Do Legislators Under Iowa's Golden Dome Know Better?: Surveying Jury-Trial Constitutional Challenges on Damage Caps and Application to the Iowa Constitution

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ABSTRACT: The Iowa legislature in 2020 attempted to pass a bill that would cap non-economic damages in medical-malpractice cases regardless of the severity of the injury. This bill was ultimately not passed, but it appears to remain a top priority for future legislative sessions. However, the movement toward damage caps in Iowa would likely not withstand a determination that damage caps are unconstitutional under the Iowa Constitution. Of all the different inevitable constitutional challenges to damage caps, there is one that stands out: the right to a jury trial. Since the late 1980s, federal and state courts have produced a divisive split on whether damage caps violate the Seventh Amendment or independent state constitutional jury-trial protections, especially in states that protect the right to a jury trial as "inviolate," article I, section 9 of the Iowa Constitution also protects the right to a jury trial as "inviolate." However, Iowa courts have not had the opportunity to interpret the Iowa Constitution's article I, section 9 to determine what side of this split on which they should land. This Note examines the history of jury-trial provisions, reasoning from federal and state case law, and then reconciles this history and reasonings with textual and historical analyses of the Iowa Constitution and subsequent Iowa case law interpreting article I, section 9. This analysis shows that Iowa's right to a jury trial is uniquely designed to protect the proceedings according to common law, or in the alternative, the essential function of a jury's determination of

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non-economic damages in common-law causes of action. Based on this analysis, future Iowa legislation enacting a hard cap on non-economic damages in medical-malpractice actions should be struck down as unconstitutional, in violation of Iowa's constitutional right to a jury trial.

I. INTRODUCTION

Rickie Huitt of Panora, Iowa was misdiagnosed with prostate cancer after a pathologist at the Iowa Clinic had mistakenly switched slides of non-cancerous tissue with another in April 2017.[1] This mistake led to the removal of Rickie's prostate gland, damaging his nerves and "leaving [him] impotent and incontinent."[2] Rickie could no longer engage in an active love life and had to "use[] two to three urine-absorbent pads per day."[3] The Huitts could not remove the smell of urine from the house, and told their granddaughters

1. Tony Leys, *Wrong-Patient Prostate Cancer Surgery Costs Iowa Clinic $12.25 Million in Malpractice Case*, DES MOINES REG. (Apr. 5, 2019, 6:52 PM), https://www.desmoinesregister.com/story/news/health/2019/04/05/wrong-patient-prostate-cancer-surgery-medical-malpractice-trial-verdic-iowa-clinic-health-care-court/3377004002 [https://perma.cc/6LGV-99XK].

2. *Id.*

3. *Id.*

that the smell came from the dog, not Rickie, to save him embarrassment.[4] The Huitts filed a medical-malpractice suit against the Iowa Clinic seeking damages of $15 million.[5] "Judy Huitt repeatedly teared up as she told jurors how her husband felt diminished as a husband because of his impotence."[6] Judy described the trial experience as embarrassing, stressful, and horrible.[7] The jury awarded $12.25 million in damages in April 2019.[8]

Kathryn Schussler of Marion, Iowa lost her son, Dane, to suicide in 2015 after Iowa State University counselors did not refer his case to specialists.[9] This happened despite Dane having previously told counselors "that he [had] researched the idea of suicide and . . . methods of suicide."[10] The Schusslers were blindsided.[11] When Iowa State failed "to release certain records," the Schusslers filed a medical-negligence claim on the grounds of inadequate counseling services.[12] Kathryn described the litigation process as "a gut wrenching and brutal process no family wants to go through."[13] The family received a six-figure verdict solely in noneconomic damages.[14]

Dave Brown of Des Moines, Iowa believed that the hospital failed to give him fast enough care after he was "infected with a flesh-eating bacteria."[15] The hospital's inaction left Dave's bowel to rupture.[16] Dave lost his "whole abdomen clear to [his] back on both sides . . . from [his] chest down."[17] Dave described his body as "look[ing] like somebody took a backhoe and shoved it

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.*

9. Nick Weig, *Political Lines Drawn in Iowa over Capping Medical Malpractice Suits*, IOWA'S NEWS NOW (Feb. 26, 2020), https://cbs2iowa.com/news/local/political-lines-drawn-in-iowa-over-capping-medical-malpractice-suits [https://perma.cc/J9RB-2KR6]; Kathryn Schussler, *A Mother's Perspective on the Dangers of Medical Malpractice Caps*, GAZETTE (Feb. 28, 2020), https://www.thegazette.com/subject/opinion/guest-columnist/a-mothers-perspective-on-the-dangers-of-medical-malpractice-caps-20200228 [https://perma.cc/82K6-Q72R].

10. Jacob Smith, *State Shares Responsibility for 2015 Suicide of Iowa State Student*, IOWA ST. DAILY (Sept. 4, 2019), https://www.iowastatedaily.com/news/dane-schussler-suicide-iowa-state-2015-medical-negligence-trial-verdict-counseling-center-death-linn-county-jury-martin-diaz-attorney/article_b66e567e-ce8d-11e9-9008-4fa006033eff.html [https://perma.cc/QMN7-4GQD].

11. Weig, *supra* note 9.

12. *Id.*; Smith, *supra* note 10.

13. Schussler, *supra* note 9.

14. Weig, *supra* note 9.

15. Alex Schuman, '*I Am Disfigured for Life': Man Claims Hospital Didn't Get Him Help Fast Enough*, KCCI DES MOINES (Feb. 26, 2020, 10:21 PM), https://www.kcci.com/article/i-am-disfigured-for-life-man-claims-hospital-didnt-get-him-help-fast-enough/31124258 [https://perma.cc/8P3B-X3JU].

16. *Id.*

17. *Id.*

in my side and just pulled everything out."[18] As of this writing, Dave plans to sue the unnamed Des Moines hospital in the near future.[19]

These three stories of Iowans constitute a small fraction of medical errors each year in the state of Iowa. According to a 2016 study by the Heartland Health Research Institute, a mid-range estimate of 85,000 patients are seriously or fatally harmed each year "in Iowa hospitals due to [medical errors]."[20] To put this number into perspective, the mid-range estimate "would be [nearly] enough to fill *both* Kinnick Stadium (70,585) and the Hilton Coliseum (14,384) annually."[21] A 2017 study, also conducted by the Heartland Health Research Institute, "found that nearly 1 in 5 Iowa adults experienced medical errors in the previous five years, either to themselves or someone close to them."[22] The most common errors were mistakes made in testing, surgery or treatment, and misdiagnosis.[23] Less than 40 percent of Iowans were informed of these medical errors.[24]

The testimonials of Rickie, Kathryn, and Dave show medical errors can cause unfathomable pain and suffering for the individual persons and their families.[25] Despite the irreversible effect of these mistakes, the Iowa legislature has successfully limited and continues to attempt further limits on the amount of non-economic damages, commonly known as pain-and-suffering damages, that persons can receive in a medical-malpractice suit.[26] These damage caps prevent the fact-finder, normally the jury, from going above a certain amount of damages in every action to which the legislature has applied the damage

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18. *Id.*

19. *Id.*

20. DAVID P. LIND, HEARTLAND HEALTH RSCH. INST., SILENTLY HARMED: HOSPITAL MEDICAL ERRORS IN IOWA 5–8 (2016). Lind refers to the terms "medical errors" and "preventable adverse events," or "PAEs," as interchangeable. *Id.* at 4.

21. *Id.* at 6.

22. David P. Lind, *Proposed Iowa Medical Malpractice Cap is a Snake Oil Cure*, DES MOINES REG. (Feb. 10, 2020, 5:30 PM), https://www.desmoinesregister.com/story/opinion/columnists/iowa-view/2020/02/10/iowa-legislature-proposal-cap-medical-malpractice-awards-snake-oil-cure/4713151002 [https://perma.cc/7T29-8GRB]; *see* HEARTLAND HEALTH RSCH. INST., IOWANS' VIEWS ON MEDICAL ERRORS: IOWA PATIENT SAFETY STUDY 13 (2017).

23. HEARTLAND HEALTH RSCH. INST., *supra* note 22, at 16.

24. *Id.* at 20.

25. *See supra* text accompanying notes 1–24.

26. Brianne Pfannenstiel, *Branstad Signs into Law Medical Malpractice Reforms*, DES MOINES REG. (May 5, 2017, 2:58 PM), https://www.desmoinesregister.com/story/news/politics/2017/05/05/branstad-signs-into-law-medical-malpractice-reforms/311848001 [https://perma.cc/9L6V-5WAP]; *see* IOWA CODE § 147.136A (2020); *Bill History for Senate File 2338—Status: Signed by Governor*, IOWA LEGISLATURE [hereinafter *Bill History for Senate File 2338*], https://www.legis.iowa.gov/legislation/billTracking/billHistory?billName=SF%202338&ga=88 [https://perma.cc/6Y5Z-PEFM]; *see also* James Carney, Douglas Struyk & Jenny Dorman, *2020 Legislative Session in Review*, IOWA LAW., July 2020, at 6, 6 ("[T]he House Commerce Committee passed an amended SF 2338 with the medical malpractice provisions removed.").

cap.[27] Damage caps can prevent recovery of all compensatory or non-compensatory damages in the targeted action or can be limited to certain types of damages, such as non-economic damages.[28] These damage caps are either hard, allowing no exceptions to go above the damage cap, or soft, allowing exceptions above the damage cap if certain criteria are met.[29] For example, Iowa currently has a $250,000 soft cap on non-economic damages in medical malpractice actions that can be overcome if "the jury determines that there is a substantial or permanent loss or impairment of a bodily function, substantial disfigurement, or death."[30] Interestingly enough, the text only states that a jury can overcome this cap but does not mention if a judge can overcome the damage cap in a bench trial.[31] The Iowa legislature appears to be keen on eliminating this jury exception and on shifting to a hard cap in the near future.[32]

However, were the Iowa legislature to enact a hard damage cap, it would almost certainly trigger a variety of constitutional challenges.[33] A majority of state courts have already adjudicated several different constitutional challenges to damage caps.[34] These constitutional challenges include equal

27. Paul B. Weiss, *Reforming Tort Reform: Is There Substance to the Seventh Amendment?*, 38 CATH. U. L. REV. 737, 741 (1989); *see* Lind, *supra* note 22; *see, e.g.*, Hilburn v. Enerpipe Ltd., 442 P.3d 509, 514–15 (Kan. 2019) (holding that damage caps infringe on the right to a jury trial by preventing the jury from determining damages above a cap).

28. CTR. FOR JUST. & DEMOCRACY, CAPS ON COMPENSATORY DAMAGES: A STATE LAW SUMMARY 2 (2020), https://centerjd.org/content/fact-sheet-caps-compensatory-damages-state-law-summary [https://perma.cc/8HX8-XUWX].

29. Janelle Guirguis-Blake, George E. Fryer, Robert L. Phillips Jr., Ronald Szabat & Larry A. Green, *The US Medical Liability System: Evidence for Legislative Reform*, 4 ANNALS FAM. MED. 240, 241 (2006).

30. *See* IOWA CODE § 147.136A.

31. *See id.* Subsequently, there is a plausible strict textual argument that the current soft damage cap on non-economic damages in medical malpractice cases does not apply when the case is tried in a bench trial. *See id.* Alternatively, if the soft cap does apply to bench trials, the textual wording states that the cap applies "unless the *jury*" can determine a substantial or permanent loss. *Id.* (emphasis added). Thus, the soft cap could be interpreted so that only a jury, not a judge in a bench trial, can go above the soft cap, even if the judge finds a substantial or permanent loss based on the evidence. *See id.*

32. *See* Travis Breese, *Senate Bill Could Limit Settlements in Malpractice Lawsuits*, KWWL (Feb. 28, 2020, 10:51 PM), https://kwwl.com/2020/02/28/senate-bill-could-limit-settlements-in-malpractice-suits [https://perma.cc/UW3U-7K2Y].

33. *See* J. Chase Bryan, Walter H. Boone & Jordan M. Mason, *Are Non-Economic Caps Constitutional?*, 80 DEF. COUNS. J. 154, 157–63 (2013). *See generally* AM. MED. ASS'N, CONSTITUTIONAL CHALLENGES TO STATE CAPS ON NON-ECONOMIC DAMAGES (2017) (providing a list of several state law cases analyzing caps on non-economic damages).

34. AM. MED. ASS'N, *supra* note 33, at 1–7.

protection,[35] substantive due process,[36] special-legislation,[37] separation of powers,[38] open-courts,[39] and, finally, right-to-a-jury-trial challenges.[40] Some states have constitutional amendments that specifically prohibit the legislature from implementing damage caps in certain situations.[41]

To date, the most successful of these constitutional challenges has been based on the right to a jury trial.[42] This constitutional challenge is most sensical considering the purpose of a damage cap is to limit what a jury can award.[43] Essentially, this constitutional question asks whether the legislature, by capping damages, is "usurp[ing] the jury's traditional role as the decider

35. The equal protection argument against statutory caps "claim[s] that caps on damages divide tort victims into two categories, those who recover fully and plaintiffs who have been seriously injured but do not fully recover." Michael P. Murphy, Note, *Tort Reform: Would a Noneconomic Damages Cap Be Constitutional, and Is One Necessary in Iowa?*, 53 DRAKE L. REV. 813, 816 (2005).

36. The substantive due process argument argues that damage caps infringe on a fundamental right. *See* Etheridge v. Med. Ctr. Hosps., 376 S.E.2d 525, 531 (Va. 1989) ("[A] party has no fundamental right to a particular remedy or a full recovery in tort. A statutory limitation on recovery is simply an economic regulation, which is entitled to wide judicial deference.").

37. Special-legislation challenges involve attempts to show "noneconomic damages caps [are] arbitrary and capricious because [the caps] 'arbitrarily discriminate[d] between slightly and severely injured plaintiffs.'" Murphy, *supra* note 35, at 821 (third alteration in original) (quoting Kirkland v. Blaine Cnty. Med. Ctr., 4 P.3d 1115, 1120 (Idaho 2000)).

38. The separation-of-powers challenge "asserts that a legislature, by enacting the cap statute, takes away the power of remittitur from the judiciary." *Id.* (footnote omitted).

39. The open-courts argument is that the ability to go to "court[] is granted for the purpose of redressing injuries" and when a cap arbitrarily cuts the damages, the "plaintiff does not receive constitutional redress for his injuries, and thus the courts are not open to him." *Id.* at 820 (citing Smith v. Dep't of Ins., 507 So. 2d 1080, 1088 (Fla. 1987) (per curiam)).

40. Lastly, the right-to-a-jury-trial argument is that "capping damages usurps the jury's traditional role as the decider of the facts." *Id.* at 817.

41. CTR. FOR JUST. & DEMOCRACY, *supra* note 28, at 1; *see, e.g.*, ARIZ. CONST. art. II, § 31; ARK. CONST. art. V, § 32; PA. CONST. art. III, § 18; WYO. CONST. art. X, § 4.

42. Hilburn v. Enerpipe Ltd., 442 P.3d 509, 522–23 (Kan. 2019). Specifically, the Kansas Supreme Court in *Hilburn* stated that the spilt among "inviolate" states was eight "inviolate" states (Idaho, Indiana, Nebraska, Maryland, Nevada, Ohio, Oregon, and South Dakota) ruling damage caps constitutional against the state right to jury trial provision to five states (Alabama, Florida, Georgia, Missouri, and Washington) ruling damage caps unconstitutional against the state right to jury trial provision. *Id.* (citing various cases from the aforementioned states). Including the *Hillburn* decision and the recent decision from Tennessee, the split is now nine to six among "inviolate" states. *Id. See generally* McClay v. Airport Mgmt. Servs., LLC, 596 S.W.3d 686 (Tenn. 2020) (holding non-economic damages cap on civil actions constitutional in a 3–2 decision).

43. *See* Moore v. Mobile Infirmary Ass'n, 592 So. 2d 156, 159–65 (Ala. 1991) ("Because the statute caps the jury's verdict automatically and absolutely, the jury's function, to the extent the verdict exceeds the damages ceiling, assumes *less* than an advisory status."); Atlanta Oculoplastic Surgery, P.C. v. Nestlehutt, 691 S.E.2d 218, 218–24 (Ga. 2010) ("[T]he noneconomic damages caps in OCGA § 51-13-1 violate the right to a jury trial as guaranteed under the Georgia Constitution."); Sofie v. Fibreboard Corp., 771 P.2d 711, 715–23 (Wash.) (en banc) (finding it persuasive that in other states that have found the damages cap unconstitutional, "the operative language of the right to jury trial provisions in those states' constitutions is nearly identical to our own"), *amended by* 780 P.2d 260 (Wash. 1989) (mem.).

of the facts."[44] Courts that have upheld damage caps have held that the right to a jury trial extends to determining damages but not the consequences of those damages.[45] Courts that have struck down damage caps have instead held that their respective state constitutions prevent interfering with the jury's determination of damages.[46]

Since the Iowa legislature has not placed a hard cap on non-economic damage caps for medical-malpractice actions, Iowa courts have not adjudicated whether such legislation would be constitutional under the Iowa Constitution's right to a jury trial in article I, section 9.[47] Previous scholarship has only speculated as to whether a damage cap would be constitutional under Iowa's right-to-a-jury-trial provision and has admitted the need of "a very thorough analysis" on the topic.[48] This Note attempts to add clarity to Iowa's constitutional right-to-a-jury-trial provision by applying textual, originalist, and living-constitution arguments drawn from various federal and state cases, Iowa constitutional history, and Iowa case law. This Note finds that non-economic damage caps on medical malpractice are unconstitutional under the Iowa Constitution because they prevent the "inviolate" jury trial as originally understood from Iowa common law. Alternatively, a non-economic damage cap is a material impairment on a fundamental and essential fact-finding function of the civil jury.

First, Section II.A will briefly recount the recent legislative battle over damage caps in Iowa.[49] Then, Section II.B.1 will go over the early debates of whether the right to a jury trial is a substantive limitation on the legislature's powers.[50] Next, Section II.B.2 explores the fundamental differences between federal and state constitutional jury trial rights, and the importance of analyzing the two independently of each other.[51] Subsequently, Section III.A will explore relevant U.S. Supreme Court jurisprudence on the province of the jury under the Seventh Amendment.[52] Then, Section III.B will examine

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44. Murphy, *supra* note 35, at 817.

45. *See* Boyd v. Bulala, 877 F.2d 1191, 1195–99 (4th Cir. 1989) (disagreeing with the defendant that Virginia law prohibits or caps the recovery of punitive damages); Etheridge v. Med. Ctr. Hosps., 376 S.E.2d 525, 529 (Va. 1989) ("[J]ury trial secures no rights other than those that existed at common law. . . . [And] the common law never recognized a right to a full recovery in tort."); *see also* Wright v. Colleton Cnty. Sch. Dist., 391 S.E.2d 564, 569–70 (S.C. 1990) (holding damages cap does not infringe upon right to trial by jury but provides "outer limits" for recovery).

46. *See Sofie*, 771 P.2d at 723; Kan. Malpractice Victims Coal. v. Bell, 757 P.2d 251, 258 (Kan. 1988), *abrogated by Hilburn*, 442 P.3d 509; *see also* Watts v. Lester E. Cox Med. Ctrs., 376 S.W.3d 633, 641 (Mo. 2012) (en banc) ("[C]aps infringe on a party's constitutional right . . . to a jury determination as to noneconomic damages." (quoting *Nestlehutt*, 691 S.E.2d at 222–23)).

47. Murphy, *supra* note 35, at 833.

48. *Id.*

49. *See infra* Section II.A.

50. *See infra* Section II.B.1.

51. *See infra* Section II.B.2.

52. *See infra* Section III.A.

the first substantial cases, mostly from federal courts, resolving the constitutionality of damage caps under the Seventh Amendment.[53] In comparison, Part IV examines the rulings of state courts that have analyzed the constitutionality of damage caps under state constitutions with the same "inviolate" language as the Iowa Constitution.[54] Specifically, Section IV.B will discuss the importance of separating "inviolate" states from non-inviolate states.[55] Then, Section IV.C will detail the historical analysis most "inviolate" states engage in to show that medical malpractice claims and non-economic damages were triable by a jury in the common law.[56] Section IV.D rejects the arguments that seemingly allow the legislature to violate the civil jury protections.[57] Part V will apply the arguments from Part III and Part IV to the Iowa Constitution and Iowa case law through a textual, historical analysis.[58] In more depth, Section V.A covers the unique text of Iowa's jury trial provision, which suggests a strong analysis of the common law.[59] Section V.B shows that medical malpractice claims existed in Iowa common law before the adoption of the Iowa Constitution, as well as strong evidence that non-economic damages were to be determined by a jury.[60] Section V.C examines the alternative "living constitution" argument to article I, section 9, and comes to the conclusion that a non-economic damage cap would be a material impairment on the essential fact-finding function of the jury.[61] Section V.D rejects the possible application of Iowa tort-reform cases to a non-economic damage cap analysis under the "inviolate" jury trial protection.[62]

II. BACKGROUND

A. NON-ECONOMIC DAMAGE CAPS ON MEDICAL MALPRACTICE IN IOWA

In 2017, the Iowa legislature passed and Governor Terry Branstad signed a major and controversial piece of tort-reform legislation[63]: a $250,000 cap on pain-and-suffering damages (otherwise known as non-economic damages) in medical-malpractice claims.[64] Originally, this damage cap was intended to be a hard cap, which would not have allowed for a jury to make the final determination on damages regardless of the severity of the injury presented

53. *See infra* Section III.B.
54. *See infra* Part IV.
55. *See infra* Section IV.B.
56. *See infra* Section IV.C.
57. *See infra* Section IV.D.
58. *See infra* Part V.
59. *See infra* Section V.A.
60. *See infra* Section V.B.
61. *See infra* Section V.C.
62. *See infra* Section V.D.
63. Pfannenstiel, *supra* note 26.
64. *Id.*

in the specific case they were empaneled for.[65] The prospect of eliminating the jury's ability to decide damages troubled several state legislators.[66] Iowa State Senator Nate Boulton (D-16), for example, argued the hard cap "would undermine Iowa's jury system in a heartless manner."[67] Iowa State Senator Herman Quirmbach (D-23) also called the hard cap "an 'arrogant assertion that we under the golden dome know better how to decide [damages].'"[68]

The Iowa House of Representatives responded to the Senate Bill by unanimously passing an amendment that turned the hard cap into a soft cap.[69] This version with the soft cap eventually passed again in the Senate and was signed by Governor Branstad.[70] The $250,000 damage cap can only be overcome if "the jury determines that there is a substantial or permanent loss or impairment of a bodily function, substantial disfigurement, or death, which warrants a finding that imposition of such a limitation would deprive the plaintiff of just compensation for the injuries sustained."[71]

This current version of the cap, which protects a jury's determination of facts to an extent, may be short lived in Iowa's Code. In 2020, new legislation was introduced to attempt to eliminate any jury determination of damages, regardless of the type of injury suffered.[72] The new legislation eliminated the language that allows the jury to go above any cap in the case of serious injuries or death, while also upping the cap to $750,000.[73] This version passed the Iowa Senate by a 30 to 20 vote and was in the House Subcommittee of

65. Both of the Study Bills in the House and the Senate were intended to be hard caps. S. Study B. 1087, 87th Gen. Assemb., Reg. Sess. (Iowa 2017), https://www.legis.iowa.gov/docs/publications/LGI/87/SSB1087.pdf [https://perma.cc/VMU2-WEU6]; H. Study B. 105, 87th Gen. Assemb., Reg. Sess. (Iowa 2017), https://www.legis.iowa.gov/docs/publications/LGI/87/HSB105.pdf [https://perma.cc/YML5-NEBX]. This hard cap version passed the Senate before the House enacted an amendment allowing juries to overrule the hard cap in certain instances. James Q. Lynch, *Soft Cap on Non-Economic Damages in Medical Malpractice Gets Bipartisan Support in Iowa House*, GAZETTE (Apr. 12, 2017), https://www.thegazette.com/subject/news/government/soft-cap-on-non-economic-damages-in-medical-malpractice-gets-bipartisan-support-in-iowa-house-20170412 [https://perma.cc/T8NU-9YJQ].

66. William Petroski, *Limits on Medical Malpractice Lawsuits Passes Iowa Senate*, DES MOINES REG. (Mar. 20, 2017, 6:46 PM), https://www.desmoinesregister.com/story/news/politics/2017/03/20/limits-medical-malpractice-lawsuits-passes-iowa-senate/99251362 [https://perma.cc/ZPJ7-F22G].

67. *Id.*

68. *Id.* The golden dome that Senator Quirmbach mentions is a reference to the Iowa State Capital building. *See Des Moines: Iowa State Capital*, STATE SYMBOLS USA, https://statesymbolsusa.org/place/iowa/capitals-cities-towns/des-moines.

69. Lynch, *supra* note 65; Pfannenstiel, *supra* note 26.

70. Pfannenstiel, *supra* note 26.

71. IOWA CODE § 147.136A (2020). Alternatively, the cap does not apply in cases of actual malice by the defendant. *Id.*

72. S. File 2338, 88th Gen. Assemb., Reg. Sess. (Iowa 2020), https://www.legis.iowa.gov/docs/publications/LGE/88/SF2338.pdf [https://perma.cc/XG6C-TXPD].

73. *Id.*

Commerce before COVID-19 shut down the state legislature.[74] When the Iowa legislature reconvened, the House Commerce Committee decided to convert the hard cap into a COVID-19 liability protection bill.[75] This conversion eliminated any language capping non-economic damages, thus maintaining the current soft cap.[76] However, the legislature's failure to pass a new damage cap that would deprive Iowa juries' fact-finding prerogative in the 2020 session does not mean that it will not be reintroduced in future sessions—so long as interest groups and the previous statutory text continue to exist.[77]

B. FEDERAL AND STATE RIGHT TO A JURY TRIAL PROTECTIONS

As mentioned in this Note's introduction, the most successful constitutional challenge to damage caps has been the right to a jury trial.[78] Subsequently, it is important to look at the origins and history of civil jury trial provisions in both the federal and state constitutions. This Section describes in broad terms the significance of the right to a jury trial. Section II.B.1 discusses the development of jury-trial protections found in English common law, early state constitutions, and the Seventh Amendment to the U.S. Constitution.[79] Section II.B.2 isolates the textual, historical, and functional differences between state constitutions' civil jury-trial guarantees and the Seventh Amendment.[80]

1. Development of the Right to a Jury Trial

The right to a jury trial has been historically treasured.[81] William Blackstone provided sweeping endorsement of jury trials as "the 'principal bulwark of our liberties,' 'the glory of English law,' and 'the most transcendent

74. *Bill History for Senate File 2338*, *supra* note 26.

75. Erin Murphy, *Legislature Physically and Politically Distanced*, GAZETTE (June 3, 2020), https://www.thegazette.com/subject/news/government/iowa-legislature-coronavirus-political-social-distancing-20200603 [https://perma.cc/RE5Q-J6GR].

76. *See id.*

77. *See* Ashley Thompson, *Hometown Health: The Challenges and Opportunities Facing Rural Hospitals and Care*, BUS. REC. IOWA, May 2020, at 6, 8; Brian Privett, *How Many Medical Offices Have to Close Before Iowa Acts?*, GAZETTE (June 24, 2020), https://www.thegazette.com/subject/opinion/guest-columnist/how-many-medical-offices-have-to-close-before-iowa-acts-20200624 [https://perma.cc/G9L5-PT7L]. Thompson was the director of government and external affairs at UnityPoint Health at the time the 2020 Iowa legislature reconvened. Thompson, *supra*, at 8. Privett was the president of the Iowa Medical Society at the time the 2020 Iowa legislature reconvened. Privett, *supra*.

78. *See supra* text accompanying note 42.

79. *See infra* Section II.B.1.

80. *See infra* Section II.B.2.

81. MAGNA CARTA § 29 (1215); THE DECLARATION OF INDEPENDENCE para. 20 (U.S. 1776); *see* Stephan Landsman, *The Civil Jury in America: Scenes from an Unappreciated History*, 44 HASTINGS L.J. 579, 596 (1993); Robert S. Peck, *Violating the Inviolate: Caps on Damages and the Right to Trial by Jury*, 31 U. DAYTON L. REV. 307, 313–14 (2006) [hereinafter Peck, *Violating the Inviolate*].

privilege which any subject can enjoy.'"[82] This transcendent privilege played a significant role in securing the freedom of England, and American colonists saw the jury as "both the height of English liberty, as well as a means by which colonists could resist royal oppression."[83] Several scholars have noted that "[t]he struggle over jury rights was, in reality, an important aspect of the fight for American independence and served to help unite the colonies."[84] It is no wonder, then, that "[t]he right to trial by jury was probably the only one universally secured by the first American state constitutions."[85] Moreover, territories and future states were governed by the Northwest Ordinance of 1787, which also included a provision declaring that "[t]he inhabitants of the said territory shall always be entitled to the benefits of . . . trial by jury."[86]

The historic importance of a civil jury-trial right is also found in the debates of the creation and ratification of the U.S. Constitution.[87] The drafters of the Constitution originally opted against the inclusion of civil jury-trial right because they believed "'[t]he Representatives of the people [could] be safely trusted in this matter,' and a host of drafting problems made inclusion of a civil jury guarantee impossible."[88] Anti-federalists and several states disagreed, making it clear that civil jury trials would need to be secured in the Bill of Rights.[89] They argued that the civil jury guarantee was key to

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82. Robert S. Peck & Erwin Chemerinsky, *The Right to Trial by Jury as a Fundamental and Substantive Right and Other Civil-Trial Constitutional Protections*, 96 OR. L. REV. 489, 491 (2018) (quoting 3 WILLIAM BLACKSTONE, COMMENTARIES *350, *379).

83. Peck, *Violating the Inviolate*, *supra* note 81, at 314; *see also* Landsman, *supra* note 81, at 595–97 ("The right to a jury trial was appealing because of both its association with the revolution and its fundamentally participatory character.").

84. Landsman, *supra* note 81, at 596; *see also* Peck, *Violating the Inviolate*, *supra* note 81, at 315 (explaining that the fight for jury rights was like the fight for American independence).

85. Charles W. Wolfram, *The Constitutional History of the Seventh Amendment*, 57 MINN. L. REV. 639, 655 (1973) (alteration in original) (quoting LEONARD W. LEVY, LEGACY OF SUPPRESSION: FREEDOM OF SPEECH AND PRESS IN EARLY AMERICAN HISTORY 281 (1960)). The right to a civil jury trial, was found in 86 percent of the total number of state constitutions and was enjoyed by 92 percent of the national population by 1791. Steven G. Calabresi, Sarah E. Agudo & Kathryn L. Dore, *State Bills of Rights in 1787 and 1791: What Individual Rights Are Really Deeply Rooted in American History and Tradition?*, 85 S. CAL. L. REV. 1451, 1511–12 (2012); *see* G. ALAN TARR, UNDERSTANDING STATE CONSTITUTIONS 78–79 (1998) ("To protect against official threats to liberty, the declarations emphasized popular control of government . . . . To some extent this control was achieved through direct popular involvement in governing: the right to a jury trial was the only right protected in every state constitution.").

86. THE NORTHWEST ORDINANCE art. II (1787).

87. Landsman, *supra* note 81, at 599–600.

88. *Id.* at 598 (alteration in original) (quoting Nathaniel Gorham, Address at the Constitutional Convention (Sept. 12, 1787), *in* JAMES MADISON, DEBATES IN THE FEDERAL CONVENTION OF 1787 (1937)).

89. *Id.* at 598–600; Wolfram, *supra* note 85, at 667–73. For example, six of the seven states that had ratified the Constitution with amendments, embraced anti-federalists' concerns and specifically called for the right to a civil jury trial be added as an amendment. Peck, *Violating the Inviolate*, *supra* note 81, at 317 (citing Galloway v. United States, 319 U.S. 372, 399 n.3 (1943) (Black, J., dissenting)).

"frustrati[ng] . . . unwise legislation," "vindicati[ng] . . . the interests of private citizens" against the government, and "protecti[ng] . . . litigants against overbearing and oppressive judges."[90] Furthermore, anti-federalists felt that "the jury serve[d] the interests of democracy by injecting the values of the 'many' into judicial proceedings."[91] Even federalist Alexander Hamilton was forced to concede that the right to a jury trial was "a valuable safeguard to liberty . . . [or] the very palladium of free government."[92] Congress subsequently added the right to a civil jury trial as the Seventh Amendment to the U.S. Constitution. The Amendment states:

> In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.[93]

In addition to the federal right, the right to a civil jury trial is found in nearly every state constitution. The Iowa Constitution has its provision at article I, section 9. Section 9 states:

> The right of trial by jury shall remain inviolate; but the General Assembly may authorize trial by jury of a less number than twelve men in inferior courts; but no person shall be deprived of life, liberty, or property, without due process of law.[94]

2. Differences Between State and Federal Civil Jury Trials Guarantees

Nearly all state constitutions have a civil jury-trial guarantee in their Bill of Rights that bears some similarity to the federal Seventh Amendment.[95] However, the Seventh Amendment is one of the few Bill of Rights provisions that has not been incorporated through the Fourteenth Amendment.[96] As the Iowa Supreme Court has described, "the Seventh Amendment [is] inapplicable to state court proceedings brought under state law."[97] Furthermore there are textual, historical, and functional differences between state civil jury-trial protections and the Seventh Amendment.[98] These differences suggest that state supreme courts should engage in a highly specific analysis of their own

90. Wolfram, *supra* note 85, at 670–71.

91. Landsman, *supra* note 81, at 600.

92. THE FEDERALIST NO. 83, at 612 (Alexander Hamilton) (Floating Press ed., 2011).

93. U.S. CONST. amend. VII.

94. IOWA CONST. art. I, § 9.

95. Eric J. Hamilton, Note, *Federalism and the State Civil Jury Rights*, 65 STAN. L. REV. 851, 855 (2013).

96. Walker v. Sauvinet, 92 U.S 90, 92 (1876) (finding, as far as the Seventh Amendment is concerned, states "are left to regulate trials in their own courts in their own way"); *see also, e.g.*, Pearson v. Yewdall, 95 U.S. 294, 296 (1877). For an interesting argument in favor of incorporation of the Seventh Amendment, see Peck & Chemerinsky, *supra* note 82, at 554–58.

97. Channon v. United Parcel Serv., Inc., 629 N.W.2d 835, 853 (Iowa 2001).

98. *See infra* notes 100–26 and accompanying text.

jury-trial protections rather than defaulting to the federal analysis of the Seventh Amendment.[99]

To begin, state civil jury-trial protections textually "bear [a] greater resemblance to each other than they do the Seventh Amendment" for three main reasons.[100] First, state civil jury-trial protections generally lack a reexamination clause.[101] The Reexamination Clause in the Seventh Amendment provides "no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law."[102] Only two state civil jury-trial protections, West Virginia[103] and Oregon,[104] contain a reexamination clause. A second, and more subtle, difference is that an overwhelming majority of state constitutions do not "preserve" the right to a jury trial.[105] State constitutions from the eighteenth century generally state that the right to a jury trial "ought to be held sacred."[106] Meanwhile, a supermajority of state constitutions from the nineteenth century—including Iowa's—seemingly adopted stronger language, typically declaring that the right to a jury trial "shall remain inviolate."[107] Lastly, most state constitutions place the civil jury-trial right, along with the rest of their Bill of Rights, at the beginning of their constitutions.[108] The prominent placement in state constitutions serves as a textual reminder of its importance as a restraint on state legislatures, in contrast to the U.S. Constitution's placement of this right.[109]

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99. *See infra* notes 100–26 and accompanying text.

100. Hamilton, *supra* note 95, at 854.

101. *See, e.g.*, U.S. CONST. amend. VII (containing a reexamination clause); *see also* Robert F. Williams, *State Constitutional Protection of Civil Litigation*, 70 RUTGERS U. L. REV. 905, 927 (2018) (discussing the Seventh Amendment and finding "[t]wo states, Oregon and West Virginia, have similar provisions in their constitutions").

102. U.S. CONST. amend. VII.

103. W. VA. CONST. art. III, § 13.

104. OR. CONST. art VII, § 3.

105. Hamilton, *supra* note 95, at 855. Only a couple of state constitutions "preserve" the right to a jury trial. *See, e.g.*, ALASKA CONST. art. I, § 16 ("[T]he right of trial by a jury of twelve is preserved to the same extent as it existed at common law.").

106. Peck, *Violating the Inviolate*, *supra* note 81, at 316 n.67; *see* TARR, *supra* note 85, at 76 ("One difference [in Eighteenth Century State Constitutions] is the frequent (though not consistent) use of the hortatory *ought*, rather than the more mandatory *shall*, in the state declarations."); *see, e.g.*, VA. CONST. art. I, § 11 (1776) ("[T]rial by jury is preferable to any other, and ought to be held sacred."); *see also* PENN. CONST. art. XI (1776) ("[T]he parties have a right to trial by jury, which ought to be held sacred."). *But see, e.g.*, N.Y. CONST. art. XLI (1777) ("[T]rial by jury . . . shall be established and remain inviolate forever.").

107. *See, e.g.*, IOWA CONST. art. I, § 9 ("The right of a trial by jury shall remain inviolate; but the General Assembly may authorize trial by a jury of a less number than twelve men in inferior courts; but no person shall be deprived of life, liberty, or property, without due process of law."); Peck, *Violating the Inviolate*, *supra* note 81, at 311. For an analysis specific to damage caps as to why "inviolate" tends to be a stronger guarantee than "sacred," see *infra* Section IV.B.

108. TARR, *supra* note 85, at 11–12.

109. *Id.*

The state jury-trial constitutional guarantees are also rooted in different waves of constitution-making.[110] Eighteenth-century state constitutions focused on the creation of government and thus "imposed few restrictions on [the] legislature[] beyond . . . declaration[] of rights . . . framed as admonitory principles rather than specific legal restraints."[111] Nineteenth-century "state constitutions became more polished and professional . . . [and] increasingly became instruments of government rather than merely frameworks for government."[112] Likewise, nineteenth-century state constitutions, such as Iowa's 1844 and 1846 versions, were influenced by Jacksonian democracy.[113] Jacksonian democracy's significant distrust of legislative supremacy and powerful interests led to a new focus on "the curtailment of legislative power" in these nineteenth-century constitutions.[114] The curtailments found in nineteenth-century constitutions included "prohibitions on special legislation, procedural hurdles that legislation had to meet, and enhanced separation of powers that emphasized increased judicial independence."[115]

As part of checking legislative power, Jacksonian democracy notably believed jury trials served an extremely important function.[116] Alexis de Tocqueville, an observer of Jacksonian democracy, described juries as "an essential institution for American democracy, ascribing the people's 'good political sense' to the 'long use that they have made of the jury in civil matters.'"[117] Jacksonians favored extensive use of juries because they "plac[ed] actual control of society in the hands of the governed . . . rather than of the government."[118] The jury essentially legitimized the "robust role for the judiciary in government . . . as a counterweight to executive and legislative

110. *Id.* at 58–59.

111. *Id.* at 62, 117.

112. *Id.* at 132.

113. *Id.* at 95; ROBERT F. WILLIAMS, THE LAW OF AMERICAN STATE CONSTITUTIONS 85 (2009); *see* Robert S. Peck, *Tort Reform's Threat to an Independent Judiciary*, 33 RUTGERS L.J. 835, 882 (2002) [hereinafter Peck, *Tort Reform's Threat*] ("After their disastrous experiments with legislative supremacy, states embarked on significant constitutional changes that were a direct product of Jacksonian democracy."); *see also* R. Lawrence Hachey, *Jacksonian Democracy and the Wisconsin Constitution*, 62 MARQ. L. REV. 485, 488 (1979) ("Some twenty constitutions were written between 1839 and 1850, the watershed of Jacksonian Democracy."). Iowa's first two constitutional conventions in 1844 and 1846 were dominated by Democrat delegates. TODD E. PETTYS, THE IOWA STATE CONSTITUTION 9, 18 (2d ed. 2018).

114. TARR, *supra* note 85, at 95; *see* Peck, *Tort Reform's Threat*, *supra* note 113, at 882.

115. Peck, *Tort Reform's Threat*, *supra* note 113, at 882.

116. JEFFREY ABRAMSON, WE, THE JURY: THE JURY SYSTEM AND THE IDEAL OF DEMOCRACY 37 (1994).

117. Peck, *Violating the Inviolate*, *supra* note 81, at 314 (quoting ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 126 (Hackett Publ'g. Co. 2000)); *see* Giulia Oskian, *Tocqueville and the Legal Culture of Jacksonian America*, 39 J. EARLY REPUBLIC 135, 138 (2019).

118. Albert W. Dzur, *Democracy's "Free School": Tocqueville and Lieber on the Value of the Jury*, 38 POL. THEORY 603, 608 (2010) (quoting ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 313 (Libr. of Am. 2004)).

power and a buffer against majority tyranny."[119] The textual differences between "sacred" jury trial provisions generally from the eighteenth-century state constitutions and "inviolate" provisions more prevalent in nineteenth century constitutions, possibly illustrate a historical movement toward stronger textual protection of jury trials against legislative infringement.[120] Simply applying Seventh Amendment jurisprudence to respective state civil jury trial guarantees ignores the tenets of Jacksonian democracy and other political movements that influenced nineteenth-century state constitution-makers.[121]

Beyond their different histories, state civil jury-trial protections are functionally different from the Seventh Amendment. The U.S. Constitution provides very few "protections for civil litigation" and leaves significant liberty interests to state constitutions.[122] Thus state civil jury-trial protections should be seen as "primary, rather than . . . secondary, constitutional guarantees."[123] This consideration is appropriate in the context of medical-malpractice litigation and, more broadly, civil litigation, because a majority of this litigation is handled by civil jury trials in state courts, not federal courts.[124] As aptly summarized by Professor Robert F. Williams, federal case law on the Seventh Amendment can certainly be persuasive to state courts, but it "should not cast a 'shadow' or shine a 'glare' over the proceedings."[125] Thus, based on the textual, historical, and functional differences between the Seventh Amendment and state jury-trial protections, this Note concludes that, in interpreting the Iowa Constitution, Seventh Amendment jurisprudence ought to be less persuasive than similar "inviolate" provisions in state constitutions.[126]

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119. *Id.* at 604.

120. *See supra* text accompanying notes 100–09. This argument does not attempt to say state constitutions that provide for jury trials "ought to be sacred" do not provide strong protection for jury trials. Rather, this argument attempts to show that a constitution that promises its jury rights "shall remain inviolate" is intended to give stronger protection than "ought to be sacred" provisions. Interestingly enough, "inviolate" was found in several early state constitutions with regards to protecting free speech and liberty of the press. THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 414–16 (2d ed. 1871) (citing several state constitutions).

121. *See* TARR, *supra* note 85, at 47.

122. Williams, *supra* note 101, at 908.

123. *Id.* at 909.

124. *Id.* at 907; *see* B. Sonny Bal, *An Introduction to Medical Malpractice in the United States*, 467 CLINICAL ORTHOPAEDICS & RELATED RSCH. 339, 340 (2009).

125. Williams, *supra* note 101, at 909 (footnotes omitted).

126. This Note acknowledges the debate within the Iowa Supreme Court regarding whether a neutral criteria approach or an independent approach should be adopted in cases involving state constitutional claims with textually similar federal constitutional provisions. *See* Eric M. Hartmann, Note, *Preservation, Primacy, and Process: A More Consistent Approach to State Constitutional Interpretation in Iowa*, 102 IOWA L. REV. 2265, 2280–82 (2017). *Compare* State v. Gaskins, 866 N.W.2d 1, 22–23 (Iowa 2015) (Appel, J., concurring), *with id.* at 51–52 (Waterman, J., dissenting). The neutral criteria approach does not belong in a damage cap analysis under a state-jury trial provision considering that the Seventh Amendment is not incorporated against the

III. PERSUASIVE SEVENTH AMENDMENT CASE LAW

Notwithstanding these significant differences, current Iowa civil jury-trial case law tends to examine persuasive Seventh Amendment case law and then compare or apply it to the Iowa Constitution.[127] As the Iowa Supreme Court held in *Schloemer v. Uhlenhopp*, "[t]he intention of the [federal and state right to a jury trial] is obviously the same."[128] Thus it is necessary to have an understanding of Seventh Amendment jurisprudence, and explore its subsequent use by state courts in interpreting their own civil jury-trial protections. This Note divides persuasive Seventh Amendment case law on damage caps into three separate sections. Section III.A observes three influential U.S. Supreme Court opinions (*Dimick v. Schiedt*,[129] *Tull v. United States*,[130] and *Feltner v. Columbia Pictures Television, Inc.*[131]) which exhibit the Seventh Amendment protection of a jury's determination of damages in common-law actions. Section III.B examines four opinions stemming from the Fourth Circuit,[132] the Third Circuit,[133] and the Virginia Supreme Court[134] that apply Seventh Amendment case law, including the rules from *Dimick* and *Tull*, to state damage caps. Section III.C discusses *Channon v. United Parcel*

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states. *See* Sofie v. Fibreboard Corp., 771 P.2d 711, 716 n.4 (Wash.) (en banc) (rejecting even applying the *Gunwall*'s neutral criteria because the Seventh Amendment does not apply in state court proceedings), *amended by* 780 P.2d 260 (Wash. 1989) (mem.). Even if the Iowa Supreme Court decided to use a neutral criteria approach, this Note convincingly addresses several areas of the neutral criteria described in the *Gaskins* dissent, such as Iowa constitutional text in Section V.A, Iowa constitutional history in Section V.B, state precedent in Sections V.C and V.D, decisions of sister "inviolate" states in Part IV, and the lack of need for national uniformity in Part II that each thoroughly suggest a divergence from the federal case law regarding state damage caps. *See Gaskins*, 866 N.W.2d at 51–52 (Waterman, J., dissenting).

127. *See* Weltzin v. Nail, 618 N.W.2d 293, 298–303 (Iowa 2000) (en banc); Iowa Nat'l Mut. Ins. Co. v. Mitchell, 305 N.W.2d 724, 726–29 (Iowa 1981).

128. Schloemer v. Uhlenhopp, 21 N.W.2d 457, 458 (Iowa 1946).

129. *See generally* Dimick v. Schiedt, 293 U.S. 474 (1935) (holding the process of additur unconstitutional under the Seventh Amendment).

130. *See generally* Tull v. United States, 481 U.S. 412 (1987) (holding that a jury's determination of a civil penalty was not a fundamental element of the Seventh Amendment).

131. *See generally* Feltner v. Columbia Pictures Television, Inc., 523 U.S. 340 (1998) (holding that plaintiff had a Seventh Amendment right to a jury's determination of damages in a copyright case).

132. *See generally* Boyd v. Bulala, 647 F. Supp. 781 (W.D. Va. 1986) (holding Virginia's damage cap on medical malpractice damages was unconstitutional under the Seventh Amendment and Virginia's right to jury trial provision), *aff'd in part, rev'd in part*, 877 F.2d 1191 (4th Cir. 1989) (holding Virginia's damage cap on medical malpractice damages was constitutional under the Seventh Amendment), *certifying questions to* 389 S.E.2d 670 (Va. 1990).

133. *See generally* Davis v. Omitowoju, 883 F.2d 1155 (3d Cir. 1989) (holding the Virgin Islands' damage cap on medical malpractice was constitutional under the reexamination clause of the Seventh Amendment).

134. *See generally* Etheridge v. Med. Ctr. Hosps., 376 S.E.2d 525 (Va. 1989) (holding Virginia's damage cap on medical malpractice damages was constitutional under Virginia's right to jury trial provision).

Service, Inc., which, to date, has been Iowa courts' only attempt to apply Seventh Amendment case law to a damage cap under Title VII.[135]

A. UNDERSTANDING THE BASICS: DIMICK, TULL *AND THE* FELTNER *PRINCIPLE*

This Section examines three persuasive Seventh Amendment cases from the U.S. Supreme Court relating to damages determinations by a jury. These cases have had a significant impact on how other federal and state courts have interpreted their civil jury-trial protections. Section III.A.1 details the case *Dimick v. Schiedt*, in which the U.S. Supreme Court appeared to give strong protection to a jury's determination of damages under the Seventh Amendment. Section III.A.2 observes the clash between *Dimick v. Schiedt* and *Tull v. United States*, in which the U.S. Supreme Court held that a jury's determination of a civil penalty was not protected under the Seventh Amendment. Section III.A.3 clarifies this clash by examining the Court's opinion in *Feltner v. Columbia Pictures Television, Inc.*, in which the Court clarified that a determination of damages in common-law action was protected under the Seventh Amendment. The damages determination by a jury, it reasoned, was not the same as a jury's determination of a civil penalty.

1. The Purpose of the Jury

Dimick v. Schiedt is a prototypical example of a historical analysis under the Seventh Amendment. In *Dimick*, the jury awarded the plaintiff, David Dimick, $500 in personal-injury damages for an automobile accident with Peter Schiedt.[136] However, Dimick "moved for a new trial on the grounds . . . that the damages allowed were inadequate."[137] Through a process called additur, the district court conditionally granted the motion for a new trial but denied that motion after Schiedt consented to an increase in the amount of damages to $1,500.[138] (Remittitur, a similar process to additur, lowers the jury's determination of damages instead of raising damages, while still preserving the motion for a new trial.)[139] Dimick appealed the verdict on the grounds that additur was not permitted by the Seventh Amendment.[140]

The *Dimick* majority first concluded, based on a historical rationale, that additur was not preserved under the Seventh Amendment. The Supreme Court determined that in a Seventh Amendment challenge, the Court must engage in a historical analysis of the common law to determine if additur was

135. *See* Channon v. United Parcel Serv., Inc., 629 N.W.2d 835 (Iowa 2001); Channon v. United Parcel Serv., Inc., No. 66303, 1998 WL 317210, at *1 (Iowa Dist. Ct. May 22, 1998), *aff'd in part, rev'd in part*, 629 N.W.2d 835 (Iowa 2001).

136. Dimick v. Schiedt, 293 U.S. 474, 475 (1935).

137. *Id.*

138. *Id.* at 475–76.

139. *Id.* at 486.

140. *Id.* at 476.

a device preserved by the Seventh Amendment.[141] The Court's extensive analysis of English and early American common law determined that additur was hardly ever used prior to the adoption of the U.S. Constitution.[142] This historical lack of additur meant that additur had not been preserved by Seventh Amendment.[143]

The *Dimick* majority then held that additur would violate protections guaranteed under the Seventh Amendment. The Supreme Court framed the Seventh Amendment's importance by boldly stating that the "[m]aintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care."[144] Under the Seventh Amendment, it is for the "jury [to] properly determine the question of liability and the extent of the injury by an assessment of damages" because "[b]oth are questions of fact."[145] This function is especially proper "in cases where the amount of damages was uncertain [that] their assessment was a matter so *peculiarly within the province of the jury* that the Court should not alter it."[146] Relying on the fundamental principle that damages are uniquely within the province of the jury, the Court found additur to be "a bald addition of something which in no sense can be . . . included in the verdict" while remittitur was "merely lopping off an excrescence" from the jury's determination.[147] The common law was flexible, but the Court was "dealing with a constitutional provision . . . [that] adopted the rules of the common law, in respect of trial by jury, as these rules existed in 1791. To effectuate any change . . . is not to deal with the common law . . . *but to alter the Constitution.*"[148] *Dimick*'s conclusions regarding the Seventh Amendment's protection of a jury's determination of compensatory damages have been cited approvingly by several state supreme courts interpreting their own civil jury-trial guarantees to protect the jury's determination of damages.[149]

2. *Tull*—Clashing with *Dimick*

While *Dimick* thus seemingly stands for the conclusion that a jury's determination of compensatory damages is protected by the Seventh

141. *Id.*

142. *Id.* at 477–78.

143. *Id.*

144. *Id.* at 486.

145. *Id.*

146. *Id.* at 480 (emphasis added) (quoting COLEMAN PHILLIPSON, MAYNE'S TREATISE ON DAMAGES 571 (9th ed. Sweet & Maxwell 1920) (1856)).

147. *Id.* at 486.

148. *Id.* at 487 (emphasis added).

149. *See, e.g.*, Watts v. Lester E. Cox Med. Ctrs., 376 S.W.3d 633, 639 (Mo. 2012) (en banc); Sofie v. Fibreboard Corp., 771 P.2d 711, 717 (Wash.) (en banc), *amended by* 780 P.2d 260 (Wash. 1989) (mem.).

Amendment, the Supreme Court muddied this principle over 50 years later in *United States v. Tull*. In *Tull*, the United States sued Edward Tull, "a real estate developer, for dumping fill on wetlands" without a permit, in violation of the Clean Water Act.[150] Tull's demand for a jury trial was denied with regard to the determination of liability and damages, which allowed the district court to impose a civil penalty of $325,000.[151]

The Supreme Court in *Tull* engaged in a similar English common-law historical analysis to *Dimick*, specifically "examin[ing] both the nature of the action and of the remedy sought."[152] This historical analysis revealed that if a civil penalty is pursued, persons "ha[ve] a constitutional right to a jury trial to determine [their] liability on the legal claims."[153] However, the *Tull* majority noted that "[t]he Seventh Amendment is silent on the question whether a jury must determine the remedy in a trial in which it must determine liability."[154] Despite the silence of the Seventh Amendment, the *Tull* majority determined that a legislature could not legislate away "incidents which are regarded as fundamental, as inherent in and of the essence of the system of trial by jury."[155] The *Tull* majority found that the American Congress and British Parliament historically had the power to determine civil penalties and thus could delegate that responsibility to trial judges.[156] Thus, the determination of a civil penalty was "not an essential function of a jury trial."[157]

Notably, Justice Scalia dissented strongly to the Court's decision to remove the civil-penalty determination from the jury.[158] Justice Scalia could "recall no precedent for judgment of civil liability by jury but assessment of amount by the court."[159] He was concerned that if Congress could enforce its regulatory authority by controlling a judge's determination of civil penalties in a civil jury trial, then the proceeding would essentially become a criminal jury trial analogous to sentencing.[160] This standard would allow the government to use a criminal-law penalty without abiding by the criminal-law standard requiring proof beyond a reasonable doubt.[161] If the government only needed

150. Tull v. United States, 481 U.S. 412, 414 (1987).

151. *Id.* at 415, 420.

152. *Id.* at 417.

153. *Id.* at 425 (determining that the civil penalty found in the Clean Water Act is a punitive remedy historically found in a court of law hence requiring a jury).

154. *Id.* at 425–26.

155. *Id.* at 426 (quoting Colgrove v. Battin, 413 U.S. 149, 156 n.11 (1973)). *Colgrove*'s analysis appears to come from Austin Wakeman Scott, *Trial by Jury and the Reform of Civil Procedure*, 31 HARV. L. REV. 669 (1918). *Colgrove*, 413 U.S. at 156 n.11. Scott's piece proves to be influential in Iowa civil jury trial law. *See* discussion *infra* Section V.C.

156. *Tull*, 481 U.S. at 426–27.

157. *Id.* at 427.

158. *Id.* at 427–28 (Scalia, J., concurring in Parts I and II and dissenting in Part III).

159. *Id.* at 428.

160. *Id.*

161. *Id.*

to prove liability by a preponderance of evidence, then the government would need to accept the amount of an award determined by a jury instead of a judge.[162]

Despite the strong dissent of Justice Scalia, the majority's holding in *Tull* improperly influenced a series of damage-cap cases in the late 1980s and early 1990s.[163] The reach of *Tull*'s influence should have been limited for several reasons. First, *Tull* involved a statutorily created "cause of action that was [not] recognized at common law," as contrasted from claims rooted in the common law, such as medical malpractice.[164] Second, the determination of civil penalties in the Clean Water Act are based on a highly discretionary criteria with multiple factors.[165] In contrast, compensatory damages generally depend on the facts of the case, which are traditionally assigned for a determination by the jury.[166] Third, the purpose of civil penalties and compensatory damages differ, as the former is punitive in nature while the latter is focused on compensation for an injury.[167]

3. The *Feltner* Principle

The confusion created by *Tull* was clarified ten years later by the 1998 Supreme Court case *Feltner v. Columbia Pictures Television, Inc.*[168] In *Feltner*, the Supreme Court determined that the Seventh Amendment required a jury for determining the amount of statutory damages under the Copyright Act of 1976.[169] The Supreme Court conducted the usual Seventh Amendment historical analysis under English and American common law, finding that juries had historically determined damages in copyright-infringement cases.[170] As the backdrop to this holding, the Supreme Court reaffirmed its commitment to *Dimick*.[171] The *Feltner* Court also distinguished *Tull*'s holding because the civil penalty was historically different from statutory damages in

162. *Id.*

163. *See* Boyd v. Bulala, 877 F.2d 1191, 1196 n.5 (4th Cir. 1989); Adams v. Child.'s Mercy Hosp., 832 S.W.2d 898, 906–07 (Mo. 1992) (en banc), *overruled by* Watts v. Lester E. Cox Med. Ctrs., 376 S.W.3d 633 (Mo. 2012) (en banc); Peck & Chemerinsky, *supra* note 82, at 553–54; Peck, *Violating the Inviolate*, *supra* note 81, at 324–25; Colleen P. Murphy, *Determining Compensation: The Tension Between Legislative Power and Jury Authority*, 74 TEX. L. REV. 345, 366–70 (1995); *see infra* Section IV.D.1; *see, e.g.*, *Watts*, 376 S.W.3d at 643–44 (describing how *Adams* should not have considered *Tull* in its analysis).

164. Peck & Chemerinsky, *supra* note 82, at 554.

165. Murphy, *supra* note 163, at 367–68.

166. *Id.* at 367.

167. *Id.* at 369–70.

168. Feltner v. Columbia Pictures Television, Inc., 523 U.S. 340, 354–55 (1998); *see* Peck, *Violating the Inviolate*, *supra* note 81, at 325.

169. *Feltner*, 523 U.S. at 342.

170. *Id.* at 349–52.

171. *Id.* at 353 ("[I]n cases where the amount of damages was uncertain[,] their assessment was a matter so peculiarly within the province of the jury that the Court should not alter it." (second alteration in original) (quoting Dimick v. Schiedt, 293 U.S. 474, 480 (1935))).

copyright cases.[172] Thus, *Feltner* reaffirms the principle that the Seventh Amendment includes the right to have a jury determine damages if the jury did so at common law.[173] Despite the promise of *Feltner*, the U.S. Supreme Court has yet to analyze the constitutionality of damage caps on common-law causes of action under the Seventh Amendment. As a result, the focus shifts to precedents by other federal courts, and more importantly, other state supreme courts.[174]

B. THE FIRST APPLICATIONS TO DAMAGE CAPS UNDER CIVIL JURY PROTECTIONS

From 1986 through 1989, a series of opinions from courts in Virginia and the Virgin Islands specifically addressed the question of whether damage caps violated the Seventh Amendment. The first major cases to challenge damage caps under the Seventh Amendment arose when Virginia instituted a $750,000 hard cap for all damages in medical malpractice actions in 1983.[175] There were two cases that considered the constitutionality of the Virginia damage cap, *Boyd v. Bulala*,[176] which was filed in federal court, and *Etheridge v. Medical Center Hospitals*,[177] which was filed in state court. These cases produced three notable opinions on damage caps that collectively make up what this Note in Section III.B.1 calls the Virginia Trilogy. First was the federal district court's opinion in *Boyd*, which held that damage caps were unconstitutional based on the Seventh Amendment, and subsequently applied its ruling to the Virginia Constitution's right-to-a-jury-trial provision.[178] Second was the Virginia Supreme Court's opinion in *Etheridge*, which rejected the federal district court's opinion and held that damage caps were constitutional under the Virginia Constitution's right-to-a-jury-trial provision.[179] Third was the Fourth Circuit's opinion reversing the district court's opinion in *Boyd* under the Seventh Amendment.[180] The Third Circuit further developed a unique rationale for the constitutionality of damage caps in *Davis v. Omitowoju* that was completely different from the Virginia Trilogy.[181]

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172. *Id.* at 354–55; *see* Michael S. Kang, Note, *Don't Tell Juries About Statutory Damage Caps: The Merits of Nondisclosure*, 66 U. CHI. L. REV. 469, 475 n.35 (1999) (stating that *Tull*'s precedential value was weakened by *Feltner*'s ruling); *see also* Peck, *Violating the Inviolate*, *supra* note 81, at 324–25 (supporting the proposition that *Feltner* distinguished *Tull*); Peck & Chemerinsky, *supra* note 82, at 553–54 (same).

173. Peck, *Violating the Inviolate*, *supra* note 81, at 325 (citing *Feltner*, 523 U.S. at 353).

174. *See infra* Section III.B; *see infra* Part IV.

175. Boyd v. Bulala, 647 F. Supp. 781, 785 (W.D. Va. 1986) (citing VA. CODE. ANN. § 8.01-581.15 (West 1983)), *aff'd in part, rev'd in part*, 877 F.2d 1191 (4th Cir. 1989).

176. *Id.*

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

178. *Boyd*, 647 F. Supp. at 781.

179. *Etheridge*, 376 S.E.2d at 525.

180. *Boyd*, 877 F.2d at 1191.

181. Davis v. Omitowoju, 883 F.2d 1155, 1159, 1168–69 (3d Cir. 1989).

1. The Virginia Trilogy

The first major opinion in the Virginia Trilogy stems from the tragic case of *Boyd v. Bulala*, which was filed in the Western District of Virginia in 1986.[182] Helen and Roger Boyd sued Dr. Bulala for medical malpractice regarding the delivery of their child, Veronica Boyd, who "suffered a perinatal injury [that created] profound physical and mental handicaps" and died six weeks after the district-court trial.[183] Dr. Bulala was at his home several miles away and told nurses to only contact him after crowning.[184] Due to Dr. Bulala's instruction, Mrs. Boyd's baby was delivered by nurses "untrained in emergency measures" that could have otherwise prevented the injuries to the baby.[185] The jury returned a verdict in favor of the plaintiffs totaling $8,300,000 in damages.[186] However, post-trial motions would have reduced damages to $750,000 under Virginia's damage cap.[187] The Boyds deployed three federal and two state constitutional challenges to the damages cap.[188] The federal challenges were brought under the Due Process and Equal Protection Clauses of the Fourteenth Amendment, as well as the right to a jury trial under the Seventh Amendment.[189] The two state-specific constitutional challenges were based on separation of powers and prohibition of special legislation.[190]

The district court opinion, in striking down the damage cap, specifically found the Seventh Amendment challenge most compelling.[191] The district court first concluded that the Seventh Amendment preserved the right for the jury to hear medical-malpractice actions.[192] The district court also held that under *Dimick*, the Seventh Amendment protection extends to "not only the question of liability but also the extent of the injury by an assessment of damages."[193] Thus, the court concluded that a damage cap "infringes strongly on the fact-finding function of the jury in assessing appropriate damages" because the damage cap would either prevent the jury from considering damages above the cap or it would "invalidate[] any jury finding which

182. *Boyd*, 647 F. Supp. at 781.

183. *Id.* at 784.

184. *Id.*

185. *Id.*

186. *Id.*

187. *Id.* at 785 (citing VA. CODE. ANN. § 8.01-581.15 (West 1983)).

188. *Id.*

189. *Id.*

190. *Id.* The district court rejected the due process and equal protection challenges because the damages cap "neither create[d] a suspect classification nor infringe[d] upon a fundamental right" to require a stronger level of review and thus "[wa]s clearly a rational means to achieve the legislative goal." *Id.* at 787.

191. *Id.* at 788–90.

192. *Id.* at 788 (citing C. Joseph Stetler, *The History of Reported Medical Professional Liability Cases*, 30 TEMP. L.Q. 366 (1957)).

193. *Id.* (citing Dimick v. Schiedt, 293 U.S. 474, 486 (1935)).

exceeds the cap."[194] The district court determined its Seventh Amendment analysis was applicable to the Virginia's constitutional right-to-a-jury-trial provision despite the linguistic difference between "preserved" and "sacred."[195]

Despite ruling that the Seventh Amendment protected the jury's determination of the damages, the district court recognized "that a federal court has the power to set aside a verdict and order a new trial, or order remittitur, or enter judgment notwithstanding the verdict."[196] However, these examples of legal devices were strictly limited to situations in which the evidence was plainly contrary or did not support the verdict.[197] The hard cap, on the other hand, "would require the court to ignore a verdict [above the hard cap] which is *supported by evidence*."[198] Thus, the hard cap was not analogous to a court's power to change a jury's verdict and it impermissibly infringed on the jury's ability to determine the facts.[199] Therefore, the Virginia legislature would have to "abolish a common law right of action and . . . replace it with a compensation scheme" in order for the damage cap to not run afoul with civil jury-trial protections.[200]

The district court's holding in *Boyd* was disagreed with three years later by the Virginia Supreme Court in *Etheridge v. Medical Center Hospitals*.[201] In *Etheridge*, a healthy mother with "a deteriorating jaw bone" suffered brain damage and paralysis during a bone-grafting treatment.[202] The jury's verdict of $2,750,000 was reduced to $750,000 under the same damage cap applied in *Boyd*.[203] While the Virginia Supreme Court agreed with the *Boyd* district court that the jury's fact finding function extended to damages,[204] the court determined that under the Virginia Constitution "[a] remedy is a matter of law, not . . . fact."[205] This distinction between law and fact has been aptly termed "splitting theory."[206] Under splitting theory, "a party has the right to have a jury assess . . . damages, [but] has no right to have a jury dictate through an award the legal consequences of its assessment."[207] Thus, the Virginia Supreme Court concluded there was no violation of Virginia's right

194. *Id.* at 788–89.
195. *Id.* at 789 (referencing VA. CONST. art. I, § 11).
196. *Id.* (emphasis omitted).
197. *Id.*
198. *Id.* (emphasis added).
199. *Id.*
200. *Id.*
201. Etheridge v. Med. Ctr. Hosps., 376 S.E.2d 525, 528–29 (Va. 1989).
202. *Id.* at 526–27.
203. *Id.* at 527.
204. *Id.* at 529.
205. *Id.*
206. *See* Matthew W. Light, Note, *Who's the Boss?: Statutory Damage Caps, Courts, and State Constitutional Law*, 58 WASH. & LEE L. REV. 315, 332–36 (2001).
207. *Etheridge*, 376 S.E.2d at 529.

to a jury trial provision because the jury had made a determination on the facts, and the legal nature of the remedy was not protected under the jury-trial provision.[208]

Consequently, the district court's holding in *Boyd* did not survive the scrutiny of the Fourth Circuit.[209] The Fourth Circuit applied the splitting theory pronounced in *Etheridge* to the Seventh Amendment.[210] It reasoned that it was up to "the jury as factfinder to determine the extent of a plaintiff's injuries," but "it [was] not the role of the jury to determine the legal consequences of its factual findings."[211] The Fourth Circuit also misapplied *Tull* by holding that the Seventh Amendment does not extend to the remedy phase of the trial, even though the Boyds' case involved a common-law action and not a civil penalty.[212] In response to the district court's claim that in order to create a capped remedy the Virginia legislature would have to abolish a cause of action, the Fourth Circuit creatively explained that if legislatures have the power to "abolish a cause of action" without violating the right to trial by a jury, then legislatures consequentially would have the power to abolish certain parts of a civil action.[213] This power would include limiting damages on a cause of action as well.[214] The rationales from *Etheridge* and *Boyd*'s Fourth Circuit opinion were adopted in the Sixth Circuit[215] and the Eighth Circuit[216] in 2005 and 2017, respectively. However, neither of these recent cases reconciled the Fourth Circuit's use of *Tull* with the *Feltner* principle in their respective efforts to interpret the right to a jury trial.

2. The Third Circuit's Fixation on the Reexamination Clause

Shortly after *Etheridge* and *Boyd*, the Third Circuit, in *Davis v. Omitowoju*, agreed that damage caps were constitutional based on the Reexamination Clause in the Seventh Amendment instead of relying on splitting theory or

208. *Id.* at 528–29.

209. Boyd v. Bulala, 877 F.2d 1191, 1195–97 (4th Cir. 1989).

210. *See id.* at 1196.

211. *Id.* (citing *Etheridge*, 376 S.E.2d at 529).

212. *Id.*; *see also id.* at 1196 n.5 (citing Tull v. United States, 481 U.S. 412, 426 n.9 (1987)).

213. *Id.* at 1996. This rationale is similar to *Franklin v. Mazda Motor Corporation*, a federal district court case from Maryland, where the court held that a hard cap on non-economic damages was constitutional because "[j]uries always find facts on a matrix of laws given to them by the legislature." Franklin v. Mazda Motor Corp., 704 F. Supp. 1325, 1331 (D. Md. 1989), *superseded by statute*, MD. CODE ANN. CTS. & JUD. PROC. § 11-108(d)(1), *as recognized in* Rodriguez v. Cooper, 182 A.3d 853 (2018).

214. *Boyd*, 877 F.2d at 1196.

215. *See* Smith v. Botsford Gen. Hosp., 419 F.3d 513, 519 (6th Cir. 2005) (citing *Boyd*, 887 F.2d at 1196) (embracing that the remedy is a matter of law and that damage caps are within the legislature's power).

216. *See* Schmidt v. Ramsey, 860 F.3d 1038, 1045 (8th Cir. 2017) (citing *Boyd*, 887 F.2d at 1196) (embracing solely that the remedy is a matter of law).

legislative power.[217] In *Davis*, Dr. Omitowoju was to conduct an arthroscopic surgery on Theresa Davis, "a procedure that involves a small puncture of the knee" and not opening the knee up.[218] However an arthrotomy was performed in addition to an arthroscopic surgery, which opened up the knee.[219] The jury found total damages of $650,000, but pain-and-suffering damages were reduced to $250,000 due to a damage cap.[220]

To begin, the Third Circuit undertook an examination of the two aforementioned Supreme Court cases, *Dimick* and *Tull*.[221] The Third Circuit left the inherent tension unresolved between the *Boyd* district court's justification of the authoritativeness of *Dimick* and the Fourth Circuit's justification of *Tull*.[222] The Third Circuit determined that neither case truly applied to damage caps, as *Dimick* was focused on the concepts of additur and remittitur,[223] and *Tull* was focused on a civil penalty rather than damages in a civil case.[224] The Third Circuit then acknowledged the difference in rationales between the district court and Fourth Circuit in *Boyd* but also did not make a determinative decision embracing either approach.[225]

The Third Circuit's rationale instead introduced a new textual analysis of the Seventh Amendment's Reexamination Clause to the damage-caps debate. The Reexamination Clause states that "no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law."[226] Under *Davis*' interpretation, the Reexamination Clause limited the role of the court in reexamining the facts of the jury, but not the legislature.[227] In fact, the textual analysis of the Reexamination Clause "makes no mention of the other branches of government."[228] The Third Circuit then engaged in a historical analysis to support its textual interpretation by examining a statement made by delegate Elbridge Gerry at the Constitutional Convention,[229] Alexander Hamilton's Federalist No. 83,[230] and Thomas

217. Davis v. Omitowoju, 883 F.2d 1155, 1162 (3d Cir. 1989).

218. *Id.* at 1157.

219. *Id.*

220. *Id.* at 1157–58 (citing V.I. CODE ANN. tit. 27, § 166b (1975)).

221. *Id.* at 1159–60 (first citing Dimick v. Schiedt, 293 U.S. 474 (1935); and then citing Tull v. United States, 481 U.S. 412 (1987)).

222. *See* discussion *supra* Section III.A.

223. *Davis*, 883 F.2d at 1159–60 (citing *Dimick*, 293 U.S. at 482–85).

224. *Id.* at 1160.

225. *See id.* at 1160–61.

226. U.S. CONST. amend. VII.

227. *Davis*, 883 F.2d at 1161–62.

228. *Id.* at 1162.

229. *Id.* at 1163 (citing Edith Guild Henderson, *The Background of the Seventh Amendment*, 80 HARV. L. REV. 289, 293 (1966)).

230. *Id.* at 1164 (citing THE FEDERALIST NO. 83, at 563 (Alexander Hamilton) (J. Cooke ed., 1961)).

Jefferson's letter to Abbe Arnoux,[231] each of which point to the right to a jury trial guarding against only judicial action. Thus, the Third Circuit determined that the district court "was not reexamining a 'fact tried by a jury' within the meaning of" the Seventh Amendment by applying the legislature's damage cap.[232]

The *Davis* court strongly relied on a textual and historical account of the Reexamination Clause, instead of "splitting theory" and expansive power of legislative ability to modify a common-law cause of action.[233] Despite *Davis*' unique analysis on the Reexamination Clause, it is not heavily cited among several states considering that an equivalent to the Reexamination Clause is not found in many state civil jury protections.[234]

3. Lessons of the Virginia Trilogy and *Davis*

The Virginia Trilogy and *Davis* flesh out three important arguments in favor of the constitutionality of damage caps. First, *Etheridge* created, and *Boyd*'s Fourth Circuit opinion subsequently adopted, the "splitting theory" to the Seventh Amendment.[235] Second, *Boyd*'s Fourth Circuit opinion expanded legislative power under the Seventh Amendment by stating that a derivative power of the legislature's ability to eliminate a common-law cause of action was to cap the amount of damages in that action.[236] Third, *Davis* focused on how the Reexamination Clause in the Seventh Amendment only checked judicial interference with jury verdicts but not legislative interference.[237] Each of these arguments has not only had a varying impact on state courts interpreting the constitutionality of federal damage caps under the Seventh Amendment but has also been applied by state courts in interpreting state damage caps under state civil jury-trial protections.[238]

C. IOWA'S SEVENTH AMENDMENT ANALYSIS IN CHANNON

It is necessary to consider, therefore, what impact these developments have had in Iowa. Iowa courts have only once examined the aforementioned federal cases in examining a damage cap challenge under the Seventh Amendment. In the case of *Channon v. United Parcel Service, Inc.*, the plaintiff

231. *Id.* (citing 5 PHILLIP B. KURLAND & RALPH LERNER, THE FOUNDERS' CONSTITUTION 364 (1986)).

232. *Id.* at 1162.

233. *Compare Davis*, 883 F.2d at 1162–63, *with* Boyd v. Bulala, 877 F.2d 1191, 1195–97 (4th Cir. 1989).

234. But for those states that do have a similar re-examination clause, *Davis* has been cited effectively. *See, e.g.*, Robinson v. Charleston Area Med. Ctr., Inc., 414 S.E.2d 877, 887–88 (W. Va. 1991) (first citing W. VA. CONST. art. III, § 13; and then citing *Davis*, 883 F.2d at 1165).

235. *See supra* Section III.B.1.

236. *See supra* Section III.B.1.

237. *See supra* Section III.B.2.

238. *See infra* Part IV.

challenged the constitutionality of Title VII of the Civil Rights Act's hard cap on compensatory and punitive damages under the Seventh Amendment, after a jury trial in state district court.[239] Both the Iowa district court and the Iowa Supreme Court rested their holding on the fact "that the Seventh Amendment governs proceedings only in federal courts and not in state courts."[240] While the Iowa Supreme Court did not go beyond holding that the Seventh Amendment analysis did not apply to state courts,[241] the district court expounded briefly on why the Seventh Amendment challenge would fail.[242]

1. The Iowa District Court's Opinion

The Iowa district court determined that the Seventh Amendment challenge did not apply for two reasons.[243] First, the district court stated that "the Seventh Amendment governs proceedings only in federal courts and not in state courts."[244] Second, the district court relied on the text of the Reexamination Clause in the Seventh Amendment, which states that "no fact tried by a jury, shall be otherwise re-examined in *any Court of the United States,*" to show that the Seventh Amendment only applied to proceedings in federal court, and not proceedings in state court.[245]

The Iowa district court further concluded in dicta that Title VII's damage cap did not violate the Seventh Amendment.[246] The district court cited the Fourth Circuit's arguments in *Boyd* that the damage caps are a matter of law and that the legislature can eliminate damages if it can eliminate a cause of action as well.[247] The district court also briefly cited approvingly to *Davis*' analysis on the Reexamination Clause.[248] The district court then cited to *Tull* to indicate that the Seventh Amendment did not guarantee a jury determination of damages—but, notably, it did so without resolving the inherent tension in *Dimick* or explicit tension from *Feltner.*[249] The district court did deploy a historical analysis regarding the jury-determined damages by showing there

239. Channon v. United Parcel Serv., Inc., No. 66303, 1998 WL 317210, at *1 (Iowa Dist. Ct. May 22, 1998) (citing 42 U.S.C. § 1981a (1991)), *aff'd in part, rev'd in part*, 629 N.W.2d 835, 852–53 (Iowa 2001).

240. *Id.*; *Channon*, 629 N.W.2d at 852.

241. *Channon*, 629 N.W.2d at 853 ("[W]e do not reach the question whether the $300,000 damages cap imposed by 42 U.S.C. § 1981a(b)(3)(D) violates the Seventh Amendment.").

242. *Channon*, 1998 WL 317210, at *1.

243. *Id.*

244. *Id.*

245. *Id.* (citing U.S. CONST. amend. VII).

246. *Id.*

247. *Id.* (citing Boyd v. Bulala, 877 F.2d 1191, 1196 (4th Cir. 1989)).

248. *Id.* (citing Davis v. Omitowoju, 883 F.2d 1155, 1158–65 (3d Cir. 1989)).

249. *Id.* (citing Tull v. United States, 481 U.S. 412, 425–26 (1987)). The *Feltner* opinion was released on March 31, 1998, while the district court's *Channon* opinion was released on May 22, 1998. *Compare* Feltner v. Columbia Pictures Television, Inc., 523 U.S. 340 (1998), *with Channon*, 1998 WL 317210, at *1. *See also supra* Section III.A.

was no common-law right to a jury in cases of "disparate treatment, sexual harassment, or retaliation in the workplace . . . [and that only] [a]fter the enactment of the Civil Rights Act of 1991, claimants received the statutory rights to . . . damages as well as the right to a jury trial."[250] Thus, the constitutional right to a jury trial could not attach to the Title VII claim.[251]

2. The Iowa Supreme Court's Opinion

The Iowa Supreme Court affirmed the district court on the question of whether the Seventh Amendment applied.[252] It specifically highlighted the recent U.S. Supreme Court opinion *Gasperini v. Center for Humanities*, which stated that "[t]he Seventh Amendment . . . governs proceedings in federal court, but not in state court."[253] The Iowa Supreme Court also noted several other cases that stated the same principle.[254] It then cited approvingly to the district court's textual analysis of the Seventh Amendment.[255] However, the court ultimately did "not reach the question whether the $300,000 damages cap . . . violate[d] the Seventh Amendment."[256] The Iowa Supreme Court did not adopt any of the arguments of *Boyd*, *Davis*, or *Tull* despite their citation in the district judge's holding that Title VII damage caps do not violate the Seventh Amendment.[257]

3. *Channon*'s District Court's Opinion Cannot Be Applied to Iowa Medical-Malpractice Damage Caps

While *Channon* does give some insight as to how one Iowa district court judge viewed the constitutionality of damage caps under the Seventh Amendment, *Channon*'s Seventh Amendment rationale should not be applied to a challenge of an Iowa state law that would put a hard damage caps on non-economic damages in medical malpractice actions. This is true for several reasons. First, even if the Iowa Supreme Court tepidly agreed with the district court judge's arguments about the Seventh Amendment, the Iowa Supreme Court strongly emphasized that the Seventh Amendment does not apply to state-court proceedings.[258] Clearly, a possible hard medical-malpractice damage cap would involve proceedings in state court, and thus not implicate the Seventh Amendment. Furthermore, this ruling suggests an independent review of Iowa's right-to-a-jury-trial provision and civil jury-trial case law. Second, the district court did not examine the splitting theory; the theory that

250. *Channon*, 1998 WL 317210, at *1.
251. *Id.*
252. Channon v. United Parcel Serv., Inc., 629 N.W.2d 835, 852–53 (Iowa 2001).
253. *Id.* at 852 (quoting Gasperini v. Ctr. for Humans., Inc., 518 U.S. 415, 432 (1996)).
254. *Id.* at 852–53 (citing various cases).
255. *Id.* at 853.
256. *Id.*
257. *Id.*
258. *Id.* at 852–53.

if the legislature can abolish a common-law cause of action, then the legislature can set caps; or the Reexamination Clause.[259] Instead, the district court found no equivalent common-law cause of action for Title VII claims to which the right to a jury trial could attach for Seventh Amendment purposes.[260] In that regard, medical malpractice should be viewed as entirely different from Title VII. Third, a Seventh Amendment analysis loses the benefit of horizontal federalism, which looks at other state constitutional right-to-a-jury-trial provisions that are more similar to Iowa's provision in text, historical understanding, and function.[261] For these reasons, it is necessary to turn to an analysis of other similar state constitutions and associated case law.

IV. MORE PERSUASIVE "INVIOLATE" STATE CASE LAW

As already indicated, in interpreting article I, section 9 of the Iowa Constitution, the Iowa Supreme Court is not bound by interpretations of the Seventh Amendment despite the similarity between the two provisions.[262] The Iowa Supreme Court instead ought to take into account state case law interpreting similar "inviolate" constitutional provisions for the textual, historical, and functional reasons described in Section II.B.2.[263] Furthermore, in analyzing this area of the law, state supreme courts tend to heavily rely on each other, i.e., relying on state case law that interprets state constitutional jury trial provisions rather than the Seventh Amendment.[264] Iowa should follow suit.

This Part describes the arguments in state case law involving challenges to damage caps under right-to-a-jury-trial provisions enshrined in other states' constitutions. Section IV.A covers the rise of right-to-a-jury-trial challenges under state constitutions.[265] Section IV.B observes textual arguments that differentiate state constitutions whose texts contain "sacred" and "inviolate" civil jury-trial protections.[266] Section IV.C observes historical arguments from state supreme courts that find civil jury protections attach to medical-malpractice actions and protect the right to determine damages.[267] Section IV.D rejects alternative state supreme court arguments, such as splitting theory, the theory of expansive legislative power to abolish a cause, and the inapt comparison to remittitur.[268]

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259. Channon v. United Parcel Serv., Inc., No. 66303, 1998 WL 317210, at *1 (Iowa Dist. Ct. May 22, 1998).

260. *Id.*

261. *Id.*

262. Weltzin v. Nail, 618 N.W.2d 293, 298–303 (Iowa 2000) (en banc).

263. *See* discussion *supra* Section II.B.2.

264. *See, e.g.*, Hilburn v. Enerpipe Ltd., 442 P.3d 509, 522–23 (Kan. 2019).

265. *See infra* Section IV.A.

266. *See infra* Section IV.B.

267. *See infra* Section IV.C.

268. *See infra* Section IV.D.

A. THE RISE OF STATE JURY-TRIAL CHALLENGES TO DAMAGE CAPS

In the late 1970s and early 1980s, the state supreme courts that heard constitutional challenges to damage caps generally did not hear claims based on the right to a jury trial. These constitutional challenges instead focused on equal protection,[269] due process,[270] or special-legislation theories.[271] Only the Indiana Supreme Court faced the jury-trial question, and the court dedicated only two paragraphs to the constitutional challenge and did not engage in any historical analysis.[272] However, between 1987 and 1993, after the success of *Boyd*'s Seventh Amendment challenge in federal district court,[273] several state supreme courts began hearing challenges based on the right-to-a-jury-trial constitutional provisions.[274] While federal courts have generally upheld damage caps in Seventh Amendment challenges, state courts of last resort have been split in their decisions based on their own constitutional civil jury protections.[275] In particular, states whose constitutions contained "inviolate" provisions are more likely to have found such damage caps unconstitutional under state law.[276]

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269. *See generally* Arneson v. Olson, 270 N.W.2d 125 (N.D. 1978) (finding multiple constitutional violations); Carson v. Maurer, 424 A.2d 825 (N.H. 1980) (per curiam) (finding an equal protection violation), *overruled by* Cmty. Res. for Just., Inc. v. City of Manchester, 917 A.2d 707 (N.H. 2007); Baptist Hosp. of Se. Tex., Inc. v. Baber, 672 S.W.2d 296 (Tex. Ct. App. 1984) (finding an equal protection violation); Fein v. Permanente Med. Grp., 695 P.2d 665 (Cal. 1985) (upholding on equal protection grounds).

270. *See generally Fein*, 695 P.2d at 665 (upholding on substantive due process grounds).

271. *See generally* Wright v. Cent. Du Page Hosp. Ass'n, 347 N.E.2d 736 (Ill. 1976) (finding a special legislation violation).

272. *See* Johnson v. St. Vincent Hosp., Inc., 404 N.E.2d 585, 601–02 (Ind. 1980), *overruled by In re* Stephens, 867 N.E.2d 148 (Ind. 2007). *But see* Sofie v. Fibreboard Corp., 771 P.2d 711, 723 (Wash.) (en banc) (criticizing the Indiana Supreme Court for not engaging in an historical analysis), *amended by* 780 P.2d 260 (Wash. 1989) (mem.).

273. Boyd v. Bulala, 647 F. Supp. 781 (W.D. Va. 1986), *aff'd in part, rev'd in part*, 877 F.2d 1191 (4th Cir. 1989), *certifying questions to* 389 S.E.2d 670 (Va. 1990).

274. *See generally* Smith v. Dep't of Ins., 507 So. 2d 1080 (Fla. 1987) (per curiam) (invalidating damage caps); Kan. Malpractice Victims Coal. v. Bell, 757 P.2d 251 (Kan. 1988) (invalidating damage caps), *abrogated by* Hilburn v. Enerpipe Ltd., 442 P.3d 509 (Kan. 2019); English v. New Eng. Med. Ctr., 541 N.E.2d 329 (Mass. 1989) (upholding damage caps); Condemarin v. Univ. Hosp., 775 P.2d 348 (Utah 1989) (upholding damage caps); *Sofie*, 771 P.2d (invalidating damage caps); Wright v. Colleton Cnty. Sch. Dist., 391 S.E.2d 564 (S.C. 1990) (upholding damage caps); Robinson v. Charleston Area Med. Ctr., Inc., 414 S.E.2d 877 (W. Va. 1991) (upholding damage caps); Peters v. Saft, 597 A.2d 50 (Me. 1991) (upholding damage caps); Murphy v. Edmonds, 601 A.2d 102 (Md. 1992) (upholding damage caps); Adams v. Child.'s Mercy Hosp., 832 S.W.2d 898 (Mo. 1992) (upholding damage caps), *overruled by* Watts v. Lester E. Cox Med. Ctrs., 376 S.W.3d 633 (Mo. 2012); Scholz v. Metro. Pathologists, P.C., 851 P.2d 901 (Colo. 1993) (upholding damage caps).

275. *See supra* Section III.B; *see also Hilburn*, 442 P.3d at 522–23 (citing split in cases).

276. *Hilburn*, 442 P.3d at 522–23 ("[E]ight decisions . . . compared to . . . five states [six including Kansas through *Hilburn*] that have struck down damages caps as unconstitutional under constitutional provisions that make the jury trial right 'inviolate.'").

B. SACRED V. INVIOLATE

Textualism plays a curious role in damage-cap challenges based on the constitutional right-to-a-jury-trial provisions in federal courts. The *Davis* court clearly valued textualism with its analysis of the Reexamination Clause in the Seventh Amendment, concluding that reexamination damages only applied to the judiciary and not the legislature.[277] On the other hand, the federal district court in *Boyd* held that the Seventh Amendment language that "preserves" the right to a jury trial and the Virginia Constitution's language that describes the jury trial as "preferable" and "sacred" were similar enough.[278] This interpretative split presents a dilemma for state supreme courts in states whose constitutions include "inviolate" language. Should they find the decisions of states with similar "inviolate" provisions in their constitutions more persuasive? Or, instead, does it not matter that other state constitutions contain different language such as "sacred" or "preserved," which are more similar to the federal jury-trial provision in the Seventh Amendment?[279]

To answer, states who term their jury trial rights "inviolate" have split in their analysis. For example, "inviolate" states such as South Carolina in 1990[280] and Missouri in 1992[281] did not engage in any analysis regarding the definition of "inviolate." These courts merely adopted the arguments from Virginia's *Etheridge* opinion without engaging the different constitutional language and influences in their constitution.[282] Several courts that have interpreted state provisions have continued to turn to *Etheridge*, such as in the Fifth Circuit's 2013 opinion in *Learmonth v. Sears, Roebuck & Co.*, which interpreted Mississippi's "inviolate" provision.[283] The Fifth Circuit ultimately

277. *See* Davis v. Omitowoju, 883 F.2d 1155, 1164 (3d Cir. 1989) ("We know that civil juries were provided for in the first clause of the Seventh Amendment ostensibly to protect against biased or corrupt judges.").

278. *Boyd*, 647 F. Supp. at 789 (citing VA. CONST. art. I, § 11).

279. The Oregon Supreme Court produced an interesting argument in *Horton v. Oregon Health & Science University* which suggested that "the prepositional phrase 'by Jury' . . . preserves . . . a right to a procedure . . . rather than a substantive result." Horton v. Or. Health & Sci. Univ., 376 P.3d 998, 1036 (Or. 2016) (citing OR. CONST. art. I, § 17).

280. S.C. CONST. art. I, § 14 ("The right of trial by jury shall be preserved inviolate."); *see* Wright v. Colleton Cnty. Sch. Dist., 391 S.E.2d 564, 569–70 (S.C. 1990).

281. MO. CONST. art. I, § 22(a) ("That the right of trial by jury as heretofore enjoyed shall remain inviolate."); *see* Adams v. Child.'s Mercy Hosp., 832 S.W.2d 898, 906–07 (Mo. 1992) (en banc), *overruled by* Watts v. Lester E. Cox Med. Ctrs., 376 S.W.3d 633 (Mo. 2012) (en banc).

282. *See Wright*, 391 S.E.2d at 569–70 (citing Etheridge v. Med. Ctr. Hosps., 376 S.E.2d 525 (Va. 1989)) (adopting the argument that the "remedy is a matter of law, not a matter of fact"); *Adams*, 832 S.W.2d at 906–07 (citing *Etheridge*, 376 S.E.2d 525) (holding that the legislature's power extends capping damages since the right to remedy is a matter of law), *overruled by Watts*, 376 S.W.3d 633.

283. Learmonth v. Sears, Roebuck & Co., 710 F.3d 249, 263 (5th Cir. 2013).

concluded, and some other state supreme courts have agreed, that "a jury guarantee's 'inviolability' is not dispositive."[284]

By contrast, several state supreme courts with "inviolate" jury trial constitutional provisions have respectfully refused to blindly adopt the *Etheridge* approach.[285] Typical definitions of "inviolate" include "secure against violation or impairment"[286] or "free from change or blemish, pure or unbroken."[287] This strong textual command has persuaded several courts interpreting "inviolate" provisions, such as the Alabama Supreme Court in 1991, that "sacred" provisions provide weaker protection than "inviolate."[288] The Georgia Supreme Court in 2012 similarly described non-"inviolate" jury-trial provisions as "less comprehensive constitutional jury trial provisions."[289] Even the Virginia Supreme Court has noted that its "sacred" provision "provides a weaker protection than other states."[290] Furthermore, it appears that the recent trend among courts interpreting "inviolate" provisions as applied to damage caps is to cite predominately to other "inviolate" states.[291] The statistical analysis of jurisprudence in "inviolate" states shows that there is a near 50/50 spilt in upholding the constitutionality of damage caps.[292]

C. HISTORICAL ANALYSIS: A CRITICAL UNDERPINNING

Even with an understanding that "inviolate" jury-trial protections deserve more scrutiny than non-"inviolate" provisions, the "inviolate" states still tend

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284. *Id.* (first citing Gourley v. Neb. Methodist Health Sys., Inc., 663 N.W.2d 43, 75 (Neb. 2003) (per curiam); and then citing Kirkland v. Blaine Cnty. Med. Ctr., 4 P.3d 1115, 1117, 1120 (Idaho 2000)) (noting that both the Nebraska and Idaho Supreme Courts embraced *Etheridge*'s holdings despite separate jury trial protections); *see Horton*, 376 P.3d at 1036 ("[T]he text of [inviolate provisions], standing alone, [is] not definitive[] . . . .").

285. *See, e.g.*, Moore v. Mobile Infirmary Ass'n, 592 So. 2d 156, 163 (Ala. 1991); Lakin v. Senco Prods., Inc., 987 P.2d 463, 473 n.10 (Or. 1999), *overruled by Horton*, 376 P.3d at 998; Atlanta Oculoplastic Surgery, P.C. v. Nestlehutt, 691 S.E.2d 218, 224 n.8 (Ga. 2010); *Watts*, 376 S.W.3d at 644.

286. *Lakin*, 987 P.2d at 468 (citing 3 THE CENTURY DICTIONARY 3174 (1889)).

287. *Watts*, 376 S.W.3d at 638 (citing WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1190 (1993)); *see Inviolate*, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1841) (defining "inviolate" as "unhurt; uninjured; unprofaned; unpolluted; unbroken"). Inviolate, in the modern sense, is defined as "not violated or profaned" which implies a sense that inviolate is unalterable; while sacred, again in the modern sense, is defined as "entitled to reverence and respect" which doesn't necessarily have that same implication that it is unalterable. *Inviolate*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/inviolate [https://perma.cc/H295-PYGJ]; *Sacred*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/sacred [https://perma.cc/BL5B-SYZA].

288. *Moore*, 592 So. 2d at 163 (comparing ALA. CONST. art 1, § 11, with VA. CONST. art. I, § 11); *see Watts*, 376 S.W.3d at 644.

289. *Nestlehutt*, 691 S.E.2d at 224 n.8.

290. Peck & Chemerinsky, *supra* note 82, at 553; *see* Pulliam v. Coastal Emergency Servs. of Richmond, Inc., 509 S.E.2d 307, 314 (Va. 1999).

291. *See* Hilburn v. Enerpipe Ltd., 442 P.3d 509, 522–23 (Kan. 2019).

292. *See supra* note 42 and accompanying text.

to apply a two-part historical analysis of English and state common law before the ratification of their individual state constitution.[293] This historical approach is evident in the U.S. Supreme Court's Seventh Amendment opinions in *Dimick*, *Tull*, and *Feltner*.[294] More specifically, the Virginia Trilogy and Third Circuit opinions also support the use of a historical analysis in damage-cap cases.[295] For similar reasons, a historical analysis is critical to understanding each state's right-to-a-jury-trial provision.

The historical analysis first starts by examining whether the specific claim in question required a jury at common law prior to the ratification of the state constitution.[296] If an attachable jury-trial claim existed at common law, the court will typically proceed to the next inquiry, which focuses more narrowly on what the responsibilities of the common-law jury were within that claim.[297] Once the plaintiff has shown that non-economic damages in common-law claims were part of the common-law jury fact-finding function, this jury function is protected under the "inviolate" language.[298] However, if the two-part historical analysis fails at either step, the jury-trial constitutional analysis is over.[299] Although this approach is not uniform, "inviolate" states that do not engage in this historical analysis have been heavily criticized for failing to give full weight to their own jury-trial constitutional protections.[300]

Applying the first prong of the historical test in the medical-malpractice context, it is clear that there is substantial jurisprudence determining that the English and early American common law included medical-malpractice claims.[301] Several state courts have also recognized medical-malpractice claims

293. *See, e.g.*, Sofie v. Fibreboard Corp., 771 P.2d 711, 717 (Wash.) (en banc), *amended by* 780 P.2d 260 (Wash. 1989) (mem.); *see* Peck, *Violating the Inviolate*, *supra* note 81, at 313. Strong support for "inviolate" language requires an analysis of the common law which is found in the influential writings of legal academic and Chief Justice of the Michigan Supreme Court Thomas Cooley. COOLEY, *supra* note 120, at 415–16 ("[T]hey recognize certain rights as now existing, and seek to protect and perpetuate them, by declaring that they . . . shall remain inviolate. They do not assume to create new rights, but their purpose is to protect the citizen in the enjoyment of those already possessed. We are at once, therefore, turned back from these provisions to the pre-existing law, in order that we may ascertain that the rights are which are thus protected . . . .").

294. *See supra* Section III.A; *see also* Peck, *Violating the Inviolate*, *supra* note 81, at 313 (discussing a unified approach under the historical cannon of construction).

295. *See supra* Section III.B.

296. *See, e.g.*, *Sofie*, 771 P.2d at 717.

297. *Id.*

298. *Id.* at 716.

299. *See, e.g.*, Dodson v. Ferrara, 491 S.W.3d 542, 555–56 (Mo. 2016) (en banc) (stating that wrongful death damages from medical malpractice were not cognizable at common law).

300. *Sofie*, 771 P.2d at 723 (criticizing the Indiana Supreme Court in *Johnson v. St. Vincent Hospital, Inc.*, 404 N.E.2d 585 (Ind. 1980), for failing to engage in a historical analysis: "It is also notable that the [*Johnson*] court did not undertake any historical analysis to reach its conclusion. This lack of analysis minimizes the impact of the similarity between the Indiana constitution's jury provision and our own.").

301. *See* Atlanta Oculoplastic Surgery, P.C. v. Nestlehutt, 691 S.E.2d 218, 221–22 (Ga. 2010) (observing that the common law recognized medical malpractice claims, or *mala praxis*, through

in their earliest reported case law or before the ratification of their state constitutions.[302] Even if medical malpractice did not exist in name under the state's common law, the core theory of medical malpractice is centered on basic tort theories, such as negligence, which existed at common law.[303] Thus, several "inviolate" states have found medical-malpractice claims satisfy the first prong of the historical test.[304]

The second prong of the historical test then engages in a similar analysis to the first prong, by focusing on whether non-economic damages in medical-malpractice cases were determined *by a jury* under English and early state common law.[305] As mentioned previously, the U.S. Supreme Court's opinions in *Dimick* and *Feltner* generally stand for the proposition that the Seventh Amendment protects the fact-finding function of the jury, which includes a determination of damages.[306] State supreme courts have looked to their own common law to support the general holdings from *Dimick* and *Feltner* that damages are generally part of the jury's fact-finding function.[307] Most states, even those upholding damage caps, have recognized that the jury's fact-finding function includes a determination of damages.[308] Furthermore, several "inviolate" states have agreed with *Dimick* that non-economic damages such as pain and suffering are incalculable, and their calculation is "*primarily and peculiarly* within the province of the jury" since the jury is able to observe firsthand the witnesses and evidence at trial.[309] The responsibility of a jury to

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fourteenth century Kings Bench cases and Blackstone commentaries); Watts v. Lester E. Cox Med. Ctrs., 376 S.W.3d 633, 638 (Mo. 2012) (en banc).

302. *Nestlehutt*, 691 S.E.2d at 222 (finding the earliest reported cases from Georgia in 1853 and 1860); *Watts*, 376 S.W.3d at 638 (finding the earliest reported case from Missouri in 1844); *see* Robert S. Peck & Hartley Hampton, *A Challenge Too Early: The Lawsuit to Invalidate Texas Damage Caps Ten Years Ago and Its Likely Future Vindication*, 51 TEX. TECH L. REV. 667, 677 (2019).

303. *See* Kan. Malpractice Victims Coal. v. Bell, 757 P.2d 251, 258 (Kan. 1988) (citing Tefft v. Wilcox, 6 Kan. 46, 57 (1870)), *abrogated by* Hilburn v. Enerpipe Ltd., 442 P.3d 509 (Kan. 2019); Moore v. Mobile Infirmary Ass'n, 592 So. 2d 156, 164 (Ala. 1991) (distinguishing between compensatory damages in a common law negligence action and civil penalties in a federal act, and specifically referring to *Tull v. United States*, 481 U.S. 412 (1987)).

304. *See supra* text accompanying notes 298–300. *But see* Horton v. Or. Health & Sci. Univ., 376 P.3d 998, 1034 (Or. 2016) (citing Hughes v. PeaceHealth, 178 P.3d 225, 233 (Or. 2008)).

305. *Nestlehutt*, 691 S.E.2d at 223; *Moore*, 592 So. 2d at 159.

306. *See supra* Sections III.A.1, III.A.3; *Nestlehutt*, 691 S.E.2d at 222 (citing Dimick v. Scheidt, 293 U.S. 474, 480 (1935)); *Watts*, 376 S.W.3d at 641 (citing *Dimick*, 293 U.S. at 480).

307. Sofie v. Fibreboard Corp., 771 P.2d 711, 716 (Wash.) (en banc) (citing Baker v. Prewitt, 19 P. 149, 150 (Wash. 1888)), *amended by* 780 P.2d 260 (Wash. 1989) (mem.); *Moore*, 592 So. 2d at 159 (citing Ensley Ry. Co. v. Chewning, 9 So. 458, 462 (Ala. 1891)); *Nestlehutt*, 691 S.E.2d at 222 (citing Smith v. Overby, 30 Ga. 241, 245 (1860)).

308. *See, e.g.*, Gourley v. Neb. Methodist Health Sys., Inc., 663 N.W.2d 43, 76 (Neb. 2003) (per curiam); Kirkland v. Blaine Cnty. Med. Ctr., 4 P.3d 1115, 1118 (Idaho 2000); McClay v. Airport Mgmt. Servs., LLC, 596 S.W.3d 686, 690 (Tenn. 2020).

309. *Sofie*, 771 P.2d at 717 (emphasis added) (quoting Bingaman v. Grays Harbor Cmty. Hosp., 669 P.2d 1230, 1232 (Wash. 1985) (en banc)); *see Watts*, 376 S.W.3d at 641 (first citing *Nestlehutt*, 691 S.E.2d at 222–23; and then citing *Moore*, 592 So. 2d at 163).

determine non-economic damages also has been applied to medical-malpractice claims.[310] Thus, "inviolate" states finding damage caps unconstitutional under civil jury protection describe a jury's assessment of damages as an essential or fundamental function of a right to a civil jury trial.[311]

D. When "Inviolate" States Misinterpret What "Inviolate" Protects

While a number of "inviolate" states have thus held that damage caps are unconstitutional based on constitutional jury-trial protections, others have not. As explained in Section IV.D.1 these states have reached the opposite conclusion based on several arguments. These arguments include appeals to history, theories of legislative power, and comparisons to remittitur. This Note will address each of these arguments in turn. Section IV.D.1 discusses the flaws in historical arguments that civil jury protections do not include a jury's determination of damages.[312] Next, Section IV.D.2 disputes the extent to which state legislatures have power to modify causes of action.[313] Finally, Section IV.D.3 examines the inapt comparison of damage caps to a remittitur exercised by the courts.[314]

1. Historical Arguments Against Substantive Jury Trial Protection

There are three historical arguments that have been made to undercut the argument that the right to a jury trial includes the determination of damages. First, a handful of state courts, especially those which decided jury-trial cases immediately after the district court's opinion in *Boyd*, have cited to *Tull* in an attempt to show that "[t]here is no substantive right under the common law to a jury determination of damages."[315] However, the use of *Tull* has since been thoroughly discredited by several state courts, because the historical distinction "between damages in a tort action and a civil penalty in a regulatory enforcement case is fundamental."[316] Even "inviolate" states that have upheld damage caps have not cited *Tull* since the Missouri Supreme

310. *See Nestlehutt*, 691 S.E.2d at 222–23.

311. *Sofie*, 771 P.2d at 719; *see Moore*, 592 So. 2d at 163–65 ("The relevant inquiry is whether the function of the jury has been impaired."); *Nestlehutt*, 691 S.E.2d at 223 (citing Pollard v. State, 96 S.E. 997, 1000 (Ga. 1918)); Hilburn v. Enerpipe Ltd., 442 P.3d 509, 514–15 (Kan. 2019).

312. *See infra* Section IV.D.1.

313. *See infra* Section IV.D.2.

314. *See infra* Section IV.D.3.

315. Adams v. Child.'s Mercy Hosp., 832 S.W.2d 898, 907 (Mo. 1992) (en banc) (referencing Tull v. United States, 481 U.S. 412 (1987)); *see In re* Certification of Questions of L. from U.S. Ct. of Appeals for the Eighth Cir., Pursuant to Provisions of SDCL 15-24A-1, 544 N.W.2d 183, 202 (S.D. 1996) (citing *Tull*, 481 U.S. at 426), *superseded by statute*, S.D. CODIFIED LAWS § 21-3-11.1 (1997), *as recognized in* Peterson v. Burns, 635 N.W.2d 556 (S.D. 2001); Peck, *Violating the Inviolate*, *supra* note 81, at 324–25; *supra note* 163 and accompanying text.

316. *Sofie*, 771 P.2d at 717–18 (citing *Tull*, 481 U.S. at 412); Watts v. Lester E. Cox Med. Ctrs., 376 S.W.3d 633, 643–44(Mo. 2012) (en banc); *Moore*, 592 So. 2d at 164.

Court did so in 1992.[317] And, frankly, the U.S. Supreme Court's decision in *Feltner* makes *Tull*'s holding inapplicable moving forward.[318]

The second historical argument is that legislatures at common law could alter damages. The Idaho Supreme Court, for example, pointed to the existence of double or treble statutory damages in some civil actions before the adoption of its state constitution to show the legislature could alter common-law damages.[319] However, the applicability of common-law statutory alteration of damages should be limited. If the historic inquiry regarding a right-to-a-jury-trial provision requires showing that the specific common-law cause of action or its essential equivalent demanded the right to a jury trial, the finding for statutory treble damages before ratification at common law should be equally specific. In other words, the statutory double or treble damages must be have applied specifically in an action for medical malpractice or its equivalent. An analysis that finds determinative any existence of statutory damages would otherwise swallow the entire purpose of a historical analysis, specifically its first prong of looking at the specific cause of action. Even if statutory double or treble damages existed for medical-malpractice claims or its equivalent cause of action before the ratification of the state constitution, they, as the Georgia Supreme Court in *Atlanta Oculoplastic Surgery P.C. v. Nestlehutt*, stated, "merely operate[d] upon and thus affirm[ed] the integrity of that award," similar to pre- or post-judgment interest.[320]

Third, some courts in "inviolate" states argue that, historically, civil jury-trial protections were not designed to prevent legislative intervention on damages.[321] Specifically, the Oregon Supreme Court, in 2016, canvased the history of early civil jury-trial protections and determined that the civil jury-trial protection "guarantees a procedural right . . . [but does not] limit[] the legislature's authority to define, as a matter of law, the substantive elements of a cause of action or the extent to which damages will be available in that action."[322] This reasoning draws a parallel to *Davis*' historical analysis of the Reexamination Clause, which concluded that civil jury-trial protections only

317. *Adams*, 832 S.W.2d at 906–07.

318. *See supra* Section III.A.3; *see also* Atlanta Oculoplastic Surgery, P.C. v. Nestlehutt, 691 S.E.2d 218, 222 & n.5 (Ga. 2010) (citing Feltner v. Columbia Pictures Television, Inc., 523 U.S. 340, 353 (1998)) ("Though it is argued that the damages determination does not fall within the scope of the right to jury trial, we note that the primary case relied on for this proposition, *Tull v. United States*, . . . has been limited expressly by the U.S. Supreme Court to apply only to the determination of civil penalties and not actual damages, which the Court has since explicitly found to be an issue for jury determination." (citations omitted)).

319. Kirkland v. Blaine Cnty. Med. Ctr., 4 P.3d 1115, 1117–19 (Idaho 2000); *see* Phillips v. Mirac, Inc., 651 N.W.2d 437, 442 (Mich. Ct. App. 2002).

320. *Nestlehutt*, 691 S.E.2d at 224; *see Sofie*, 771 P.2d at 726–27; McClay v. Airport Mgmt. Servs., LLC, 596 S.W.3d 686, 700 n.5 (Tenn. 2020) (Clark, J., dissenting).

321. *See, e.g.*, Horton v. Or. Health & Sci. Univ., 376 P.3d 998, 1036–40 (Or. 2016).

322. *Id.*

check the reexamination of damages by the judiciary and not the legislature.[323] This interpretation is strained at best considering the historical evidence that suggests that civil jury-trial protections were intended to check overreach by all branches of government, not just judges.[324] Moreover, the historical understanding seems to protect essential or fundamental functions of civil juries, which cannot be invaded by the judiciary or the legislature.[325]

2. The Legislative Power to Alter the Common Law

Rather being rooted in a more general historical practice, the overarching narrative from "inviolate" states upholding damage caps is based on the legislature's power to alter the common law. Several "inviolate" courts have adopted the Fourth Circuit's argument in *Boyd*, which held that if legislature can abolish to a common-law cause of action, then the legislature has the consequent lesser power to modify the remedy for causes of action.[326] This power appears to be rooted in a legislature's historic ability to alter the common law, as well as specific state constitutional schedule provisions, which allow the legislature to expressly repeal or alter the common law.[327] Under the theory that the legislature can *abolish* the common law, some courts put forward the theory that a damage cap abolishes any cause of action above the damage cap.[328] Alternatively, under the theory that the legislature can *alter* the common law, some courts equate the effect of damage caps on jury-trial rights to other, well-accepted statutory limitations of that right—statutes of limitations or repose, failure to assert a jury trial, or limiting liability in negligence cases.[329] Furthermore, these courts apply the *Etheridge* splitting theory, which

323. *See* discussion *supra* Section III.B.2; *see also Horton*, 376 P.3d at 1036–40 ("[T]he arguments for and against including a civil jury trial guarantee that Hamilton canvassed all addressed the jury's value as a procedural corrective to potentially biased or, worse, corrupt judges serving as the triers of fact. Those arguments do not suggest that the right was viewed as a substantive limit on Congress's lawmaking power.").

324. *See supra* Section III.B.2; Murphy, *supra* note 163, at 389.

325. *Sofie*, 771 P.2d at 719; *see* Moore v. Mobile Infirmary Ass'n, 592 So. 2d 156, 163 (Ala. 1991) ("The relevant inquiry is whether the function of the jury has been impaired."); *Nestlehutt*, 691 S.E.2d at 222–23 (citing Pollard v. State, 96 S.E. 997, 1000 (Ga. 1918)).

326. *See* discussion *supra* Section III.B.1; *see also* Gourley v. Neb. Methodist Health Sys., Inc., 663 N.W.2d 43, 75 (Neb. 2003) (per curiam); Adams v. Child.'s Mercy Hosp., 832 S.W.2d 898, 907 (Mo. 1992) (en banc), *overruled by* Watts v. Lester E. Cox Med. Ctrs., 376 S.W.3d 633, 636 (Mo. 2012) (en banc).

327. *See* Phillips v. Mirac, Inc., 651 N.W.2d 437, 442 (Mich. Ct. App. 2002) (citing MICH. CONST. art. III, § 7); Guzman v. St. Francis Hosp., Inc., 623 N.W.2d 776, 785 (Wis. Ct. App. 2000) (citing WIS. CONST. art. XIV, § 13), *abrogated by* Ferdon *ex rel.* Petrucelli v. Wis. Patients Comp. Fund, 701 N.W.2d 440, 454–55 (Wis. 2005); Kirkland v. Blaine Cnty. Med. Ctr., 4 P.3d 1115, 1119 (Idaho 2000) (citing IDAHO CONST. art. XXI, § 2).

328. Murphy v. Edmonds, 601 A.2d 102, 117 (Md. 1992); *see* McClay v. Airport Mgmt. Servs., LLC, 596 S.W.3d 686, 691 (Tenn. 2020) (Kirby, J., concurring) (citing *Murphy*, 601 A.2d at 117).

329. *Sofie*, 771 P.2d at 719; *see, e.g.*, Johnson v. St. Vincent Hosp., Inc., 404 N.E.2d 585, 602 (Ind. 1980), *overruled by In re* Stephens, 867 N.E.2d 148 (Ind. 2007); *Kirkland*, 4 P.3d at 1119; Horton v. Or. Health & Sci. Univ., 376 P.3d 998, 1041 (Or. 2016).

argues that a remedy is a matter of law, and a court is simply applying the law—the damage cap—to the facts found by a jury.[330]

In response, "inviolate" states that have determined damage caps are unconstitutional find that damage caps are an overuse of legislature's constitutional authority to modify common-law causes of action. Admittedly, nearly all, if not all, of these "inviolate" states would agree that "if the cause of action is completely done away with, then the right to trial by jury becomes irrelevant."[331] By eliminating the underlying common-law action entirely, there is no longer anything to which the right to a jury trial can attach, i.e., satisfy the first prong of the historical analysis.[332] However, if the legislature has not abolished the cause of action, the legislature "must not encroach upon constitutional protections."[333] Again, those constitutional protections include essential or fundamental functions of the jury, which in several "inviolate" states includes the jury's fact-finding function and its ability to determine damages.[334] The argument that legislative power extends to abolishing the cause of action above the cap makes civil jury "protections of only theoretical value—they would exist only unless and until limited by the legislature."[335] The alternative argument that damage caps are similar to other legislative limitations fails to understand that those legislative limitations are fundamentally different from a damage cap, because a damage cap "directly changes the outcome of a jury determination . . . to a predetermined formula."[336]

Likewise, splitting theory cannot justify the preservation of damage caps. Notably, several "inviolate" states have used splitting theory without determining if splitting theory exists within their own case law.[337] More

330. *See* discussion *supra* Section III.A.1; *see also McClay*, 596 S.W.3d at 691 (citing several "inviolate" states that have adopted *Etheridge*'s splitting theory); Hilburn v. Enerpipe Ltd., 442 P.3d 509, 521–22 (Kan. 2019) (same).

331. *Sofie*, 771 P.2d at 719; *see* Moore v. Mobile Infirmary Ass'n, 592 So. 2d 156, 164–65 (Ala. 1991); Atlanta Oculoplastic Surgery, P.C. v. Nestlehutt, 691 S.E.2d 218, 223 (Ga. 2010); *Watts*, 376 S.W.3d at 642–43; *Hilburn*, 442 P.3d at 516 (citing Samsel v. Wheeler Transp. Servs., Inc., 789 P.2d 541, 561 (Kan. 1990) (Herd, J., dissenting)).

332. *Sofie*, 771 P.2d at 719; *see* Murphy, *supra* note 163, at 386.

333. *Sofie*, 771 P.2d at 719; *see Nestlehutt*, 691 S.E.2d at 223 ("[T]he Legislature has authority to modify or abrogate the common law, we do not agree with the notion that this general authority empowers the Legislature to abrogate *constitutional* rights that may inhere in common law causes of action."); *see also* Murphy, *supra* note 163, at 386 (disagreeing with "the proposition that the legislature may limit compensation because it has the greater power to abolish the cause of action entirely").

334. *Sofie*, 771 P.2d at 719; *see Moore*, 592 So. 2d at 163 ("The relevant inquiry is whether the function of the jury has been impaired."); *Nestlehutt*, 691 S.E.2d at 222–23 (citing Pollard v. State, 96 S.E. 997, 1000 (Ga. 1918)).

335. *Watts*, 376 S.W.3d at 643; *see* Murphy, *supra* note 163, at 387 ("It is the limitation on remedy, not the abolition of a cause of action, that raises the question whether the legislature has transgressed constitutionally protected jury decisionmaking.").

336. *Sofie*, 771 P.2d at 720.

337. Several "inviolate" states just cite to *Etheridge*, without making an attempt to find case law from their own state that supports *Etheridge*'s splitting theory. *See* Wright v. Colleton Cnty. Sch.

importantly, a splitting-theory argument fails to understand the essential nature of the jury trial. Generally speaking, the common-law jury trial attaches only to legal actions and not equitable actions.[338] From that general understanding, "[i]t would be illogical . . . to find that a jury, *empaneled because monetary damages are sought*, could not then fully determine the amount of damages suffered."[339] As the Washington Supreme Court in *Sofie v. Fibreboard* aptly put it, splitting theory "pays lip service to the form of the jury but robs the institution of its function."[340] Essentially, splitting theory would render the jury's verdict as "*less* than an advisory status."[341]

3. The Inapt Comparison to Remittitur

States have further attempted to argue that because the judicial doctrine of remittitur allows for damages to be altered, the legislature can alter damages.[342] Equating a damage cap to a remittitur is seriously flawed for multiple reasons. First, remittitur preserves the option for the plaintiff to consent to a new civil jury trial, which a legislative damage cap does not allow.[343] The Oregon Supreme Court in *Horton* attempted to explain away this issue, concluding that the fact that "remittitur d[oes] not permit a trial court to unilaterally substitute its view of the evidence for the jury[] . . . does not mean the legislature cannot define, as a matter of law, the nature and extent of damages."[344] Yet, this interpretation runs afoul of the basic premise that remittitur requires a trial judge to invalidate the jury's assessment of damages based on reviewing the specific record at hand.[345] Second, a trial judge cannot engage in remittitur unless the jury has gone beyond its constitutional purview of assessing damages by making a flawed assessment based on bias and prejudice[346] or an inconsistent preponderance of the evidence.[347] In fact, the reason why a trial judge cannot freely engage remittitur is because the

Dist., 391 S.E.2d 564, 569–70 (S.C. 1990); Murphy v. Edmonds, 601 A.2d 102, 117 (Md. 1992); *In re* Certification of Questions of L. from U.S. Ct. of Appeals for the Eighth Cir., Pursuant to Provisions of SDCL 15-24A-1, 544 N.W.2d 183, 202 (S.D. 1996).

338. Kan. Malpractice Victims Coal. v. Bell, 757 P.2d 251, 258 (Kan. 1988), *abrogated by* Hilburn v. Enerpipe Ltd., 442 P.3d 509 (Kan. 2019).

339. *Id.* (emphasis added); *see Sofie*, 771 P.2d at 722 (citing *Kan. Malpractice Victims Coal.*, 757 P.2d at 258).

340. *Sofie*, 771 P.2d at 721; *see Hilburn*, 442 P.3d at 514–15.

341. Moore v. Mobile Infirmary Ass'n, 592 So. 2d 156, 164 (Ala. 1991).

342. *Id.* at 159 ("[Defendants] contend[] that the legislative imposition of a damages cap impairs the right to a jury trial no more than the traditional forms of judicial supervision of damages assessments.").

343. *Sofie*, 771 P.2d at 720; *see* Murphy, *supra* note 163, at 384.

344. Horton v. Or. Health & Sci. Univ., 376 P.3d 998, 1041 (Or. 2016) (emphasis omitted).

345. *Sofie*, 771 P.2d at 720–21; *Moore*, 592 So. 2d at 159–60; *see* Murphy, *supra* note 163, at 384.

346. *Moore*, 592 So. 2d at 161 ("This Court has often cautioned against interference with a jury's damages assessment unless the particular assessment is flawed by bias, passion, prejudice, corruption, or other improper motive.").

347. Atlanta Oculoplastic Surgery, P.C. v. Nestlehutt, 691 S.E.2d 218, 224 (Ga. 2010).

remedy's use is carefully circumscribed to protect the constitutional function of a civil jury.[348] Lastly, remittitur has an extensively documented history of its use in a pre-constitutional history, whereas a mandatory damage cap did not.[349] Thus, the framers of state constitutions would have understood that remittitur was incorporated into the background of their states' jury-trial provisions—a functional exception, in narrow circumstances, to the jury-trial requirement. Finally, a mandatory legislative cap cannot be compared to a remittitur because it cannot effectively make case-by-case determinations, which are reserved to the jury and judge based on the evidence presented.[350]

In conclusion, the various arguments used to uphold damage caps fall on shaky legal ground. They either undercut the historical analysis of an "inviolate" right to a jury trial, fail to appreciate that the legislature cannot legislate away essential functions of the civil jury trial, or make flawed comparisons to remittitur.

V. APPLICATION TO THE IOWA CONSTITUTION AND CASE LAW

This Part applies arguments based on the federal Seventh Amendment and other state "inviolate" case law to the Iowa Constitution's right to a jury trial provision. In particular, Section V.A examines the unique textual and historical aspects of the Iowa Constitution's right-to-a-jury-trial provision in article I, section 9.[351] Section V.B.1 then looks at Iowa's early case law to examine the depth of Iowa's right to jury trial provision.[352] Section V.B.2 also engages in the two-step historical test, determining that medical malpractice was a cause of action that existed in Iowa's early case law and that a jury's right to determine non-economic damages also existed at that time.[353] Subsequently, Section V.C examines Iowa's case law and explores an alternative, "living constitution" approach to whether a jury's determination of damages constitutes an essential function that is beyond the reach of the Iowa legislature.[354] Finally, Section V.D responds to the flawed argument that other tort-reform cases in Iowa should influence the state's jury-trial case law, especially as it concerns the constitutional use of legislative power.[355]

A. TEXTUAL ANALYSIS OF IOWA'S "INVIOLATE" RIGHT-TO-A-JURY-TRIAL PROVISION AND THE IOWA CONSTITUTIONAL CONVENTIONS

The drafters at the 1857 Iowa Constitutional Convention took care in writing the Iowa Bill of Rights. As Delegate George Ells stated, "When [the

348. *Id.*; *see Moore*, 592 So. 2d at 161.
349. Watts v. Lester E. Cox Med. Ctrs., 376 S.W.3d 633, 640 (Mo. 2012) (en banc).
350. *Sofie*, 771 P.2d at 720.
351. *See infra* Section V.A.
352. *See infra* Section V.B.1.
353. *See infra* Section V.B.2.
354. *See infra* Section V.C.
355. *See infra* Section V.D.

people] read it, I wish them to see how cautious and careful were the men sent here to make a Constitution, in putting it in plain English what they conceive to be the true, primary and original rights of the people."[356] Delegate Rufus Clarke echoed the sentiment, describing the Iowa Bill of Rights as "an important part of the constitution; a wrong word here in any one section of this Bill of Rights may cause confusion in the legislation of the State for years to come."[357] Thus, a strong focus on the text when interpreting the Iowa Constitution is certainly warranted. The Iowa right to a jury trial is located at article I, section 9.[358] That provision states:

> The right of trial by jury shall remain inviolate; but the General Assembly may authorize trial by jury of a less number than twelve men in inferior courts; but no person shall be deprived of life, liberty, or property, without due process of law.[359]

A comparison of Iowa's right-to-a-jury-trial provision to the Seventh Amendment reveals a structural difference and three textual differences between the two.

First, the structural difference is that the Iowa Constitution features its right-to-a-jury-trial provision before the Iowa legislature's enumerated powers.[360] By contrast, in the U.S. Constitution the Bill of Rights appears after the legislature's enumerated powers.[361] The different placement was explained by George Ells at the 1857 Iowa Constitutional Convention. There, he described the Bill of Rights as "of more importance than all the other clauses in the Constitution put together, because it is the foundation and written security upon which the people rest their rights."[362] Iowa case law has repeatedly noted that the framers of the Iowa Constitution put the Bill of

356. 1 THE DEBATES OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF IOWA 144 (1857) [hereinafter 1857 DEBATES Vol. 1] (statement of George Ells), http://publications.iowa.gov/7313/1/The_Debates_of_the_Constitutional_Convention_Vol%231.pdf.

357. *Id.* at 215 (statement of Rufus Clarke).

358. IOWA CONST. art. I, § 9 (1857). This right was located in article II, section 8 in the 1844 proposed constitution and article II, section 9 in the 1846 constitution. IOWA CONST. art. II, § 8 (1844); IOWA CONST. art. II, § 9 (1846). These rights to a jury trial in the 1844 proposed constitution and the 1846 constitution were nearly textually identical except for a change from "legislature" in the 1844 proposed constitution to "General Assembly" in the 1846 constitution. *Compare* IOWA CONST. art. II, § 8 (1844), *with* IOWA CONST. art. II, § 9 (1846). However, the text from the 1846 constitution was dramatically changed in the 1857 constitution due to the addition of the due process clause. *Compare* IOWA CONST. art. II, § 9 (1846), *with* IOWA CONST. art. I, § 9 (1857).

359. IOWA CONST. art. I, § 9 (1857).

360. *Id.*; *see also* Donald P. Racheter, *The Iowa Constitution: Rights Over Mechanics*, *in* THE CONSTITUTIONALISM OF AMERICAN STATES 479, 479 (George E. Conner & Christopher W. Hammons eds., 2008) ("State constitutions generally start with an article entitled a bill of rights.").

361. U.S. CONST. amend. VII.

362. 1857 DEBATES Vol. 1, *supra* note 356, at 103 (statement of George Ells).

Rights first, as emphasis that those rights cannot be constrained by the subsequent powers of the Iowa legislature.[363]

In addition to this structural distinction, Iowa's jury-trial provision contains three textual differences that dictate an analysis that is independent from the Seventh Amendment. The first of the three textual differences is the linguistic choice of "inviolate" instead of "preserved."[364] The second difference is the omission of a reexamination clause like the one found in the U.S. Constitution's Seventh Amendment.[365] Lastly, the framers of the 1857 Iowa Constitution added the powerful due process clause to the "inviolate" provision at article I, section 9.[366] Together, the first two differences suggest that the drafters of Iowa Constitution consciously decided to model their jury-trial protections after other state constitutions' jury-trial provisions instead of the Seventh Amendment. After all, they had access to the U.S. Constitution and numerous other state constitutions at the time. Moreover, the definition of "inviolate" is not textually constrained by any equivalent to the Seventh Amendment's Reexamination Clause.

Admittedly, despite the careful drafting of the Bill of Rights through three Iowa Constitutional Conventions, there was hardly any dialogue concerning the extent of Iowa's right-to-a-jury-trial provision. However, there was some dialogue at the 1844 Iowa Constitutional Convention which gives an idea as to the ordinary meaning of the term "inviolate" within the bill of rights. Specifically, Thomas McKean, a Republican delegate to the 1844 Constitutional Convention, insisted that the Iowa Bill of Rights were "guaranteed . . . to remain *forever inviolate*. They were *never to be curtailed by any modification* of our form of Government or change in our Constitution. They were not to be infringed upon, either *by any department of the government*, or by the people themselves."[367] Thomas McKean's use of the term "inviolate" to epitomize the grand importance of the Bill of Rights is important, considering "inviolate" is used to specifically secure the Iowa right to a jury trial. Indeed, the term is "a unique superlative of unmatched force that appears nowhere else in the Constitution."[368] This statement regarding the original meaning of

363. State v. Ochoa, 792 N.W.2d 260, 274 (Iowa 2010); State v. Baldon, 829 N.W.2d 785, 809–10 (Iowa 2013) (Appel, J., concurring); *see supra* text accompanying notes 108–09.

364. *Compare* IOWA CONST. art. I, § 9 (1857), *with* U.S. CONST. amend. VII.

365. *Compare* IOWA CONST. art. I, § 9 (1857), *with* U.S. CONST. amend. VII.

366. IOWA CONST. art. I, § 9 (1857).

367. FRAGMENTS OF THE DEBATES OF THE IOWA CONSTITUTIONAL CONVENTIONS OF 1844 AND 1846, at 117–18 (Benjamin F. Shambaugh ed., 1900) [hereinafter 1844 AND 1846 DEBATES] (emphasis added), http://publications.iowa.gov/11077/1/Fragments_of_the_debates_of_the_Iowa_constitutional_conventions_1844_and_1846.pdf; *see Convention Member Thomas McKean*, IOWA LEGISLATURE, https://www.legis.iowa.gov/legislators/constConvenMember?pid=17279&cc=true&yr=1844 [https://perma.cc/APH3-46MP] (providing a short biography on McKean).

368. Peck & Chemerinsky, *supra* note 82, at 521. Interestingly enough, the only other provision in the Iowa Constitution that contains analogous language is the robust search and seizure amendment. IOWA CONST. art. I, § 8 (1857) ("The right of the people to be secure in

"inviolate" tracks with how several states have defined "inviolate" in their respective damage-cap opinions.[369]

The last textual difference is that the due process clause is uniquely attached to the jury-trial clause.[370] The due process clause and the right to a jury trial are separated by a semicolon, which suggests a relationship between the two.[371] Moreover, the due process clause begins with the word "but," a word that is used to connect two phrases together.[372] The beginning of the due process clause is remarkably similar to another clause in article I, section 9, which allows the legislature to create a jury of less than 12 in inferior courts.[373] Both of those clauses are prefaced by a semicolon and the word "but."[374] Notably, the inferior-courts clause predated the addition of the due process clause, as the inferior-courts clause first appeared in the 1844 Iowa Constitution.[375] Since the inferior-courts clause predated the addition of the due process clause, it is likely that use of the semicolon and the word "but" in the due process clause is designed to mirror the usage in the inferior-courts clause.[376] Interestingly enough, Iowa is the only state that can claim that its due process clause has this unique textual attachment to its enumerated right-to-a-jury-trial provision.[377]

The textual relationship between these clauses is perhaps underscored by comments by George Ells at the 1857 Iowa Constitutional Convention. The record of the 1857 Constitutional Convention shows conversation between Delegates George Ells and Alpheus Scott concerning the fact that the federal Due Process Clause did not apply to the states and that one should be added

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their persons, houses, papers and effects, against unreasonable seizures and searches shall not be *violated* . . . ." (emphasis added)).

369. *See* discussion *supra* Section IV.B.

370. *See* PETTYS, *supra* note 113, at 87. *Compare* IOWA CONST. art. I, § 9 (1857), *with* U.S. CONST. amend. VI, *and* U.S. CONST. amend. VII. This Note does not analyze a substantive or procedural due process challenge to IOWA CODE § 147.136A. Rather, this Note briefly explores how the textual inclusion of the due process clause affects an analysis of a right to a jury trial challenge under the Iowa Constitution.

371. IOWA CONST. art. I, § 9 (1857); *see* State v. Short, 851 N.W.2d 474, 483 (Iowa 2014) (noting the use of a semicolon between the reasonableness and warrant clauses in IOWA CONST. art. I, section 8, suggest a relationship between the two).

372. IOWA CONST. art. I, § 9 (1857); *see But*, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1841) (defining "but" when used as a conjunction as "[m]ore; further; noting an addition").

373. IOWA CONST. art. I, § 9 (1857).

374. *Id.*

375. *Compare* IOWA CONST. art. II, § 8 (1844), *with* IOWA CONST. art. I, § 9 (1857).

376. *Compare* IOWA CONST. art. II, § 8 (1844), *with* IOWA CONST. art. I, § 9 (1857).

377. For a period of 50 years, Iowa was the only state to have its due process clause in the same section as its right to a jury trial provision. It was not until 1902 that Virginia added a due process clause to the jury-trial provision. *See* VA. CONST. art. I, § 11. However, Virginia's Constitution places the due process clause before the right to a jury trial and separates the two with the word "and" instead of a semicolon and the word "but" as compared to the Iowa Constitution. *Compare* IOWA CONST. art. I, § 9 (1857), *with* VA. CONST. art. I, § 11.

to the Iowa Constitution.[378] Ells pointed out that the federal Due Process Clause, in relationship to the Fugitive Slave Act, was "violated again and again by the dominant party in the land, which rides rough-shod ove[r] the necks of freemen."[379] Ells and other delegates felt that a due process clause, working in tandem with the right to a jury trial, in the Iowa Constitution could be used to thwart the despicable Fugitive Slave Act.[380] The framer's sentiments regarding due process have been interpreted to mean that Iowa's due process clause was to be more expansive than its federal counterpart.[381] But specifically in relation to the jury trial protection, Ells also noted that adding the due process clause to article I, section 9 was a means of ensuring "that no person shall be deprived of life, liberty or property, *without a legal proceeding based upon the principles of the common law*."[382] As a necessary consequence, the due process clause's addition to article I, section 9 possibly reflects a strong desire to maintain jury-trial proceedings according to the common law.

From a historical perspective, it may seem that the original intent for the addition of the due process clause to the jury trial would only apply to criminal jury trials in the context of the Fugitive Slave Act.[383] However, a textual reading would not suggest such a narrow view. First, the "inviolate" provision

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378. *See* PETTYS, *supra* note 113, at 87.

379. 1857 DEBATES Vol. 1, *supra* note 356, at 102 (statement of George Ells); *see* State v. Short, 851 N.W.2d 474, 483 (Iowa 2014); PETTYS, *supra* note 113, at 87.

380. *See* 1857 DEBATES Vol. 1, *supra* note 356, at 102 (statement of George Ells). William Clark, a Republican from Alamakee County, also criticized the Fugitive Slave Act on the grounds that "[i]t assumes the right to trample into the dust the right of jury trial, that palladium of American institutions." 2 THE DEBATES OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF IOWA 714 (1857) [hereinafter 1857 DEBATES Vol. 2] (statement of William Clark), https://www.legis.iowa.gov/docs/publications/ICNST/961929.pdf; *see also Convention Member William Clark*, IOWA LEGISLATURE, https://www.legis.iowa.gov/legislators/constConvenMember?pid=17198&cc=true&yr=1857 [https://perma.cc/3FTZ-AGW2] (providing a short biography on Clark).

381. 1857 DEBATES Vol. 1, *supra* note 356, at 102; *see Short*, 851 N.W.2d at 483. *Short*'s logic, regarding how Iowa's due process clause should not mirror the federal Due Process Clause based on Ells' statements on the Fugitive Slave Act, likely applies with equal force to the right to a jury trial. *See Short*, 851 N.W.2d at 483. Based on the statements from Clark and Ells of how the Fugitive Slave Act violated the right to a jury trial, it would be unsurprising that they would want stronger jury trial protections in Iowa than the Seventh Amendment. *See* 1857 DEBATES Vol. 1, *supra* note 356, at 102 (statement of George Ells); 1857 DEBATES Vol. 2, *supra* note 380, at 714 (statement of William Clark).

382. 1857 DEBATES Vol. 1, *supra* note 356, at 102 (emphasis added) (statement of George Ells). Moreover, it should be noted that George Ells was an attorney before becoming a bookkeeper. *See* ROBERT R. DYKSTRA, BRIGHT RADICAL STAR: BLACK FREEDOM AND WHITE SUPREMACY ON THE HAWKEYE FRONTIER 165 (1993). Subsequently, there is a reasonable inference that he understood the nature of what due process included and its connection to jury trial rights. *Id.* George Ells' comments emphasizing the common law for jury trials connects strongly with the presentation of civil jury trial protections in the Northwest Ordinance and the analysis of a notable 1846 Iowa Supreme Court case, *Reed v. Wright*. *See infra* text accompanying notes 410, 414.

383. *See* PETTYS, *supra* note 113, at 30–31, 91.

protects those subject to both criminal and civil jury trials.[384] Yet, the criminal jury trial is further expounded at article I, section 10.[385] Thus, if the framers intended for the due process clause to only affect criminal jury trials, they could have simply added the due process clause to article I, section 10. Moreover, the due process clause at article I, section 9 provides that "no person shall be deprived of life, liberty, or *property*, without due process of law."[386] By contrast, article I, section 10 extends to only "cases involving the life, or liberty of an individual" which are traditionally implicated in criminal proceedings.[387] Based on U.S. Supreme Court jurisprudence, the term "property" squarely implicates a civil cause of action, such as one based in tort.[388] Thus the due process clause and the civil jury-trial protections retain their textually unique relationship despite the apparent intention to disrupt the Fugitive Slave Act by the clause's inclusion. Thus, one reasonably concludes from the full text of article I, section 9 and George Ells' statement at the 1857 Constitutional Convention that a plaintiff has a right to bring a tort action in front of a constitutional jury *in accordance with the principles of the common law*.[389]

However, there are two textual considerations in the Iowa Bill of Rights that may suggest the "inviolate" provision does not protect an assessment of damages by a jury. First, article I, section 18 of the Iowa Constitution specifically secures "damages . . . assessed by a jury" in eminent-domain proceedings.[390] By negative implication, this textual inclusion may suggest that the drafters of the Iowa Constitution believed that the "inviolate" provision did not secure the jury's calculation of damages.[391] Thus, one could argue, it was necessary to add in the section 18 text to make sure that a jury's calculation of damages was secured specifically in eminent-domain cases.[392] However, damages in eminent-domain cases are fundamentally different from non-economic damages; the former are measured by the difference in fair and reasonable

384. *See id.* at 86.

385. *See* IOWA CONST. art. I, § 10 (1857). Admittingly, the criminal jury provision at article 1, section 10 is where most scholars have focused on the attempted elimination of the Fugitive Slave Act. *See* PETTYS, *supra* note 113, at 30–31, 91; DYKSTRA, *supra* note 382, at 155, 175.

386. IOWA CONST. art. I, § 9 (1857) (emphasis added).

387. IOWA CONST. art. I, § 10 (1857).

388. *See* Jeremy A. Blumenthal, *Legal Claims as Private Property: Implications for Eminent Domain*, 36 HASTINGS CONST. L.Q. 373, 376–77 (2009).

389. *See* IOWA CONST. art. I, § 18 (1857); *id.* art. I, § 9; 1857 DEBATES Vol. 1, *supra* note 356, at 102 (statement of George Ells); *see also infra* text accompanying notes 410, 414 (describing how the right to a jury trial is rooted in an analysis of the common law).

390. IOWA CONST. art. I, § 18 (1857).

391. *See id.*; Henry Wade Rogers, *Compensation as an Incident of the Right of Eminent Domain*, 5 S. L. REV. 1, 11–13 (1879).

392. *See* Rogers, *supra* note 391, at 11–13; *see also* City of Des Moines v. Layman, 21 Iowa 153, 159 (1866) (Dillon, J., dissenting) ("The right to a jury in respect to these damages is placed by the Constitution upon the same ground as the right to a jury in a case involving the liberty of a citizen.").

market value after the eminent-domain proceedings take place, and the latter is not capable of an exact mathematical determination.[393] Furthermore, the Washington and Missouri Constitutions also have similar provisions singling out the protection of damages determined by a jury in eminent-domain cases.[394] But the existence of those constitutional provisions did not affect those state supreme courts' analyses in determining their "inviolate" civil jury provisions included the right for a jury to determine incalculable non-economic damages in tort cases.[395] Similarly, other states that have ruled that non-economic damage caps are constitutional have not considered similar eminent-domain clauses in making their decisions.[396] If there is any applicable takeaway from article I, section 18, it is Rufus Clarke's statement that a jury determination of damages is within "the good sense of juries, that they will look and carefully assess the damages to the individual, so that he shall get the full damages to which he is entitled."[397]

Before proceeding, it should be noted that the Iowa Supreme Court has considered whether the Iowa Constitution gives the legislature the power to alter the *form* of the jury. In particular, it was suggested by the plaintiff's council in *Pitcher v. Lakes Amusement Co.* that Iowa's right-to-a-jury-trial provision expressly prohibits any legislative alteration to the common-law jury besides that which is specifically prohibited by the inferior-courts clause.[398] The majority of the Iowa Supreme Court rejected this strain of textual analysis because there was no clear implied restriction in the text of article I, section 9 that the legislature could not alter the jury trial.[399] However, *Pitcher*'s holding is limited to legislative regulation of the form of the jury, not the essential functions of the jury, a distinction that will be explained later in Section

393. *Compare* Welton v. Iowa State Highway Comm'n, 233 N.W. 876, 880 (Iowa 1930) (calculating damages by using the fair and reasonable market value of the property), *with* Estate of Pearson *ex rel.* Latta v. Interstate Power & Light Co., 700 N.W.2d 333, 347 (Iowa 2005) ("Damages for physical and mental pain and suffering cannot be measured by any exact or mathematical standard and must be left to the sound judgment of the jury.").

394. *See* WASH. CONST. art. I, § 16 ("[C]ompensation shall be ascertained by a jury . . . ."); MO. CONST. art. I, § 26 ("Such compensation shall be ascertained by a jury . . . .").

395. *See generally* Watts v. Lester E. Cox Med. Ctrs., 376 S.W.3d 633 (Mo. 2012) (en banc) (making no mention of the eminent domain provision); Sofie v. Fibreboard Corp., 771 P.2d 711 (Wash.) (en banc) (same), *amended by* 780 P.2d 260 (Wash. 1989) (mem.).

396. OHIO CONST. art. I, § 19 ("[S]uch compensation shall be assessed by a jury . . . ."); *see, e.g.*, Arbino v. Johnson & Johnson, 116 Ohio St. 3d 468, 2007-Ohio-6948, 880 N.E.2d 420, 430–32 (2007) (making no mention of the eminent domain provision).

397. 1857 DEBATES Vol. 1, *supra* note 356, at 206 (statement of Rufus Clarke).

398. Pitcher v. Lakes Amusement Co., 236 N.W.2d 333, 337–38 (Iowa 1975) (citing IOWA CONST. art. I, § 9).

399. *Id.* (citing IOWA CONST. art. I, § 9). *But see id.* at 338–39 (Rawlings, J., dissenting) ("We are thus called upon to evaluate Art. I, [§] 9, of our Constitution in light of its peculiar wording. . . . [N]o leave is granted to provide for other than unanimous 12 member verdicts in all cases tried to a jury in this jurisdiction . . . .").

V.C.[400] Regardless of the textual concerns raised by article I, section 18's eminent-domain clause and the *Pitcher* court's conclusion, it is clear from the text of the Iowa Constitution, historical statements at the Iowa's constitutional conventions, and other precedents from other "inviolate" states that an analysis of Iowa's common law surrounding medical-malpractice claims and non-economic damages must be conducted to determine whether the jury-trial provision prevents the imposition of legislative damage caps.

B. HISTORICAL ANALYSIS OF CIVIL JURY PROTECTIONS IN IOWA COMMON LAW

1. *Reed v. Wright*: Judicial Proceedings According to the Common Law

The Iowa Supreme Court's first major case involving the right to a jury trial was in 1849 with the case of *Reed v. Wright*.[401] This case is part of what is commonly known, with outdated phraseology, as "the Half-Breed Tract litigation from Lee County."[402] The Iowa Territorial Legislature created a commission in 1839, to commence actions to determine the validity of titles to a tract of land and then commence actions against the land's owners, notably without the benefit of a jury trial.[403] The newly-established Iowa Supreme Court, freshly created by the 1846 Iowa's Constitutional Convention dominated by Jacksonian Democrats, was with faced the question of whether this 1839 Act of the Iowa Territorial Legislature conformed with the Northwest Ordinance of 1787.[404] Iowa Democrat Justice Kinney, appointed by Democratic Iowa Governor Ansel Briggs after Justice Charles Mason resigned, was tasked with writing the opinion.[405]

Justice Kinney found numerous flaws with the 1839 territorial law; in particular, he found that the legislation took away the right to a jury trial and

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400. *See infra* Section V.C.

401. Reed v. Wright, 2 Greene 15 (Iowa 1849).

402. *John F. Kinney (1847–1854)*, IOWA JUD. BRANCH, https://www.iowacourts.gov/for-the-public/iowa-courts-history/past-justices/john-f-kinney [https://perma.cc/2FWX-TLKW]. To provide some context, Congress in 1824 had entered into a treaty with Sac and Fox tribes creating a reservation of lands for individuals of mixed Sac and Fox heritage in Iowa's Lee County. *Reed*, 2 Greene at 15. Ten years later, Congress relinquished its reversionary interests to those individuals of mixed Sac and Fox heritage, so they owned the land in fee simple. *Id.* at 16, 25; *see* B.L. Wick, *The Struggle for the Half-Breed Tract*, 7 ANNALS OF IOWA 16, 20 (1905). Various parcels of land in this tract were either sold by those individuals several times over to multiple persons without proper title, or claimed under pretext by speculators and squatters. Wick, *supra*, at 20–21.

403. *Reed*, 2 Greene at 16–17.

404. *Id.* at 19–22; *see* PETTYS, *supra* note 113, at 1, 18; Matthew Hill, "Half-Breeds," Squatters, Land Speculators, and Settler Colonialism in the Des Moines-Mississippi Confluence 87–88 (May 2019) (M.A. thesis, University of Northern Iowa), https://scholarworks.uni.edu [https://perma.cc/5LUH-X7PD].

405. *Reed*, 2 Greene at 15 (noting that Kinney wrote the opinion); *see* PETTYS, *supra* note 113, at 21. It is also worth noting that Justice Kinney was president of the Iowa's State Democratic Convention. 4 ORSON F. WHITNEY, HISTORY OF UTAH 732 (1904). Thus, it stands for a reasonable assumption that Justice Kinney embraced much of the legal tenets of Jacksonian Democracy, especially as it related to the jury trial. *See id.*; *see supra* Section II.B.2.

placed deprivation of property into the hands of the commissioners.[406] Justice Kinney stated that the legislature "can make laws, but cannot subvert the constitution, which is the written will of the people, the supreme law of the land, and all legislation must be conformable with its provisions."[407] Specifically, Justice Kinney described the right to trial by jury as a "great landmark[] of national liberty" and noted that it was "so wisely secured to the inhabitants of the territory by the ordinance, were insuperable barriers against legislative encroachment."[408] Moreover, the 1787 Northwest Ordinance provided the guarantee that "no [person] shall be deprived of [their] liberty or property but by the judgement of his peers or the laws of the land."[409] Thus, Justice Kinney framed the question as whether the territorial legislation deprived owners of the aforementioned land "by judicial proceedings according to the course of the common law."[410] Justice Kinney subsequently answered the question in the affirmative, determining that the territorial legislation powers given to the commission, such as the ability to commence suits against owners and not any person by name without a jury, as well as the ability to commence actions of debt for the commissioners services without a jury trial, were not judicial proceedings according to the common law.[411]

This case, while interpreting the 1787 Northwest Ordinance, adds great perspective as to how the early Iowa Supreme Court viewed the jury-trial right. A right-to-a-jury-trial provision, according to Justice Kinney, was intended to protect proceedings according to the principles of common law that were unalterable by the legislature. In classic Jacksonian Democrat fashion, Justice Kinney's opinion showed extreme distrust of the legislature usurping control from the common man.[412] Despite the fact that Republicans became the majority at the 1857 Iowa Constitutional Convention,[413] a comparison of Justice Kinney's language about jury trials in *Reed* to Republican George Ells later statements at the 1857 Iowa Constitutional Convention is strikingly similar. Both saw in ensuring right to jury trial provisions were intended to

406. *Reed*, 2 Greene at 22.

407. *Id.* at 21 (referencing the Constitution as the Northwest Ordinance).

408. *Id.* at 22.

409. *Id.*

410. *Id.* at 28. This Note understands that the Northwest Ordinance specifically has a provision that ensures "judicial proceedings according to the course of the common law." THE NORTHWEST ORDINANCE art. II (1787). However, Justice Kinney appears to show the lack of a jury trial as proof that the commission's actions were not judicial proceedings according to the common law. *Reed*, 2 Greene at 28–30. Moreover, this language makes its way into the 1857 Debates on article I, section 9 of the Iowa Constitution. *See infra* note 414 and accompanying text.

411. *Reed*, 2 Greene at 28–30.

412. *See supra* Section II.B.

413. PETTYS, *supra* note 113, at 24 (describing that Iowa Jacksonian Democrats lost the majority of delegates to Iowa Republicans for the 1857 Iowa Constitutional Convention).

forever protect proceedings consistent with the principles of the common law.[414]

2. Medical Malpractice Claims and Non-Economic Damages Exist in Iowa Common Law

Against this backdrop, the text and history of the Iowa Constitution's "inviolate" right to a jury trial and early Iowa Supreme Court case law strongly urge one to conduct an originalist analysis, looking at the judicial proceedings of the common law.[415] Thus, this Note will engage in a two-step historical analysis similar to the one used by other "inviolate" states, as described in Section IV.D.3. Within the context of medical-malpractice damage caps, an originalist analysis would focus on whether medical-malpractice claims existed, and whether non-economic damages were a jury determination at common law, at the adoption of the Iowa Constitution in 1857. The first determination of the constitutional right to a trial by jury applies only in "cases where a jury was necessary" at common law.[416] This inquiry focuses on "the essential nature of the cause of action, rather than solely at the remedy."[417] It is relatively clear from other state supreme court cases that there is a substantial amount of jurisprudence in English common law in which an action of medical malpractice was triable by jury.[418] Iowa common law also recognized medical-malpractice claims triable by a jury as early as 1848 in *Bowman v. Woods*, which involved alleged malpractice regarding the delivery of a baby.[419]

Turning to the second step of the historical analysis, Iowa case law has viewed damages to be a unique jury function for the past 170 years. Generally,

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414. *Compare Reed*, 2 Greene at 28 (using the phrase "judicial proceedings according to the course of the common law"), *with* 1857 DEBATES Vol. 1, *supra* note 356, at 102 (statement of George Ells) (using the phrase "without a legal proceeding based upon the principles of the common law").

415. *See* Renée Lettow Lerner, *The Failure of Originalism in Preserving Constitutional Rights to Civil Jury Trial*, 22 WM. & MARY BILL RTS. J. 811, 813 (2014) ("[O]riginalism has indeed been the method most state courts have used to interpret [jury trial] provisions . . . .").

416. Iowa Nat'l Mut. Ins. Co. v. Mitchell, 305 N.W.2d 724, 728 (Iowa 1981) (quoting State *ex rel.* Kirby v. Henderson, 124 N.W. 767, 769 (Iowa 1910) (per curiam)).

417. Weltzin v. Nail, 618 N.W.2d 293, 297 (Iowa 2000) (en banc) (emphasis omitted) (quoting Carstens v. Cent. Nat'l Bank & Tr. Co., 461 N.W.2d 331, 333 (Iowa 1990)).

418. The existence of medical-malpractice claims at English common law may be even enough in itself to prove a claim in Iowa. *See Mitchell*, 305 N.W.2d at 727 (explaining that "the basic Iowa law is rooted in English common law"); *see also, e.g.*, Atlanta Oculoplastic Surgery, P.C. v. Nestlehutt, 691 S.E.2d 218, 221–22 (Ga. 2010) (observing extensively that the common law has recognized medical-malpractice claims since the fourteenth century, and such claims have been historically present in the early years of the United States); Lakin v. Senco Prods., Inc., 987 P.2d 463, 468–71 (Or. 1999) (observing Blackstone's Commentaries on the right to a jury trial), *overruled by* Horton v. Or. Health & Sci. Univ., 376 P.3d 998 (Or. 2016); *see infra* Section V.D.3.

419. Bowman v. Woods, 1 Greene 441, 443 (Iowa 1848) ("In those facts we can see nothing irrelevant or inadmissible; and as matter of defence [sic] to the jury, the defendant was entitled to the benefit of them.").

actions, such as medical malpractice, for damages in common law were triable by a jury and subsequently covered under the "inviolate" provision.[420] Iowa case law regarding damages has constantly referred to the jury "[a]s the fact finding body *empowered* to assess damages"[421] and stated that damages are "traditionally a jury function,"[422] "within the province of the jury,"[423] or "within the sound discretion of the jury."[424] Non-economic damages "are *peculiarly within the province* of the jury to determine"[425] because these damages "cannot be measured by any exact or mathematical standard"[426] "and must be left to the sound judgement of the fact-finder, based on the *evidence*."[427] Furthermore, Iowa's earliest juries have also historically assessed non-economic damages in medical-malpractice cases.[428]

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420. Iowa Dep't of Just., Off. of the Att'y Gen., Opinion Letter, 1929 WL 62491 (Feb. 15, 1929) ("Under that part of Section 9, which reads, 'the right of trial by jury shall remain inviolate,' the courts have construed that any action which was triable by a jury at common law, is now triable in like manner, unless the Constitution provides otherwise."). Iowa has also had several cases involving "inviolate" in article I, section 9 read in conjunction with the "eminent domain" provision at article I, section 18. These cases have also shown a strong insistence that damages are to be determined by a constitutional jury. *See supra* text accompanying note 390; *see infra* text accompanying notes 421–28 (describing damages is traditionally a jury function regardless of whether the jury is presented with a condemnation case); *see also* Fleming v. Hull, 35 N.W. 673, 675 (Iowa 1887) ("The assessment or non-assessment of damages by the trustees cannot be regarded as 'due process of law,' unless the right of appeal exists to a tribunal where such an assessment can be made by a constitutional jury.").

421. Fredrickson v. Heline, 106 N.W.2d 74, 76 (Iowa 1960) (emphasis added) ("[W]e do not invade the province of the jury, which is the fact finding body empowered to assess damages."); Dunham v. Des Moines Ry. Co., 35 N.W.2d 578, 583 (Iowa 1949) (noting that the amount of damages is a "a pure fact question for that of the jury").

422. Estate of Pearson *ex rel.* Latta v. Interstate Power & Light Co., 700 N.W.2d 333, 345 (Iowa 2005); Olsen v. Drahos, 229 N.W.2d 741, 742 (Iowa 1975); *see also* Stender v. Blessum, 897 N.W.2d 491, 517 (Iowa 2017) (describing "[t]he amount of an award [a]s primarily a jury question" (first alteration in original) (quoting Smith v. Iowa State Univ., 851 N.W.2d 1, 31 (Iowa 2014))).

423. Foggia v. Des Moines Bowl-O-Mat, Inc., 543 N.W.2d 889, 892 (Iowa 1996); Schmitt v. Jenkins Truck Lines, Inc., 170 N.W.2d 632, 665 (Iowa 1969); *Heline*, 106 N.W.2d at 76; *see* De Toskey v. Ruan Transp. Corp., 40 N.W.2d 4, 6 (Iowa 1949); Tathwell v. City of Cedar Rapids, 97 N.W. 96, 97 (Iowa 1903); Russ v. Steamboat War Eagle, 14 Iowa 363, 372 (1862).

424. Elings v. Ted McGrevey, Inc., 53 N.W.2d 882, 885 (Iowa 1952); *see* Blume v. Auer, 576 N.W.2d 122, 126 (Iowa Ct. App. 1997).

425. *Steamboat War Eagle*, 14 Iowa at 372 (emphasis added); *see* Mazur v. Grantham, 125 N.W.2d 807, 813 (Iowa 1964); Francis v. Barnes, 130 N.W.2d 683, 687 (Iowa 1964).

426. *Interstate Power & Light Co.*, 700 N.W.2d at 347.

427. Schnebly v. Baker, 217 N.W.2d 708, 725 (Iowa 1974) (emphasis added), *overruled by* Franke v. Junko, 366 N.W.2d 536 (Iowa 1985); *see* Buffalo v. City of Des Moines, 186 N.W. 844, 848 (Iowa 1922) ("[T]here is no such thing as a money equivalent for a broken and crippled body or for physical or mental suffering, but as the nearest practical approach to satisfaction for torts of this nature the law allows the jury in proper cases to assess money damages.").

428. Smothers v. Hanks, 34 Iowa 286, 287–88 (1872) (per curiam) (allowing for a jury determination of non-economic damages in a medical-malpractice case); Stanley v. Taylor, 142 N.W. 81, 81 (Iowa 1913) (same).

Iowa courts have seemingly buttressed the right of the jury to determine damages through the high standards of remittitur, in which they have asserted that "[i]t is not for [the courts] to invade the province of the jury" unless the award is flagrantly excessive, shocks the conscience, results from passion, or lacks evidentiary support.[429] These limitations on remittitur are in place because the Iowa Constitution provides for more than just procedural protection, instead providing for the substantive protection of a jury to calculate damages.[430] A holding that Iowa's Constitution's right to a jury trial includes damages would be consistent with other states that provided territorial laws to Iowa—such as Missouri,[431] Michigan,[432] and Wisconsin[433] —or that adopted Iowa's territorial laws—such as Oregon.[434] In conclusion, a review from an originalist standpoint affirmatively shows that medical malpractice existed in Iowa common law and that non-economic damages were for a jury to decide at common law.

C. LIVING CONSTITUTION: REASONABLE REGULATION ON PROCEDURE OR MATERIAL IMPAIRMENT

Even were one unpersuaded by the previous Section's more "originalist" approach, a jury's determination of damages would also be protected under a "living constitutionalist" approach as an essential function of the jury trial. In 1975, the Iowa Supreme Court in *Pitcher v. Lakes Amusement Co.* adopted a flexible view, synonymous with living constitutionalism, of article I, section 9's textual command regarding "inviolate" jury trials.[435] Specifically, the court, in *Pitcher*, noted that "[t]ime has increasingly demonstrated it was illogical

429. Schmitt v. Jenkins Truck Lines, Inc., 170 N.W.2d 632, 659 (Iowa 1969); *see* Note, *Remittitur of Jury Verdicts in Iowa*, 48 IOWA L. REV. 649, 650 n.9 (1963).

430. Hurtig v. Bjork, 138 N.W.2d 62, 67 (Iowa 1965) (Becker, J., dissenting) ("[E]ach time a verdict is set aside, the right to a jury trial is, to that extent invaded, despite the admonition of Article I, section 9 of the Iowa Constitution. 'The right of trial by jury shall remain inviolate . . . .'" (second alteration in original)); *Remittitur of Jury Verdicts in Iowa*, *supra* note 429, at 664 ("The Iowa Constitution provides for protection of the right to jury trial . . . . [T]his province seems to have been freely invaded when the court subsequently makes the determination of damages—which is often the crux of the jury's task." (footnotes omitted)); Note, *Judicial Administration: The Power of the Trial Court to Reduce Excessive Damages*, 18 IOWA L. REV. 404, 405 (1933) ("But, in general, the question of damages is held to be one of fact which is for the jury.").

431. PETTYS, *supra* note 113, at 5; *see* Watts v. Lester E. Cox Med. Ctrs., 376 S.W.3d 633, 637 –38 (Mo. 2012) (en banc).

432. PETTYS, *supra* note 113, at 6; *see* Phillips v. Mirac, Inc., 651 N.W.2d 437, 441 (Mich. Ct. App. 2002).

433. PETTYS, *supra* note 113, at 6; *see* Guzman v. St. Francis Hosp., Inc., 623 N.W.2d 776, 785 (Wis. Ct. App. 2000).

434. *See* Lakin v. Senco Prods., Inc, 987 P.2d 463, 469 (Or. 1999), *overruled by* Horton v. Or. Health & Sci. Univ., 376 P.3d 998 (Or. 2016).

435. Pitcher v. Lakes Amusement Co., 236 N.W.2d 333, 335–36 (Iowa 1975). *But see* Planned Parenthood of the Heartland v. Reynolds, 915 N.W.2d 206, 248 (Iowa 2018) (Mansfield, J., dissenting) ("[I]n . . . *Pitcher* . . . we recognized that the Iowa Constitution was living in the sense that it could adapt to *legislative enactments* reflecting new societal needs.").

to freeze forever our conception of a jury trial."[436] Notably, the "basic characteristic of the common law is its capacity for dynamic adaption to changing social and economic conditions."[437] Thus, under the *Pitcher* approach, "the [Iowa] legislature may [enact] reasonable regulations concerning procedures in civil cases which pertain to the right to a jury trial" without violating section 9.[438] A prime example is *State v. Walker*, in which the Iowa Supreme Court held that women can serve on the jury trial even though the inferior-courts provision within article I, section 9 explicitly states only men may do so.[439] Other notable examples include nonunanimous jury verdicts, as described in *Pitcher*,[440] and the waiver of a jury trial unless demanded, as described in *Scholemer v. Uhlenhopp*.[441]

But even with strong language regarding the common law's ability to change, the right to a jury trial still "may not be 'materially impaired.'"[442] For example, in *R.E. Morris Investments, Inc. v. Lind*, the Iowa Supreme Court found that striking a demand for a jury trial for failure to comply with discovery order was unconstitutional.[443] The question under this mode of inquiry becomes whether a damage cap is a reasonable regulation on procedure or materially impairs the right to a jury trial. This inquiry does not ask whether the regulation or legislation is responding to "new societal needs."[444] While the legislature is primarily responsible for adapting to "changing conditions,"[445] Thomas McKean, George Ells, and Justice Kinney in *Reed v. Wright* remind the Iowa Supreme Court that the legislature's power cannot be used to subvert the state constitution.[446]

With that limitation on the living-constitutionalist interpretation of article I, section 9, a damages cap still cannot be framed as a "reasonable regulation[] concerning procedure."[447] In rejecting a constitutional

436. *Pitcher*, 236 N.W.2d at 335.

437. Iowa Nat'l Mut. Ins. Co. v. Mitchell, 305 N.W.2d 724, 728–29 (Iowa 1981).

438. R.E. Morris Invs., Inc. v. Lind, 304 N.W.2d 189, 192 (Iowa 1981) (first citing Schloemer v. Uhlenhopp, 21 N.W.2d 457, 458 (Iowa 1946); and then citing *Pitcher*, 236 N.W.2d at 334–38).

439. State v. Walker, 185 N.W. 619, 625–26 (Iowa 1921) (citing IOWA CONST. art. I, § 9), *overruled by Pitcher*, 236 N.W.2d 333.

440. *Pitcher*, 236 N.W.2d at 334.

441. *Schloemer*, 21 N.W.2d at 458. The waiver of a jury trial "does not abridge or limit or modify the right which the constitution says shall remain inviolate. It merely prescribes an orderly *procedure* . . . ." *Id.* (emphasis added).

442. *Lind*, 304 N.W.2d at 192 (quoting *Schloemer*, 21 N.W.2d at 458).

443. *Id.* at 189.

444. Planned Parenthood of the Heartland v. Reynolds, 915 N.W.2d 206, 248 (Iowa 2018) (Mansfield, J., dissenting) (first citing Griffin v. Pate, 884 N.W.2d 182, 185–86, 198–205 (Iowa 2016); then citing *In re* Int. of Johnson, 257 N.W.2d 47, 48 (Iowa 1977); and then citing *Pitcher*, 236 N.W.2d at 334–35).

445. *Id.*

446. *See supra* Sections V.A–.B.

447. *Lind*, 304 N.W.2d at 192 (first citing *Schloemer*, 21 N.W.2d at 458; and then citing *Pitcher*, 236 N.W.2d at 334–38).

interpretation that required unanimous jury verdicts, the *Pitcher* court was influenced by Austin Wakeman Scott's 1918 work *Trial by Jury and the Reform of Civil Procedure*.[448] Scott suggested that "[o]nly . . . incidents which are regarded as fundamental, as inherent in and of the essence of the system of trial by jury, are placed beyond the reach of the legislature."[449] Whether an incident of the jury is fundamental turns on "a question of substance, not of form."[450] This substance includes matters that are properly within the province of the jury, such as questions of fact.[451] It is hard to argue that a jury's determination of damages is not a fundamental incident of jury trials, considering the 170 years of Iowa case law that have described damages, especially non-economic damages, as being particularly within the jury's province.[452] To be reasonable, a regulation concerning procedure must be limited "to the mechanics of jury trials," rather than matters of substance.[453]

The test for whether a legislative procedure is a reasonable regulation also appears to depend on how the new procedure would materially change the outcome of the jury trial.[454] For example, the *Pitcher* court in determining that civil jury trials did not need a unanimous decision stated that "[a] requirement of unanimity . . . *does not materially contribute to the exercise of this commonsense judgment*."[455] Similarly, in *Schloemer*, the court reasoned that the demand for a jury trial "merely prescribes an orderly procedure by which the litigant may exercise" the constitutionally protected jury trial right.[456] Thus, the procedures described in *Pitcher* and *Schloemer* merely concern the form of the jury and do not deserve fundamental protection under the Iowa Constitution. By contrast, the determination of damages by the jury is a

448. *Pitcher*, 236 N.W.2d at 336–37 (citing Scott, *supra* note 155).

449. *Id.* at 337 (quoting Scott, *supra* note 155, at 671); *see, e.g.*, Moore v. Mobile Infirmary Ass'n, 592 So. 2d 156, 161 (Ala. 1991) ("A jury determination of the amount of damages is the essence of the right to trial by jury . . . ." (quoting Indus. Chem. & Fiberglass Corp. v. Chandler, 547 So. 2d 812, 818 n.1 (Ala. 1989))).

450. *Pitcher*, 236 N.W.2d at 337 (quoting Scott, *supra* note 155, at 671); *see, e.g.*, *Moore*, 592 So. 2d at 163 ("Etheridge court's analysis of the jury's function placed form over substance.").

451. Scott, *supra* note 155, at 671 n.10, 675; Peck & Chemerinsky, *supra* note 82, at 551.

452. *See supra* notes 415–30 and accompanying text; *see, e.g.*, Feltner v. Columbia Pictures Television, Inc., 523 U.S. 340, 355 (1998) ("to preserve 'the substance of the common-law right of trial by jury.'" (quoting Tull v. United States, 481 U.S. 412, 426 (1987))). The strength of 170 years of Iowa case law would suggest that a jury's determination of damages is still an essential function today, even with the "changing views on the validity of its various essentials." *Pitcher*, 236 N.W.2d at 335.

453. *See* PETTYS, *supra* note 113, at 88.

454. *Pitcher*, 236 N.W.2d at 338.

455. *Id.* (emphasis added) (quoting Apodaca v. Oregon, 406 U.S. 404, 410 (1972), *abrogated by* Ramos v. Louisiana, 140 S. Ct. 1390 (2020)). While *Apodaca*'s language as applied to criminal jury trials has been abrogated by *Ramos*, *Apodaca*'s language regarding where certain policy creates material contribution or impairment still impacts Iowa civil jury trials, such as medical malpractice. *See* R.E. Morris Invs., Inc. v. Lind, 304 N.W.2d 189, 192 (Iowa 1981).

456. Schloemer v. Uhlenhopp, 21 N.W.2d 457, 458 (Iowa 1946).

question of substance that is inherent to the jury trial. In this light, the statement in *Pitcher* that the Iowa Constitution "protects the right to a jury trial and not any particular feature thereof"[457] should be specifically limited to alterable incidents such as the selection, size and unanimity that do not affect the jury's verdict and should not be extended to alter the verdict itself.[458]

Since a non-economic damage cap invades on an essential function of the jury, it should instead be framed as a "material impairment" on the right to a jury trial.[459] Based on *Lind*, one can reason that a "material impairment" involves the destruction of the entirety of the right to a jury trial, not just some aspect of it.[460] The source of the "materially impair" language in Iowa can be traced to *Littleton v. Fritz*, which quotes the 1860 Vermont case of *Plimpton v. Town of Somerset*.[461] The *Littleton* and *Plimpton* courts suggested that, any legislation "which destroys *or* materially impairs the right of trial by jury, according to the course of the common law in cases proper for the cognizance of a jury, is unconstitutional."[462] The separation between "destroy" and "materially impair" indicates that the legislature does not have to completely eliminate the right to a jury trial in order to materially impair it.[463] *Plimpton* described the right to trial by jury as a process in which "[t]he jurors are to hear for themselves, to use their own judgment," and reasoned that "the *verdict is to be the result of their deliberation and reflection* upon the testimony and argument."[464] Thus, a material impairment occurs "[i]f the judgment of some other body upon the the same matters is substituted for" the jury's.[465] At that point, "[the] *action upon the subject ceases to be a trial* and becomes but the mere recording of a verdict made for them by others."[466] This definition does not ask about the possible policy benefits of whatever the regulation is; rather, it is a direct analysis of how the regulation interferes with the fact-finding function of the jury. Consistent with several "inviolate" states, non-economic damage caps are a material impairment under Iowa law because the judgement of some other body—in this case the legislature—substitutes the fact-finding of the jury, leaving the jurors unable to render a verdict or make a determination of damages (including, in medical-malpractice cases, non-

457. *Pitcher*, 236 N.W.2d at 338.

458. *See Lind*, 304 N.W.2d at 192.

459. *Id.* (quoting *Schloemer*, 21 N.W.2d at 458).

460. *See id.*

461. Littleton v. Fritz, 22 N.W. 641, 643 (Iowa 1885) (quoting Plimpton v. Town of Somerset, 33 Vt. 283, 290 (1860)).

462. *Id.* (emphasis added) (quoting *Plimpton*, 33 Vt. at 290).

463. *Id.*

464. *Plimpton*, 33 Vt. at 293 (emphasis added).

465. *Id.*

466. *Id.* (emphasis added).

economic damages) based on their own observations and discussions of the evidence.[467]

D. Resisting the Urge to Apply Iowa's Other Tort-Reform Cases

As illustrated, hard, non-economic damage caps cannot survive either a strict originalist interpretation or a flexible living constitutionalist interpretation of Iowa's jury-trial provision. A damage cap either violates the right to a proceeding according to the course of the common law secured by Iowa's "inviolate" provision, or it materially impairs an essential function of the jury secured by the same provision. Despite this conclusion, an Iowa court, or an interested party, may be look to the analyses of modern Iowa tort-reform cases. This Section addresses some possible analogies drawn from other Iowa tort-reform cases upholding the constitutionality of legislative tort reform against various constitutional challenges.

1. Legislative Power to Create Statutes of Repose

First, one could conceivably argue that if, as illustrated in Iowa case law, the legislature has the power to create statutes of repose, it has the power to institute damage caps. A statute of repose cuts off a cause of action after a period of time, effectively preventing a cause of action. In *Bob McKiness Excavating & Grading, Inc. v. Morton Buildings, Inc.*, the Iowa Supreme Court held that a statute of repose on actions arising out of unsafe improvements to real property did not violate due process.[468] Notably, the *Morton* court held that "if the legislature can abolish a cause of action for a legitimate purpose, it also may prevent a cause of action from arising by enacting a statute of repose."[469] *Morton*'s due process analysis clearly bears a tight correlation to the Fourth Circuit's opinion in *Boyd* and the several "inviolate" states that have extended this rationale to damage caps.[470] It is dubious to apply this argument to Iowa's right-to-a-jury-trial provision. Beyond the several criticisms that several other "inviolate" states have expressed about this rationale,[471] it would effectively rewrite the right-to-a-jury-trial analysis under the Iowa Constitution. First, this derivative reasoning would essentially eliminate the originalist or historical test under Iowa's right-to-a-jury-trial provision which intends to preserve the common law. Alternatively, its reasoning would also defeat the

467. *See supra* Sections IV.C, IV.D.3, V.B.2; *see, e.g.*, Hilburn v. Enerpipe Ltd., 442 P.3d 509, 521 (Kan. 2019) ("[T]he cap impairs the jury trial right of section 5 [of the Kansas Constitution] and is thus unconstitutional . . . .").

468. Bob McKiness Excavating & Grading, Inc. v. Morton Bldgs., Inc., 507 N.W.2d 405, 409–10 (Iowa 1993).

469. *Id.* at 410. *See generally* Koppes v. Pearson, 384 N.W.2d 381 (Iowa 1986) (upholding a statute of repose for medical-malpractice cases), *abrogated by* Christy v. Miulli, 692 N.W.2d 694 (Iowa 2005).

470. *See supra* Sections III.B, IV.D.1.

471. *See supra* Section IV.D.1.

purpose of the material-impairment test, thus allowing the legislature to remove essential functions of the jury trial.

2. Abrogation of the Collateral Source Rule in Medical Malpractice Cases

More on point, in the 1980 Iowa Supreme Court case of *Rudolph v. Iowa Methodist Medical Center*, the court upheld Iowa Code section 147.136, which abrogated the collateral-source rule in medical-malpractice cases, against an equal protection challenge under the Iowa and Federal Constitutions.[472] A 4–3 majority upheld the abrogation of the collateral-source rule on the basis that Iowa Code section 147.136 had a rational relationship to the state's interest in reducing medical-malpractice premiums.[473] The dissent argued that the collateral-source rule invaded a substantive right and arbitrarily reduced the damages award in medical-malpractice cases when the collateral-source rule was not abrogated in other tort cases.[474] Notably absent is an analysis of the "inviolate" jury trial question at all. In defense of the authors, this opinion was decided in 1980, many years before the first significant wave of constitutional challenges involving the right to a jury trial—at least with regards to damage caps in federal and state court in the late 1980s and early 1990s.

Furthermore, the collateral-source rule can be distinguished from a hard cap on non-economic damages in a jury trial. A hard cap seriously invades the essential function of the jury's fact-finding province. It destroys the jury's verdict of damages that was based on the evidence and testimony absolutely, while the abrogation of the collateral-source rule allows the jury to take evidence of mitigating damages into the decision of their verdict.[475]

3. Comparative Negligence Involving the Use of Seatbelts

In one of the only challenges of an Iowa tort-reform law based on the right to a jury trial, the 1991 Iowa Supreme Court upheld the constitutionality

472. Rudolph v. Iowa Methodist Med. Ctr., 293 N.W.2d 550, 557–60 (Iowa 1980). When the legislature abrogates the collateral-source rule, the plaintiff must subtract any money that they received from a collateral source (insurance, government programs, etc.) from the damages they received at trial against the defendant. *Id.* at 557 (citing IOWA CODE § 147.136 (1975), *amended by* IOWA CODE § 147.136 (2020)).

473. *Id.* at 558–59.

474. *Id.* at 563 (Reynoldson, C.J., dissenting).

475. *Id.* at 559 (majority opinion) (noting that the jury in this case was specifically given a special verdict in which they heard evidence regarding the amount of mitigating damages); *see* Mohammed v. Otoadese, 738 N.W.2d 628, 635 (Iowa 2007). The abrogation of the collateral-source rule goes toward the "pervasive principle in damages law[, which] is the doctrine of avoidable consequences" towards making a plaintiff whole. Richard C. Maxwell, *The Collateral Source Rule in the American Law of Damages*, 46 MINN. L. REV. 669, 669 (1962). A non-economic damage cap cannot legitimately embrace this principle as it does not take the facts of each independent case into consideration.

of Iowa Code section 321.445 in *Duntz v. Zeimet*.[476] Iowa Code section 321.445 provided that the failure to wear a safety belt was not evidence of comparative fault in a negligence case, "but may be considered to reduce the amount of a party's recovery by no more than five percent."[477] In upholding the statute, the majority of the court found that "the failure to wear a seat belt [was not] considered a failure to mitigate damages at common law."[478] Therefore, the right to a jury trial did not attach to this claim.[479] Justice Larson vigorously dissented, stating that Iowa "common law would grant the right to a defendant to prove the true extent of a plaintiff's negligence based on a failure to wear seat belts as required by law and to obtain a corresponding reduction of damages."[480] According to Justice Larson, the new seat belt law was an unconstitutional impairment on the right to a jury trial because it invaded the traditional fact-finding function of the jury.[481]

Duntz cannot be framed as a case that allows for the capping of damages in a common-law action. First, the majority found that a determination of comparative negligence in regard to seat belts was not a part of the common law and thus failed the first prong of the historical test for jury trial protections.[482] Moreover, the majority used *Kansas Malpractice Victims v. Bell*, a case that found damage caps on medical malpractice to be unconstitutional, as a means of distinguishing the case at hand from cases concerning mitigation of damages at common law.[483] Thus, the majority in *Duntz* perhaps implicitly suggested that damages in a medical-malpractice case would be protected under the Iowa Constitution's "inviolate" jury trial protections.[484] This case, while appearing unfavorable, is in fact analogous support of the analysis in Section V.B.2.

4. Civil Reparation Trust Fund with Punitive Damages

Finally, in 1991 the Iowa Supreme Court upheld a redistribution of a punitive-damages award to the civil-reparation trust fund against equal protection and due process challenges in *Shepherd Components, Inc. v. Brice*

476. Duntz v. Zeimet, 478 N.W.2d 635, 635–36 (Iowa 1991) (per curiam).

477. *Id.* (citing IOWA CODE § 321.445(4) (1989), *amended by* IOWA CODE § 321.445(4)(b) (2020)).

478. *Id.* at 636.

479. *Id.*

480. *Id.* at 637 (Larson, J., dissenting).

481. *See id.*

482. *Compare id.* at 636 (majority opinion) (stating that the right under the Iowa Constitution is the one that existed at common law), *with supra* Section V.B.2 (discussing an originalist approach to the right to a jury trial).

483. *Duntz*, 478 N.W.2d at 636 (citing Kan. Malpractice Victims Coal. v. Bell, 757 P.2d 251, 258 (Kan. 1988)).

484. *Id.*

Petrides–Donohue & Associates.[485] However, the court rested its analysis on the ground that "punitive damages are not intended to be compensatory and that a plaintiff is a fortuitous beneficiary."[486] Thus, this case presents an obvious difference between an entitlement to punitive damages and capping purely compensatory damages, such as pain and suffering.[487] Second, the legislature, by redistributing a punitive-damages award, was not materially impairing the essential fact-finding function of the jury. In fact, the jury was still able to decide the extent of punitive damages. Rather, the legislature's actions were limited to the back-end concern of who would receive the award; it did not substitute its own determination as to the extent of punitive damages that should be awarded for the jury's.[488]

5. Conclusion Among Iowa Tort-Reform Cases

This sampling of previous Iowa tort-reform cases, while posing similar arguments that one sees in other federal and state jury-trial case law, does not undermine the specific Iowa right-to-a-jury-trial analysis showing that a determination of non-economic damages is a fundamental part of the jury's essential fact-finding function. Regardless of the trend in tort-reform cases, a hard, non-economic damage cap on medical malpractice would be unconstitutional in the face of Iowa's right to a jury trial.

VI. CONCLUSION

"Until our system of jurisprudence determines that some other system is more satisfactory and more accurate in arriving at the real damage, we must leave it to our juries to set the amount of recovery."[489] The golden dome's proposed hard damage cap on non-economic damages is clearly not the system to provide justice to Rickie, Kathryn, Dave and other Iowans harmed by medical malpractice. A hard damage cap on non-economic damages in such cases is not a proceeding according to the course of the common law but instead invades the traditional province of the jury. This conclusion is supported by nearly 170 years of Iowa case law and by the conclusions of several states with matching "inviolate" provisions. Nor could this damage cap be framed as a reasonable regulation on procedure, as it is a material impairment of an essential function protected in the Iowa Constitution. Therefore, a hard cap on non-economic damages for a common law cause of

485. Shepherd Components, Inc. v. Brice Petrides–Donohue & Assocs., Inc., 473 N.W.2d 612, 619 (Iowa 1991).

486. *Id.*

487. *Id.*; *see, e.g.*, Atlanta Oculoplastic Surgery, P.C. v. Nestlehutt, 691 S.E.2d 218, 223 (Ga. 2010); *see also* Murphy, *supra* note 35, at 829 ("However, a distinction between punitive damages and noneconomic damages can be made using language from *Shepherd*.").

488. *See* Boyd v. Bulala, 647 F. Supp. 781, 789 n.7 (W.D. Va. 1986), *aff'd in part*, *rev'd in part*, 877 F.2d 1191 (4th Cir. 1989), *certifying questions to* 389 S.E.2d 670 (Va. 1990).

489. De Toskey v. Ruan Transp. Corp., 40 N.W.2d 4, 6 (Iowa 1949).

action would be contrary to George Ells' promise that the Iowa Bill of Rights has "every guarantee that could be legitimately placed there in order that Iowa not only might be the first State in the Union, unquestionably as she is in many respects, . . . [to] have the *best and most clearly defined Bill of Rights*."[490]

490. 1857 DEBATES Vol. 1, *supra* note 356, at 100 (emphasis added) (statement of George Ells).