct. App. 2011) (reviewing WASH. SUPER. CT. R. 81). "Special proceedings" are defined by case law. *Id.*, 249 P.3d at 187.

99. *Putnam*, 216 P.3d at 377.

100. *Id.* at 377-78. *See also Scheib*, 249 P.3d at 187 (noting that special proceedings include actions under the Administrative Procedure Act, WASH. REV. CODE ANN §§ 34.05.001-.903 (West 2011)).

101. *Putnam*, 216 P.3d at 378. Special statutory proceedings are occasionally spelled out expressly in court rules. *See, e.g.*, N.D. R. CIV. P. 81(a) and accompanying Table A.

102. *Putnam*, 216 P.3d at 378.

103. *Id.* at 377.

104. *Id.* at 377-80.

105. *Id.* at 379.

106. *See id.* (noting that substantive statutes "address the primary rights of either

Assembly in civil procedure lawmaking guiding common law actions in Judicial Article courts, the Washington court did not examine any explicit state constitutional provisions on high court rulemaking. In fact, there are none.[107]

The same approach to an alleged conflict between statute and court rule was followed a year later when another statutory medical malpractice procedure fell.[108] However, here the conflict was not so apparent.[109] The statute required claimants to provide notice to prospective defendants at least ninety days before commencing suits.[110] The statute was found to be procedural and to conflict with a court rule, which declared that suits are commenced by the service of summons and a complaint or by the filing of a complaint.[111] Again, there was a reliance on inferred state constitutional separation of powers, including an inherent high court power to promulgate procedural rules.[112]

2. Alternative and Exclusive Claims Systems

In his *Lebron* dissent, Justice Karmeier suggested that the Illinois General Assembly could eliminate all noneconomic damages in medical malpractice cases by replacing civil actions with "a claims system comparable to . . . workers compensation."[113] The majority said little about the availability of this vehicle for statutory damage caps applicable to medical malpractice (or other) claims now heard by Judicial Article

party" and not "the procedures to effectuate those rights").

107. The Washington Constitution is silent on high court procedural lawmaking. *But see* WASH. CONST. art. IV, § 12 (providing that the "legislature shall prescribe by law the jurisdiction and powers of any of the inferior courts which may be established in pursuance of the Constitution"), *and* WASH. CONST. art. IV, § 6 (providing that "superior courts and district courts . . . shall have such appellate jurisdiction in cases arising in justices' and other inferior courts . . . as may be prescribed by law"). *See also* WASH. REV. CODE §§ 2.04.190-.200 (West 2004) (recognizing high court procedural rulemaking powers, with those rules overriding conflicting statutes); O'Connor v. Matzdorff, 458 P.2d 154 (Wash. 1969) (both record and nonrecord courts have inherent authority to waive payment of statutory filing fees).

108. *See* Waples v. Yi, 234 P.3d 187 (Wash. 2010).

109. *Id.* at 193 (Johnson, J., dissenting) (finding no irreconcilable conflict as harmony between statute and rule was demanded).

110. *Id.* at 188 (citing WASH. REV. CODE ANN. § 7.70.100(1)).

111. *Waples*, 234 P.3d at 191 (citing WASH. SUPER. CT. CIV. R. 3(a)).

112. *Waples*, 234 P.3d at 190.

113. Lebron v. Gottlieb Mem'l Hosp., 930 N.E.2d 895, 933 (Ill. 2010) (Karmeier, J., concurring in part and dissenting in part). Justice Karmeier did not suggest replacement of trial court actions with laws mandating binding arbitration which exist at times in Illinois and elsewhere for certain insurance claims. *See, e.g.*, Reed v. Farmers Ins. Grp., 720 N.E.2d 1052 (Ill. 1999) (reviewing other state insurance dispute arbitration schemes while sustaining Illinois laws compelling binding arbitration of certain uninsured motorist coverage claims).

courts, including their juries,[114] although it did hint that such an alternative claims system would need to require "all stakeholders to make a sacrifice," something not mandated in the Act then under review.[115]

The possibility of alternative claim systems that eliminate or alter common law remedies, beyond workers compensation, is recognized elsewhere. For example, in 1955 the Texas Supreme Court declared:

> Legislative action withdrawing common-law remedies for well established common-law causes of action for injuries to one's "lands, goods, person or reputation" is sustained only when it is reasonable in substituting other remedies, or when it is a reasonable exercise of the police power in the interest of the general welfare. Legislative action of this type is not sustained when it is arbitrary or unreasonable.[116]

And in 1989, the California Supreme Court observed the following while sustaining a local agency's power to adjudicate excess rent claims:

> We too will carefully apply the "reasonable necessity/legitimate regulatory purpose" requirements in order to guard against unjustified delegation of authority to decide disputes that otherwise belong in the courts. Specifically, we will inquire whether the challenged remedial power is authorized by legislation, and reasonably necessary to accomplish the administrative agency's regulatory purposes. Furthermore, we will closely scrutinize the agency's asserted

114. *See Lebron*, 930 N.E.2d at 895. The Illinois Supreme Court has left the door open to special, pretrial settlement-facilitation procedures for pending medical malpractice cases. *See, e.g.*, Wright v. Cent. Du Page Hosp. Ass'n, 347 N.E.2d 736, 740-41 (Ill. 1976) (finding a specific statutory medical review panel requirement to be unconstitutional because it improperly vests inherent judicial power in non-judges and impermissibly restricts jury trial rights, while adding that "we do not imply that a valid pretrial panel procedure cannot be devised").

115. *Lebron*, 930 N.E.2d at 909. An alternative state compensation scheme would be assessed differently if its creation was expressly invited (or required) by the state constitution. *See, e.g.*, ARK. CONST. art. 5, § 32 (workers' compensation); LA. CONST. art. V, § 16 (workers' compensation). In Louisiana, express state constitutional authority was needed to overcome otherwise germane state constitutional limits on statutory infringements of judicial authority. *See* Moore v. Roemer, 567 So. 2d 75 (La. 1990). An alternative scheme need not cover all injuries. *See, e.g.*, Saab v. Mass. CVS Pharmacy, LLC, 896 N.E.2d 615 (Mass. 2007) (holding that the Workers' Compensation Act, MASS. GEN. LAWS ANN. ch. 152, §§ 1-86 (West 2008) can bar wrongful death claims against an employer by the parents of a deceased employee, as the Act need not support all remedies sought by injured workers or their families).

116. Lebohm v. City of Galveston, 275 S.W.2d 951, 955 (Tex. 1955) (construing the Texas constitutional Open Courts provision). *Lebohm* has precedential value. *See, e.g.*, Methodist Healthcare Sys. of San Antonio, Ltd. v. Rankin, 307 S.W.3d 283, 285-86, 288-90 (Tex. 2010) (finding that ten-year statute of repose for medical malpractice actions does not violate Open Courts provision).

> regulatory purposes in order to ascertain whether the challenged remedial power is merely incidental to a proper, primary regulatory purpose, or whether it is in reality an attempt to transfer determination of traditional common law claims from the courts to a specialized agency whose primary purpose is the processing of such claims.[117]

Such alternative claims systems operate on occasion.[118] For example, Virginia has had the Birth-Related Neurological Injury Program since 1988, wherein the Workers' Compensation Commission has jurisdiction over individual claims involving birth-related disabilities caused by oxygen deprivation or mechanical injury.[119] Such a scheme raises far fewer separation of powers, and other constitutional issues, when it is optional rather than exclusive.[120]

Alternative claims systems wherein damages are capped seemingly would not prompt judicial rulemaking analyses. But here too, generalized separation of powers analyses also are misplaced. Rather, constitutional assessments beyond individual rights (equal protection or due process, for example) should focus on the propriety of jurisdiction-stripping,[121] especially where the state constitution itself establishes the trial courts of general jurisdiction and vests in those courts all justiciable matters.[122] Of course, state constitutional issues are dramatically reduced

117. McHugh v. Santa Monica Rent Control Bd., 777 P.2d 91, 108 (Cal. 1989).

118. In some settings an alternative claims system cannot wholly deprive a common law claimant of the chance to go to court. *See, e.g.*, Duncan v. Scottsdale Med. Imaging, Ltd., 70 P.3d 435, 442-3 (Ariz. 2003) (finding that under Article 18, § 6 of the Arizona Constitution—the anti-abrogation clause—the legislature may not "regulate" a right of action so greatly as to effectively deprive a claimant of the power to bring that action).

119. For a discussion of Virginia's Birth-Related Neurological Injury Program and its lack of a damage cap, see Kathleen M. McCauley, *Damages for Medical Malpractice in Virginia*, 33 U. RICH. L. REV. 919, 933-35 (1999). The Florida no-fault administrative scheme for birth-related neurological injury claims due to oxygen deprivation or mechanical failure is described in *Bennett v. St. Vincent's Med. Ctr., Inc.*, 36 FLA. L. WEEKLY S336 (Fla. 2011).

120. *See, e.g.*, Konig v. Fair Emp't & Hous. Comm'n, 50 P.3d 718 (Cal. 2002) (deciding that the Commission's award of emotional distress damages to housing discrimination claimants did not violate the state constitution's judicial powers clause because there was a "judicial option").

121. *McHugh*, 777 P.2d at 93, 112-16 (focusing on both judicial power and jury trial limits in assessing delegation of private disputes to administrative agencies).

122. *See, e.g.*, ILL. CONST. art. VI, §§ 7, 9. For a state constitutional law analysis concluding that a health court scheme outside Judicial Article Courts could withstand challenge, see Michelle M. Mello et al., *Policy Experimentation with Administrative Compensation for Medical Injury: Issues Under State Constitutional Law*, 45 HARV. J. ON LEGIS. 59 (2008) (considering potential equal protection, due process, separation of powers, jury trial and access to courts arguments). President Obama's federal budget proposals in 2011 included possible federal funding for states establishing health courts to decide medical malpractice cases. Sylvia Hsieh, *Are Health Courts Coming to a State*

when state constitutions explicitly recognize legislative authority to establish alternative claims schemes.[123]

C. Compensatory and Punitive Damages

In *Lebron*, the Illinois Supreme Court seemingly removed punitive damage caps from its separation of powers barrier outside of "statutory causes of action."[124] The court reasoned that punitive damages are "allowed in the interest of society, and not to recompense solely the individual."[125] This rationale could serve to permit punitive damage caps elsewhere, especially where there are comparable state court approaches to the separation of powers and judicial rulemaking.

In Kentucky, there is a different approach and a different outcome, at least for now. In 2010, the Court of Appeals deemed unconstitutional the Dram Shop Act's ban on all damage awards, including punitive damage awards, against alcohol licensees and their agents.[126] Besides finding "a violation of the jural rights" doctrine,[127] the court relied on the separation of powers generally, and specifically on the Act's intrusion "upon the fact-finding role of the courts in violation of Sections 27, 28 and 109 of the Kentucky constitution," though these sections were neither quoted nor analyzed in much depth.[128] The court's ruling was

Near You?, LAWYERS USA, Feb. 25, 2011, *available at* http://lawyersusaonline.com/blog/2011/02/25/are-health-courts-coming-to-a-state-near-you

123. *See, e.g.*, LA. CONST. art. V, §§ 10, 16 (granting courts jurisdiction over workers' compensation).

124. *See* Lebron v. Gottlieb Mem'l Hosp., 930 N.E.2d 895 (Ill. 2010). In fact, Illinois law provides that there are no punitive damages in medical malpractice cases. 735 ILL. COMP. STAT. 5/2-1115 (2010).

125. *Lebron*, 930 N.E.2d at 912.

126. Taylor v. King, No. 2009-CA-001599-MR., 2010 WL 3810797, at *6 (Ky. Ct. App. Oct. 1, 2010) (invalidating the ban in KY. REV. STAT. ANN. § 413.241 (West 2010) while not ruling on other aspects of the Act, including the "standard for imposing liability upon a dram shop" or the "creation of a priority of liability between the dram shop and the intoxicated tortfeasor").

127. *Taylor*, 2010 WL 3810797, at *4. The jural rights doctrine flows from KY. CONST. §§ 14, 54, 241 and essentially holds that "the General Assembly has no authority to abolish or restrict a common law right of recovery for personal injury or wrongful death." *Taylor*, 2010 WL 3810797, at *4. KY. CONST. § 14 provides for open courts and a remedy for injuries. KY. CONST. § 54 says that the General Assembly has no power to limit recoveries for death or for personal or property injuries. KY CONST. § 241 recognizes certain General Assembly authority over the bringing of civil claims involving death.

128. *Taylor*, 2010 WL 3810797, at *5-6. KY. CONST. § 27 says that the powers of Kentucky government are divided "into three distinct departments," with each department "confined to a separate body of magistracy." KY. CONST. § 28 says that no person in one governmental department "shall exercise any power properly belonging" to another department except as "expressly directed or permitted." KY. CONST. § 109 says

grounded on the view that "fact-finding" on the causation of the personal injuries to a claimant involves "a factual matter entrusted to the judicial branch, and in particular the finder of fact in a judicial proceeding."[129]

Outside of Kentucky, there are absolute dollar caps on punitive damages.[130] Punitive damages are sometimes capped at amounts correlated to the compensatory damages.[131]

IV. CONCLUSION

General state separation of powers principles should play no part in assessments of state statutory damage caps, neither in or outside of medical cases nor in or outside of noneconomic losses. There are no core separation of powers principles guiding all state statutory damage caps. Instead, as has been done by some courts, damage caps should more frequently be examined for infringement on judicial rulemaking authority. Such examinations should distinguish between caps in statutory and common law actions, caps operative in alternative and exclusive claims systems, and caps on compensatory and punitive damages.

that the "judicial power . . . shall be vested exclusively in one Court of Justice" divided into a Supreme Court, Appeals Courts, Circuit Courts and District Courts.

129. *Taylor*, 2010 WL 3810797, at *5.

130. *See, e.g.*, VA. CODE ANN. § 8.01-38.1 ($350,000 in medical malpractice actions) (West 2010).

131. *See, e.g.*, N.D. CENT. CODE ANN. § 32-03.2-11(4) (West 2009) (allowing punitive damages no greater than twice the amount of compensatory damages or $250,000.00, whichever is greater); N.J. STAT. ANN. § 2A:15-5.14 (West 2006) (capping punitive damages at five times the defendant's compensatory damage liability or $350,000.00, whichever is greater).