STATE CONSTITUTIONAL PROTECTION OF CIVIL LITIGATION*

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TABLE OF CONTENTS

* This is a very slightly modified version of a paper delivered at the Pound Civil Justice Institute's 2018 Forum for State Appellate Court Judges in Denver, Colorado, July 2018. I received a modest honorarium. It did not change my views.

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"Although the term 'American Constitution' is often used synonymously with 'Constitution of the United States,' the operational American constitution consists of the federal Constitution and the 50 state constitutions. Together, these 51 documents comprise a complex system of constitutional rule for a republic of republics."[1]

I. INTRODUCTION: THE IMPORTANCE OF STATE CONSTITUTIONS

A standard account of American constitutionalism portrays the United States Constitution as enumerating certain powers for the federal government and leaving residual, plenary power to the states and the people.[2] Thus, the U.S. Constitution is "incomplete" in the sense that it leaves to the states the great bulk of societal, economic, and moral issues to be treated within their "subnational" constitutional provisions and ordinary lawmaking powers. According to political scientist Daniel Elazar:

> Were the federal constitution to stand alone, one could conclude that morality and government were entirely separated in the new American constitutional order. This is not, in fact, the case. Since both the federal constitution and the government it creates are incomplete and need the states to be complete, we must also look at the state constitutions to see what kind of liberty they are committed to protecting and fostering.[3]

Among the "liberty" interests that are thereby *left to the states*, and *their* state constitutions, are the rights of litigants in civil litigation heard by state courts. Of course many other matters of justice, such as workers' compensation, are also left entirely to the states and their constitutions.[4] However, by contrast to the Federal Constitution, the constitutions of the states are "low-visibility" constitutions.[5] Therefore, lawyers and some state

1. John Kincaid, *State Constitutions in the Federal System*, THE ANNALS OF THE AM. ACAD. POL. & SOC. SCI., Mar. 1988, at 12, 13.

2. ROBERT F. WILLIAMS, THE LAW OF AMERICAN STATE CONSTITUTIONS 3 (2009) [hereinafter WILLIAMS, AMERICAN STATE CONSTITUTIONS]. For another very important treatment of these issues, see 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, 541 (2018).

3. DANIEL J. ELAZAR, THE AMERICAN CONSTITUTIONAL TRADITION 169 (1988) (emphasis added); *see also* Donald S. Lutz, *The United States Constitution as an Incomplete Text*, THE ANNALS OF THE AM. ACAD. POL. & SOC. SCI., Mar. 1988, at 23, 23.

4. *See, e.g.*, Robert F. Williams, *Can State Constitutions Block the Workers' Compensation Race to the Bottom?*, 69 RUTGERS U. L. REV. 1081, 1117 (2017) [hereinafter Williams, *Race to the Bottom*].

5. WILLIAMS, AMERICAN STATE CONSTITUTIONS, *supra* note 2, at 1.

court judges hearing civil cases, particularly new judges, may be less familiar with their more relevant state constitutions than with the less-relevant Federal Constitution. This is a very important point because these less-understood state constitutions, rather than the Federal Constitution, contain far more protections for civil litigation.

In our American system of *federal* constitutionalism, the fifty state constitutions are constrained by the Federal Supremacy Clause, but they may also operate independently of federal constitutional rights guarantees to provide more protective rights within a particular state. This is a very important feature of our constitutional system, particularly with respect to constitutional protections for civil litigation, which are virtually absent from the United States Constitution. Generally speaking, the state constitutions provide rights guarantees that are redundant, in the best, most protective, sense of the word.[6]

This paper is not intended as a comprehensive catalog of state constitutional provisions protecting state civil litigation and cases interpreting them. Rather, it is intended as an introduction to such "low-visibility" constitutional provisions and the contexts where they may be applied. In the American legal system, where the vast majority of civil litigation takes place in *state* courts, and in the virtual absence of Federal Constitutional protections, it is the *state* constitutions that will provide the only line of protection. They should be taken very seriously.

II. THE GREAT MAJORITY OF CIVIL LITIGATION TAKES PLACE IN STATE COURTS

It is well known that the vast majority of civil litigation, although currently declining slightly, is filed in our state courts.[7] Tort cases actually account for a fairly small percentage of the state court civil caseload.[8] When contract actions are included, it is clear that literally millions of civil actions are filed in the state courts.[9] By contrast, in 2017, only slightly more than 292,000 civil actions of all kinds were filed in

6. Goodwin Liu, *State Constitutions and the Protection of Individual Rights: A Reappraisal*, 92 N.Y.U. L. REV. 1307, 1335 (2017). *See generally* William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 491–502 (1977).

7. NAT'L CTR. FOR STATE COURTS, EXAMINING THE WORK OF STATE COURTS: AN OVERVIEW OF 2015 STATE COURT CASELOADS 2 (2016).

8. *Id.* at 8.

9. *Id.* at 7.

federal district courts.[10] It is thus clear that the basic duty to protect access to a fair system of civil litigation is a *state* duty. It is a duty that often must be shouldered by state *courts*.

III. THE ABSENCE OF STATE CIVIL LITIGATION PROTECTIONS IN THE FEDERAL CONSTITUTION

There is very little in the United States Constitution that provides protection for civil litigation in *state* courts. Broad federal constitutional guarantees of equal protection and due process provide little protection in this context of economic regulation and deference to the states.

The Seventh Amendment to the United States Constitution provides:

> 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.[11]

Many people, including some lawyers and judges, assume that this federal constitutional guarantee applies to civil litigation in state courts. Importantly, however, unlike the Sixth Amendment right to jury trial in criminal cases, that is not the case, because the Seventh Amendment has never been "incorporated" into the Due Process Clause of the Fourteenth Amendment to apply to the states.[12] By contrast, virtually every state has at least one explicit guarantee of a right to jury trial in civil cases. So, under the Federal Constitution there is, quite simply, no right to a jury trial in state civil cases. In other words, despite the "nationalization of civil liberties" in the last half of the twentieth century,[13] the Seventh Amendment is one of the very few provisions of the

10. U.S. COURTS, U.S. DISTRICT COURTS—CIVIL FEDERAL JUDICIAL CASELOAD STATISTICS (2017), http://www.uscourts.gov/statistics/table/c/federal-judicial-caseload-statistics/2017/03/31.

11. U.S. CONST. amend. VII. *See generally* Edith Guild Henderson, *The Background of the Seventh Amendment*, 80 HARV. L. REV. 289, 290 (1966); Charles W. Wolfram, *The Constitutional History of the Seventh Amendment*, 57 MINN. L. REV. 639, 646 (1973).

12. McDonald v. City of Chicago, 561 U.S. 742, 764 n.13 (2010); Minneapolis & St. Louis R.R. v. Bombolis, 241 U.S. 211, 217 (1916); Sofie v. Fibreboard Corp., 771 P.2d 711, 716 (Wash. 1989) (en banc). Senator Sheldon Whitehouse of Rhode Island has argued that the Supreme Court should incorporate the Seventh Amendment to apply to the states. Sheldon Whitehouse, *Restoring the Civil Jury's Role in the Structure of Our Government*, 55 WM. & MARY L. REV. 1241, 1273–74 (2014); *see also* Peck & Chemerinsky, *supra* note 2, at 554–58.

13. RICHARD C. CORTNER, THE SUPREME COURT AND THE SECOND BILL OF RIGHTS: THE FOURTEENTH AMENDMENT AND THE NATIONALIZATION OF CIVIL LIBERTIES 279 (1981).

Federal Bill of Rights that has never been, and probably never will be, applied to the *states* so as to govern civil litigation in the state courts. It only applies to civil jury trials in *federal* court.

This is quite unusual, because, with most of the provisions of the Federal Bill of Rights, similar state constitutional guarantees are often (improperly) seen as "redundant," or as a "fallback" source of rights.[14] By contrast, here, the *state* constitutional guarantees of jury trial rights serve as the primary, rather than as secondary, constitutional guarantees. As a consequence, although Federal Seventh Amendment cases can certainly be persuasive in state courts applying their state constitutional jury trial guarantees, such federal cases should not cast a "shadow"[15] or shine a "glare"[16] over the proceedings, as is often the case in other constitutional litigation. State court interpretation of state constitutional jury trial rights thus proceeds in complete independence from federal interpretations of the Seventh Amendment.

Federal constitutional interpretations often exert a kind of "gravitational pull" on interpretations of identical or similar state constitutional provisions.[17] However, according to Professor Scott Dodson:

> Constitutional law often involves sensitive and important policy matters, on which local preferences tend to be stronger, more unified, and more extreme than national preferences. Further, state constitutions have a different history and erect a different governmental structure than the federal Constitution. Finally, constitutional governance is the most prominent feature of popular sovereignty, a cherished American ideal. These factors suggest that states should exercise independence in state constitutionalism, relying on the preferences of their particular populaces, with sensitivity to the nuances of their state governmental structures.[18]

Again, Seventh Amendment jurisprudence may provide useful perspective for state judges interpreting their state constitutional civil jury

14. *See, e.g.*, James A. Gardner, *The Failed Discourse of State Constitutionalism*, 90 MICH. L. REV. 761, 824 (1992).

15. Robert F. Williams, *In the Supreme Court's Shadow: Legitimacy of State Rejection of Supreme Court Reasoning and Result*, 35 S.C. L. REV. 353, 356 (1984).

16. Robert F. Williams, *In the Glare of the Supreme Court: Continuing Methodology and Legitimacy Problems in Independent State Constitutional Rights Adjudication,* 72 NOTRE DAME L. REV. 1015, 1027, 1031 (1997).

17. Scott Dodson, *The Gravitational Force of Federal Law*, 164 U. PA. L. REV. 703, 705 (2016).

18. *Id.* at 724–25.

trial guarantees, but it is in no sense binding. State constitutional jury trial guarantees for civil litigation must be applied independently.

IV. UNITED STATES SUPREME COURT APPROVAL OF INDEPENDENT STATE CONSTITUTIONAL RIGHTS DECISIONS

The following 1982 statement by Justice Stevens for a Supreme Court *majority* is important:

> As a number of recent State Supreme Court decisions demonstrate, a state court is entirely free to read its own State's constitution more broadly than this Court reads the Federal Constitution, or to reject the mode of analysis used by this Court in favor of a different analysis of its corresponding constitutional guarantee.[19]

As indicated by the above quote, the United States Supreme Court is comfortable, or even in a sense encouraging, in its acknowledgement that state courts are free, under their own state constitutions or even statutes, court rules, and common law, to render decisions that are more protective than the Supreme Court's interpretations of federal constitutional rights, which establish a national minimum standard under the United States Constitution's Supremacy Clause.[20] Therefore, it is not only in the Court's *dissenting opinions* that state courts are encouraged to "diverge" from the national minimum standard of rights,[21] but also in the opinions of the majority members of the Court. Again, state judges should take heed of the Court's statements such as those quoted above, and similar statements such as: "Our reasoning in *Lloyd*, however, does not *ex proprio vigore* limit the authority of the State to exercise its police power or its sovereign right to adopt in its own Constitution individual liberties more expansive than those conferred by the Federal Constitution."[22] Justice Scalia, in a death penalty sentencing case, noted: "The state courts may experiment all they want with their own constitutions, and often do in the wake of this Court's

19. City of Mesquite v. Aladdin's Castle, Inc., 455 U.S. 283, 293 (1982) (citing William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977)).

20. *See* U.S. CONST. art. VI, cl. 2.

21. *See, e.g.*, Michigan v. Mosley, 423 U.S. 96, 120 (1975) (Brennan, J., dissenting).

22. Pruneyard Shopping Ctr. v. Robbins, 447 U.S. 74, 81 (1980); *accord* Florida v. Powell, 559 U.S. 50, 59 (2010); Arizona v. Evans, 514 U.S. 1, 8 (1995); Nichols v. United States, 511 U.S. 738, 748–49 n.12 (1994); Oregon v. Hass, 420 U.S. 714, 719 (1975); Cooper v. California, 386 U.S. 58, 62 (1967); Minnesota v. National Tea Co., 309 U.S. 551, 557 (1940).

decisions."[23] Based on all of these statements, state judges should not feel any discomfort in "going beyond" the Supreme Court or even in disagreeing with it in the process of interpreting their own state constitutions.

V. STATE CONSTITUTIONAL RIGHTS IN CIVIL LITIGATION

A. Right-to-Remedy/Open Courts

At the time the Federal Bill of Rights was being considered, a guarantee of a "right-to-remedy," or "open courts," was considered but not proposed to the states.[24] These provisions, dating back to Magna Carta, appear in the state constitutions of thirty-nine states.[25]

1. Oregon

The Oregon Supreme Court issued a very important remedy guarantee/open courts decision in 2001 with *Smothers v. Gresham Transfer, Inc*.[26] In *Smothers*, an employee filed for workers' compensation benefits, alleging that he sustained a "compensable injury" from exposure to chemical mist and fumes in the workplace.[27] His claim was rejected by the Workers' Compensation Board on the ground that the exposure to the mist and fumes was not a "major contributing cause" of his medical condition.[28] The employee filed a tort action but was met with a defense based on the "exclusive remedy" bar contained in the workers' compensation statute.[29] The circuit court agreed, observing that the state legislature had amended the workers' compensation law in 1995 to provide that, even if a worker's injury was not compensable, still no tort suit could be brought.[30]

On appeal, the Oregon Supreme Court held that result—where a worker could not bring a tort suit even if his or her injury was not

23. Kansas v. Carr, 136 S. Ct. 633, 641 (2016).

24. David Schuman, *The Right to a Remedy*, 65 TEMP. L. REV. 1197, 1199–1200 (1992) [hereinafter Schuman, *Remedy*] (citing BERNARD SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 967–68 (1971)); *see also*, Jonathan M. Hoffman, *Questions Before Answers: The Ongoing Search to Understand the Origins of the Open Courts Clause*, 32 RUTGERS. L.J. 1005, 1005 (2001) [hereinafter Hoffman, *Questions*]; David Schuman, *Oregon's Remedy Guarantee: Article I, Section 10 of the Oregon Constitution*, 65 OR. L. REV. 35, 39–40 (1986).

25. Hoffman, *Questions*, *supra* note 24, at 1005–06, 1005 n.1.

26. 23 P.3d 333, 362 (Or. 2001), *overruled by* Horton v. Or. Health & Sci. Univ., 376 P.3d 998, 1005 (Or. 2016).

27. *Id.* at 336.

28. *Id.*

29. *Id.*

30. *Id.* at 337–38.

compensable—violated the state constitution's right to remedy guarantee.[31] The court carried out an extensive historical analysis of the constitutional provision and concluded that it operated substantively to prohibit the legislature from abolishing a common law cause of action without providing an adequate substitute.[32] The court held:

> Although this court has held that the remedy clause preserves common-law rights of action, it never has held that the remedy clause prohibits the legislature from changing a common-law remedy or form of procedure, attaching conditions precedent to invoking the remedy, or perhaps even abolishing old remedies and substituting new remedies. That is, the court never has held that the remedy clause freezes in place common-law remedies. However, just as the legislature cannot deny a remedy entirely for injury to constitutionally protected common-law rights, neither can it substitute an "emasculated remedy" that is incapable of restoring the right that has been injured.[33]

In 2016, the Oregon Supreme Court revisited this and several other issues in *Horton v. Oregon Health & Science University*—a case that arose under the State Tort Claims Act where, without a legislative waiver, the governmental entity would have been protected by sovereign immunity.[34] The court made a new analysis of the deep constitutional history behind remedy guarantee/open courts provisions, and this time concluded that the right-to-remedy clause did *not* impose substantive limits on the legislature's modification or elimination of common law claims.[35] The court concluded that, at least in the state tort claim context, the damage cap was constitutional.[36]

31. *Id.* at 362; OR. CONST. art. I, § 10.

32. *Smothers*, 23 P.3d at 359–61.

33. *Id.* at 354 (citations omitted) (citing West v. Jaloff, 232 P. 642, 645 (Or. 1925)); *see also* Clarke v. Or. Health Scis. Univ., 175 P.3d 418, 434 (Or. 2007) (upholding a Tort Claims Act damage cap in an action against a *governmental* defendant but striking it down under the right-to-remedy/open courts provision in the action against public employees in their individual capacities).

34. 376 P.3d 998, 1028–29 (Or. 2016). For a detailed critique of the *Horton* decision, see Travis Eiva, *The Constitutional Authority of Oregon Juries: Drawing the Line on Legislative Encroachment*, 96 OR. L. REV. 599, 604 (2018). *See also* Peck & Chemerinsky, *supra* note 2, at 540–52. These articles appear in a symposium that contains several other articles on *Horton*.

35. *Horton*, 376 P.3d at 1016–21; *Id.* at 1051–54 (Landau, J., concurring); *see* Kathryn H. Clarke, *Foreword: Fundamental Rights or Paper Tigers?*, 96 OR. L. REV. 479, 485–86 (2018).

36. *Horton*, 376 P.3d at 1046.

The *Horton* court appears to have taken care to avoid the appearance of an across-the-board holding in favor of damage caps. In *Bundy v. NuStar GP, LLC*,[37] the Oregon Supreme Court acknowledged the limit of its "overruling" of *Smothers*, writing that "[t]his court in *Horton* overruled the construction of the remedy clause on which *Smothers* relied. But *Horton* did not specifically overrule *Smothers*'[s] ultimate holding that injured workers who 'receive no compensation benefits' have a constitutional right to pursue a civil action for their injury."[38]

Horton has since been applied by the Oregon Court of Appeals to invalidate application of the cap on noneconomic damages in two cases: *Vasquez v. Double Press MFG., Inc.*,[39] currently on review to the Oregon Supreme Court; and *Rains v. Stayton Builders Mart, Inc.*[40] It has also cited *Horton* to invalidate a portion of Oregon's dram shop act that eliminates a cause of action by an overserved patron who suffers injury as a result of his own intoxication.[41]

2. Florida

Florida's right-to-remedy guarantee, article I, section 21 provides: "The courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay."[42] The Florida Supreme Court began its serious enforcement of this provision when the Florida Legislature enacted a no-fault automobile insurance statute, providing that there would be no remedy for property damage to an automobile under the amount of five hundred fifty dollars if the automobile was uninsured for such damage.[43] In the landmark decision of *Kluger v. White*, the Florida Supreme Court struck down this statutory limit on a negligence cause of action.[44] The court annunciated the following test:

> We hold, therefore, that where a right of access to the courts for redress for a particular injury has been provided by statutory law predating the adoption of the Declaration of Rights of the Constitution of the State of Florida, or where such right has

37. 407 P.3d 801 (Or. 2017).

38. *Id.* at 805 n.10 (citations omitted) (citing *Horton*, 376 P.3d at 1027; *Smothers*, 23 P.3d at 357).

39. 406 P.3d 225, 237 (Or. Ct. App. 2017), *review allowed*, 415 P.3d 580 (Or. 2018).

40. 410 P.3d 336, 347 (Or. Ct. App. 2018) (since settled).

41. Schutz v. La Costita III, Inc., 406 P.3d 66, 68, 73 (Or. Ct. App. 2017), *review allowed*, 416 P.3d 1096 (Or. 2018).

42. FLA. CONST. art. I, § 21.

43. Kluger v. White, 281 So. 2d 1, 2–3 (Fla. 1973).

44. *Id.* at 4.

> become a part of the common law of the State . . . the Legislature is without power to abolish such a right without providing a reasonable alternative to protect the rights of the people of the State to redress for injuries, unless the Legislature can show an overpowering public necessity for the abolishment of such right, and no alternative method of meeting such public necessity can be shown.[45]

This interpretation of the right-to-remedy clause can be seen as setting up a kind of "grand bargain" test: the legislature may eliminate or modify common law or statutory remedies, but only if it provides an adequate substitute or can justify its change by an "overpowering public necessity."[46]

Kluger set the stage for the development of an independent state constitutional jurisprudence of the right-to-remedy in Florida. A line of cases dealing with limitations on causes of action, or on damages, has ensued, and is very much alive today.

In 1987 the Florida Supreme Court struck down a "tort reform" provision capping all noneconomic damages under the authority of *Kluger*.[47] The court concluded that the statute failed to provide any "commensurate benefit" for imposition of the damage cap.[48] The statute failed the "grand bargain" test and was held unconstitutional.[49]

However, in 1993 the Florida Supreme Court upheld under the *Kluger* test a statute imposing a cap on noneconomic damages in medical malpractice claims "when a party requests arbitration."[50] The court found that the arbitration statutes did provide a "commensurate benefit," and that, in any event, the "medical malpractice insurance crisis" provided an "overpowering public necessity" justifying the damage cap.[51] Thus, it held, the statute passed the "grand bargain" test.[52]

In 2016, in a workers' compensation context, the Florida Supreme Court considered a gap between the statutory 104-week cap on temporary total disability benefits and the point at which a claimant reached "maximum medical improvement" but is "totally disabled."[53] The injured worker would have no benefits during that period. The Florida Supreme

45. *Id.*
46. Williams, *Race to the Bottom*, *supra* note 4, at 1099; *Kluger*, 281 So. 2d at 4.
47. Smith v. Dep't of Ins., 507 So. 2d 1080, 1088–89 (Fla. 1987) (per curiam).
48. *Id.* at 1088.
49. *Id.* at 1088–89.
50. Univ. of Miami v. Echarte, 618 So. 2d 189, 190 (Fla. 1993).
51. *Id.* at 194, 195, 196 (quoting *Kluger*, 281 So. 2d at 4).
52. *Id.* at 195.
53. Westphal v. City of St. Petersburg, 194 So. 3d 311, 314 (Fla. 2016).

Court struck down that statutory provision, citing *Kluger*.[54] The court stated:

> The "reasonable alternative" test is then the linchpin and measuring stick, and this Court has undoubtedly upheld as constitutional many limitations on workers' compensation benefits as benefits have progressively been reduced over the years and the statutory scheme *changed to the detriment of the injured worker*.
>
> But, there must eventually come a "tipping point," where the diminution of benefits becomes so significant as to constitute a *denial* of benefits—thus creating a constitutional violation.[55]
>
> . . . .
>
> . . . . Where totally disabled workers can be routinely denied benefits for an indefinite period of time, and have no alternative remedy to seek compensation for their injuries, something is drastically, fundamentally, and constitutionally wrong with the statutory scheme.[56]

3. Other states

Again, appearing in the constitutions of thirty-nine states, the right-to-remedy or open-court provisions seem to be the most widely available protections for civil litigation in state courts.[57] There is very thorough, fifty-state coverage of this, and many other state constitutional rights provisions, in Professor Jennifer Friesen's treatise,[58] as well as

54. *Id.* at 327 (citing Kluger v. White, 281 So. 2d 1, 4 (Fla. 1973)).

55. *Id.* at 323 (first emphasis added).

56. *Id.* at 330 (Lewis, J., concurring).

57. Schuman, *Remedy*, *supra* note 24, at 1200; *see* Dan Friedman, Jackson v. Dackman Co.: *The Legislation Modification of Common Law Tort Remedies Under Article 19 of the Maryland Declaration of Rights*, 77 MD. L. REV. 949, 978–82 (2018); *see also* Jackson v. Dackman Co., 30 A.3d 854, 865 (Md. 2011) (striking down statutory modification of tort remedy for lead paint poisoning).

58. 1 JENNIFER FRIESEN, STATE CONSTITUTIONAL LAW: LITIGATING INDIVIDUAL RIGHTS, CLAIMS, AND DEFENSES ch. 6 (4th ed. 2006). This chapter concludes with Appendix 6, which collects all of the states' provisions.

extensive law review literature.[59] A key question under these provisions is whether they operate to limit substantive legislation interfering with civil litigation or, rather, only to protect procedural rights in the judicial branch.[60] The latter is a minority view, but it is reflected in Oregon's recent *Horton* decision.[61]

B. "Equal Protection"

The Fourteenth Amendment's Equal Protection Clause certainly applies to the states, but is among the most "underenforced" provisions in the Federal Constitution.[62] By contrast, states have a variety of equality guarantees, many of which do not even refer to "equal protection."[63] The Florida Supreme Court has rendered a number of very important civil litigation decisions applying the rational basis test under its state

59. *See, e.g.*, Jonathan M. Hoffman, *By the Course of Law: The Origins of the Open Courts Clause of State Constitutions*, 74 OR. L. REV. 1279 (1995); Hoffman, *Questions*, *supra* note 24; William C. Koch, Jr., *Reopening Tennessee's Open Courts Clause: A Historical Reconsideration of Article I, Section 17 of the Tennessee Constitution*, 27 U. MEM. L. REV. 333 (1997); Martin B. Margulies, *Connecticut's Misunderstood Remedy Clause*, 14 QUINNIPIAC L. REV. 217 (1994); Thomas R. Phillips, *The Constitutional Right to a Remedy*, 78 N.Y.U. L. REV. 1309 (2003). In an exhaustively-researched article, Judith Resnik contends that right-to-remedy and access-to-court guarantees constitute a positive entitlement owed by state governments to litigants in need of this government service. Judith Resnik, *Constitutional Entitlements to and in Courts: Remedial Rights in an Age of Egalitarianism: The Childress Lecture*, 56 ST. LOUIS U. L.J. 917, 940 (2012).

60. *See, e.g.*, Meech v. Hillhaven West, Inc., 776 P.2d 488, 493 (Mont. 1989); Schuman, *Remedy*, *supra* note 24, at 1200–01.

61. Horton v. Or. Health & Sci. Univ., 376 P.3d 998, 1044 (Or. 2016).

62. In decoupling its uniformity in taxation provision from federal equal protection doctrine, the Supreme Court of Iowa wrote: "Another writer has observed that equal protection challenges to state taxation laws and business regulations are 'dismissed out of hand' by federal courts, in part due to federal restraint with respect to state matters. This author writes:

> Institutional rather than analytical reasons appear to have prompted the broad exclusion of state tax and regulatory measures from the reach of the equal protection construct fashioned by the federal judiciary. This is what creates the disparity between this construct and a true conception of equal protection, and thus substantiates the claim that equal protection is an underenforced constitutional norm.

Racing Ass'n of Cent. Iowa v. Fitzgerald, 675 N.W.2d 1, 13 n.5 (Iowa 2004) (citation omitted) (quoting Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1216, 1218 (1978)) (citing William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 503 (1977) ("With federal scrutiny diminished, state courts must respond by increasing their own.")).

63. WILLIAMS, AMERICAN STATE CONSTITUTIONS, *supra* note 2, at 209.

constitutional equality provision.[64] For example, in 2014 the court struck down a statutory cap on noneconomic damages in wrongful death actions.[65] The court, in a very important decision, took issue with the legislature's finding that there was a "medical malpractice insurance crisis."[66] It stated:

> To satisfy the rational basis test, a statute must bear a rational and reasonable relationship to a legitimate state objective, and it cannot be arbitrary or capriciously imposed. Stated another way, the test for consideration of equal protection is whether individuals have been classified separately based on a difference which has a reasonable relationship to the applicable statute, and the classification can never be made arbitrarily without a reasonable and rational basis.[67]

The court found that the damage cap failed even the rational basis test because "it imposes unfair and illogical burdens on injured parties when an act of medical negligence gives rise to multiple claimants."[68] Plaintiffs who are not seriously injured receive full compensation, whereas seriously injured plaintiffs may not receive full compensation even if suing individually. If they are litigating along with multiple claimants, they are even less likely to receive full compensation.

The court relied on an earlier decision striking down a damage cap under the same equality analysis.[69] Finally, the court relied on similar decisions from other states applying their state constitutional limits to strike down damage caps.[70] The court concluded that the damage cap:

> [H]as the effect of saving a modest amount for many by imposing devastating costs on a few—those who are most grievously injured, those who sustain the greatest damage and loss, and multiple claimants for whom judicially determined

64. FLA. CONST. art. I, § 2: "Basic rights. All natural persons, female and male alike, are equal before the law and have inalienable rights . . . ." The clause does not use the term "equal protection." *See generally* 1 FRIESEN, *supra* note 58, at ch. 3.

65. Estate of McCall v. United States, 134 So. 3d 894, 897 (Fla. 2014).

66. *Id.* at 905–10.

67. *Id.* at 901 (citation omitted).

68. *Id.*

69. *Id.* (citing St. Mary's Hosp., Inc. v. Phillipe, 769 So. 2d 961 (Fla. 2000)).

70. *Id.* at 902–03 (citing Best v. Taylor Mach. Works, 689 N.E.2d 1057, 1075 (Ill. 1997); Carson v. Maurer, 424 A.2d 825, 837 (N.H. 1980), *overruled on other grounds by* Cmty. Res. for Justice, Inc. v. City of Manchester, 917 A.2d 707, 721 (N.H. 2007)).

> noneconomic damages are subject to division and reduction simply based upon the existence of the cap.[71]

The court distinguished its right-to-remedy jurisprudence from this line of equality jurisprudence.[72] Finally, the court rejected the legislature's stated rationale for the damage cap: that there was a "medical malpractice insurance crisis."[73]

In *McCall*, the Florida court quoted with approval Illinois and Texas cases striking down statutory limits on noneconomic damages. The Texas decision responded to a certified question from the Fifth Circuit, concluding that a statutory cap on medical malpractice damages violated the Texas Constitution's right-to-remedy clause.[74] The Illinois case noted that such a cap arbitrarily discriminates between slightly and severely injured persons,[75] as well as tortfeasors who cause severe or minor injuries.[76] The court relied on the state constitution's ban on "special law[s]," which, like equality clauses, prohibits arbitrary legislative classifications.[77]

Then, in 2017 the Florida Supreme Court, relying on its earlier decision, struck down similar statutory caps on noneconomic damages in medical malpractice personal injury cases.[78] Placing significant reliance on its 2014 decision, the court held:

> We conclude that the caps on noneconomic damages in sections 766.118(2) and (3) arbitrarily reduce damage awards for plaintiffs who suffer the most drastic injuries. We further

71. *Id.* at 903.

72. *Id.* at 904.

73. *Id.* at 905–10. The court cited *Lucas v. United States*, 757 S.W.2d 687 (Tex. 1988) (concluding, in response to a certified question, that Texas cap on damages was unconstitutional). Courts in other states have stricken down other limits on workers' compensation. Merrill v. Utah Labor Comm'n, 2009 UT 74, ¶ 18, 223 P.3d 1099, 1103; *see also* Caldwell v. MACO Workers' Comp. Tr., 2011 MT 162, 256 P.3d 923 (coming to a similar result under state equal protection analysis). The Kansas Supreme Court took the opposite view, reversing earlier cases, under federal and state equal protection doctrine. *See* Hoesli v. Triplett, Inc., 361 P.3d 504 (Kan. 2015).

74. *Lucas*, 757 S.W.2d at 692. There are criticisms of caps on noneconomic damages, including their unintended consequences. *See generally* Catherine M. Sharkey, *Unintended Consequences of Medical Malpractice Damages Caps*, 80 N.Y.U. L. REV. 391 (2005) (demonstrating that, among other things, categories of economic and noneconomic damages are subject to "crossover effect," where caps on noneconomic damages lead to larger awards of economic damages).

75. *Best*, 689 N.E.2d at 1075.

76. *Id.* at 1069.

77. *Id.* at 1070; ILL. CONST. art. IV, § 13; *see also infra* notes 80–87 and accompanying text.

78. N. Broward Hosp. Dist. v. Kalitan, 219 So. 3d 49, 59 (Fla. 2017) (per curiam).

> conclude that because there is no evidence of a continuing medical malpractice insurance crisis justifying the arbitrary and invidious discrimination between medical malpractice victims, there is *no rational relationship* between the personal injury noneconomic damage caps in section 766.118 and alleviating this purported crisis.[79]

C. Prohibited Special Laws

By contrast to constitutional provisions that guarantee equality and protect individual rights, bans on special laws operate as a limitation on legislative action itself.[80] In *Best*, the Illinois court stated: "The special legislation clause expressly prohibits the General Assembly from conferring a special benefit or exclusive privilege on a person or a group of persons to the exclusion of others similarly situated."[81] The court linked its interpretation of the special laws ban to equal protection analysis,[82] and it applied a *rational basis* analysis to strike down the noneconomic damage cap.[83]

In 2016, when Oklahoma adopted a workers' compensation "opt-out" law permitting employers to develop their own worker protection programs under statutory guidelines that were substantially less protective than the workers' compensation statute, the Oklahoma Supreme Court struck it down as a prohibited "special law."[84] Article V, section 59 of the Oklahoma Constitution provides: "Laws of a general nature shall have a uniform operation throughout the State, and where a

79. *Id.* (emphasis added). *See generally* Sharkey, *supra* note 74.

80. *Best*, 689 N.E.2d at 1069; WILLIAMS, AMERICAN STATE CONSTITUTIONS, *supra* note 2, at 277–78.

81. *Best*, 689 N.E.2d at 1069.

82. *Id.* at 1108. I have criticized this, see WILLIAMS, AMERICAN STATE CONSTITUTIONS, *supra* note 2, at 213–14, 222–23.

83. For a thorough evaluation of the Pennsylvania special laws prohibition, as well as a proposed alternative to federal equal protection analysis, see Donald Marritz, *Making Equality Matter (Again): The Prohibition Against Special Laws in the Pennsylvania Constitution*, 3 WIDENER J. PUB. L. 161 (1993). *See also* Dan Friedman, *Applying Federal Constitutional Theory to the Interpretation of State Constitutions: The Ban on Special Laws in Maryland*, 71 MD. L. REV. 411 (2012); Justin R. Long, *State Constitutional Prohibitions on Special Laws*, 60 CLEV. ST. L. REV. 719 (2012); Anthony Schutz, *State Constitutional Restrictions on Special Legislation as Structural Restraints*, 40 J. LEGIS. 39 (2013–2014).

84. Vasquez v. Dillard's, Inc., 2016 OK 89, ¶¶ 1, 22, 381 P.3d 768, 770, 773.

general law can be made applicable, no special law shall be enacted."[85] The court stated:

> The statutory language itself demonstrates that injured workers under the Opt Out Act have no protection to the coverage, process, or procedure afforded their fellow employees falling under the Administrative Workers' Compensation Act. There is little question that 203 specifically allows the employers creating their own plans to include conditions for recovery making it more difficult for the injured employee falling within to recover for a work-related injury than a counterpart covered by the Administrative Act.[86]

Then, in 2018, the Oklahoma Supreme Court addressed a provision in the separate Workers' Compensation Act that was enacted together with the Opt-Out Act. It contained a provision deeming operators or owners of oil or gas wells to be (absent an actual employment relationship) an "intermediate or principal employer" of those providing services under different employers, thereby barring common law actions. The court struck this down as a special law:

> The last sentence of § 5(A) carves out a special subclass of employers, specifically oil and gas employers, who are *automatically* deemed principal employers and given immunity in the district court regardless of whether the employer would be considered a principal employer under the facts of the case. All other employers seeking immunity from civil liability under the principal employer doctrine must present factual proof that a statutory employment relationship exists pursuant to the necessary and integral test.
>
> . . . . Without a distinctive characteristic that actually warrants differential treatment, the distinction is considered arbitrary and will not withstand constitutional scrutiny.[87]

85. OKLA. CONST. art. V, § 59; *see* DANNY M. ADKISON & LISA MCNAIR PALMER, THE OKLAHOMA STATE CONSTITUTION: A REFERENCE GUIDE 87 (G. Alan Tarr ed., 2001); *see also* OKLA. CONST. art. III, § 46 (giving a list of subject areas where special laws are prohibited); ADKISON & PALMER, *supra* at 80–81 (giving same).

86. Vasquez v. Dillard's, Inc., 2016 OK 89, ¶ 22, 381 P.3d 768, 770, 773; *see also* Maxwell v. Sprint PCS, 2016 OK 41, ¶ 31, 369 P.3d 1079, 1082.

87. Strickland v. Stephens Prod. Co., 2018 OK 6, ¶¶ 10–11, 411 P.3d 369, 375.

D. Due Process

State due process clauses have been invoked to protect, *inter alia*, civil litigation rights. In Florida, the state legislature imposed a strict fee scale for workers' attorneys in workers' compensation cases, but not for employers' attorneys.[88] This statute eliminated the prior "reasonable attorney's fee" standard and imposed a rigid formula.[89] In *Castellanos v. Next Door Co.*, despite the supposed "no fault" character of workers' compensation, the claimant's lawyer confronted at least twelve defenses and spent over one hundred hours before obtaining a favorable result. Application of the rigid formula resulted in an attorney's fee of $1.53 per hour![90] Characterizing the result of the statutory schedule as an "irrebuttable presumption" of reasonableness, the Florida Supreme Court struck down the "award" as unconstitutional on its face, under both the state and federal due process clauses.[91] The court stated that "in reality, the workers' compensation system has become increasingly complex *to the detriment of the claimant*, who depends on the assistance of a competent attorney to navigate the thicket."[92]

And in *Maxwell v. Sprint PCS*,[93] the Oklahoma Supreme Court held that the deferral of permanent partial disability payments to workers who return to work, under the Administrative Workers' Compensation Act, is both a due process violation under article 2, section 7 of the state constitution and an unconstitutional special law under article 5, section 59.

88. *See* FLA. STAT. ANN. § 440.34 (West 2018).

89. Castellanos v. Next Door Co., 192 So.3d 431, 432, 436 (Fla. 2016).

90. *Id.* at 433, 435.

91. *Id.* at 432 n.1, 449. This additional reliance on the Federal Constitution, without a clear, separate state constitutional analysis, could have opened the decision up to review in the Supreme Court of the United States. *See* Michigan v. Long, 463 U.S. 1032, 1041 (1983); WILLIAMS, AMERICAN STATE CONSTITUTIONS, *supra* note 2, at 122–23, 231.

92. *Castellanos*, 192 So. 3d at 434 (emphasis added); *see also id.* at 434 n.3. The Supreme Court of Oklahoma struck down, as a state constitutional due process/irrebuttable presumption of fraud, a workers' compensation statute barring coverage for cumulative-trauma injury for workers who had not been employed for a continuous 180-day period. Torres v. Seaboard Foods, LLC, 2016 OK 20, ¶¶ 1, 4, 373 P.3d 1057, 1062; *see also* OKLA. CONST. art. II, § 7. The employer argued that a worker was not eligible for compensation or a common law remedy. *Torres*, 2016 OK 20, ¶ 2, 373 P.3d at 1062. The court deemed the provision arbitrary, as both overinclusive and underinclusive for screening fraudulent claims. *Id.* at ¶ 48, 373 P.3d at 1079.

93. 2016 OK 41, ¶ 31, 369 P.3d 1079, 1094.

E. Right to Civil Jury Trial

> Jury trials and access to the courts more generally have sustained unwarranted decades-long attacks. Assaults on these fundamental cornerstones of our civil justice system have not just warped the views of the public and policymakers, but also insinuated themselves into the outlooks of the academy and the judiciary, undermining the fundamental and critically important role that juries and litigation play in securing liberty, equality, and justice.[94]

All state constitutions, other than those of Colorado and Louisiana, protect the right to a civil jury trial.[95]

1. Jury v. Bench Trial

A central jury trial issue is which claims or defenses give rise to a right that they be heard by a jury. For example, despite the article I, section 17 "inviolate" language, the Supreme Court of Oregon held that a party does not have a right to jury trial for claims or defenses that would have been tried to a court of equity in 1857 when the Oregon Constitution was adopted.[96] On the other hand, there is a right to jury trial in cases where this was customary at the time the state constitution was adopted, and in "cases of like nature as they may hereafter arise."[97] The Supreme Court of New Jersey held that modern statutory claims, such as those arising under the state law against discrimination, do not require a right to jury trial.[98] Notably, however, after that ruling the New Jersey Legislature enacted a *statutory* right to jury trial in such cases.[99] The Supreme Court of New Jersey also held that claims against insurance companies for bad-faith refusal to settle claims were, essentially, traditional breach of contract cases that carried a right to jury trial.[100]

94. Peck & Chemerinsky, *supra* note 2, at 490.

95. Robert S. Peck, *Violating the Inviolate: Caps on Damages and the Right to Trial by Jury*, 31 U. DAYTON L. REV. 307, 311 n.30 (2006).

96. McDowell Welding & Pipefitting, Inc. v. U.S. Gypsum Co., 193 P.3d 9, 14 (Or. 2008) (en banc).

97. M.K.F. v. Miramontes, 287 P.3d 1045, 1048 (Or. 2012) (en banc) (quoting State v. 1920 Studebaker Touring Car, 251 P. 701, 704 (Or. 1926) (en banc)).

98. Shaner v. Horizon Bancorp., 561 A.2d 1130, 1141 (N.J. 1989).

99. N.J. STAT. ANN. § 10:5-13 (West 2013).

100. Wood v. New Jersey Mfrs. Ins. Co., 21 A.3d 1131, 1132 (N.J. 2011).

2. Binding Arbitration

In 2013, the Supreme Court of New Jersey struck down a statute that compelled parties seeking damages from public utilities to their underground facilities to submit such claims to binding arbitration.[101] The court concluded that such claims for damages were essentially common law negligence actions, and were therefore guaranteed a right to trial by jury under the New Jersey Constitution.[102] The court explained:

> It is well-established that this protection applies to civil cases only where the right to a jury trial existed at common law and does not normally apply to cases in equity. "Only those actions that triggered the right of a jury trial that predated our State Constitutions, and those that were created anew with [the] enactment of New Jersey's 1776 Constitution, the 1844 Constitution, or the 1947 Constitution serve as the basis for that constitutional right today."[103]

3. Limits on Voir Dire

Article II, section 12 of the New Mexico Constitution provides: "The right to trial by jury as it has heretofore existed shall be secured to all and remain inviolate."[104] That provision applies to both the legislature and the courts. Ordinarily, when it is applied to the legislature, it provides a *facial* limitation on statutes limiting the right to jury trial. It also applies to the judicial branch and restricts it from diminishing the right to trial by jury. When a court deprives a litigant of the benefit of a jury trial, it violates the constitution as clearly as any statute. The difference between the legislature and the courts is that judicial intrusions on the right to jury trial are likely to occur in individual cases and thus be examined as *applied* in any given case.

The history of the right to jury trial in New Mexico and throughout the United States demonstrates full judicial recognition of the importance of assuring that a jury panel is impartial as a whole, and that each

101. Jersey Cent. Power & Light Co. v. Melcar Util. Co., 59 A.3d 561, 575–76 (N.J. 2013) (per curiam).

102. *Id.* at 571; N.J. CONST. art. I, ¶ 9 (amended 1973) ("The right of trial by jury shall remain inviolate . . . .").

103. *Jersey Cent. Power & Light Co.*, 59 A.3d at 568 (citation omitted) (quoting Ins. Co. of N. Am. v. Anthony Amadei Sand & Gravel, Inc., 742 A.2d 550, 554 (N.J. 1999)); *see also* Peck & Chemerinsky, *supra* note 2, at 492 n.9, 493 n.10 (providing sources on the impact of arbitration on civil justice institutions).

104. N.M. CONST. art. II, § 12.

member of a petit jury is impartial. In order for a trial court to assure itself that this critical element of trial by jury is satisfied in a given case, the court must assure that juror biases are adequately explored and that litigants have a fair opportunity to exercise challenges for cause and peremptory challenges. This remains central to fair trials even though the number of them has been shrinking.[105]

In medical malpractice cases, the trial court's refusal to permit plaintiff's counsel to question prospective jurors about the alleged "malpractice crisis," "tort reform" propaganda, and related issues, or to adopt another method of exploring potential juror bias, constitutes a denial of the right to an impartial jury *as a matter of law*.[106] Counsel should be able to ask about prospective jurors' relationship to the medical field, knowledge of the case due to pretrial publicity, attitudes about medical malpractice and about people who sue doctors, relationship to persons disabled by such things as brain injury, and experiences with side effects from prescription drugs.

The contest over "tort reform" has been waged in the forum of public opinion.[107] In a very important study, Stephen Daniels and Joanne Martin observed:

> Tort reform, it now seems, is a permanent fixture of the political agenda. . . . While the reformers are, of course, seeking sympathetic rule-makers and favorable rule changes, they also want to affect the way in which the media, intellectuals, key elites, and ultimately the public at large think about the civil justice system. Consequently, this "war" has always been waged on multiple fronts, in legislatures, in the courts, in elections, in the worlds of various elites, including academe, and in the world of public perception. More than just the formal legal changes it seeks, tort reform has always been about altering the cultural environment surrounding civil litigation—e.g.,

105. *See, e.g.*, Marc Galanter, *The Hundred-Year Decline of Trials and the Thirty Years War*, 57 STAN. L. REV. 1255, 1261–62 (2005).

106. *See* Capoferri v. Children's Hosp. of Phila., 2006 PA Super 16, ¶¶ 14–15, 893 A.2d 133, 142–43.

107. *See* Stephen Daniels & Joanne Martin, "*The Impact That It Has Had Is Between People's Ears:" Tort Reform, Mass Culture, and Plaintiffs' Lawyers*, 50 DEPAUL L. REV. 453 (2001) [hereinafter Daniels & Martin, *The Impact*]. "Tort reform" was even included in the 1994 Republican *Contract With America*. *See id.* at 472. "Isn't it time to clean up the court system? Frivolous lawsuits and outlandish damage awards make a mockery of our civil justice system. Americans spend an estimated $300 billion a year in needlessly higher prices for products and services as a result of excessive legal costs." NEWT GINGRICH ET AL., CONTRACT WITH AMERICA 143 (Ed Gillespie & Bob Schellhas eds., 1994).

> what is perceived as an injury; whether and whom to blame for an injury; what to do about it; and even how to respond to what others (especially plaintiffs and their lawyers) do with regard to naming and blaming. The best evidence of this is found in the various public relations campaigns used by the reform interests since at least the 1970s to persuade people that the reformers' vision of civil litigation is the true rendition, and should guide both policy-makers and ordinary people (especially if they serve on a jury).[108]

Daniels and Martin evaluated the public relations campaigns for "tort reform" (i.e., against tort litigation) and noted one conclusion was that it potentially poisoned jury pools.[109] Plaintiffs' lawyers[110] and defense lawyers[111] are aware of this probability. A way for plaintiffs' lawyers to counter this misinformation is through effective, case-specific voir dire.[112]

A Washington court of appeals's medical malpractice decision, *Lopez-Stayer v. Pitts*,[113] is instructive. The trial court permitted inquiry on voir dire into "jurors' attitudes on medical malpractice litigation, the medical malpractice 'crisis,' claims, and frivolous lawsuits."[114] In upholding this line of questioning, the court acknowledged the difficulty of reviewing the trial court's management of voir dire "because of the nuances and subtleties presented by each jury case,"[115] but concluded that

108. Daniels & Martin, *The Impact*, *supra* note 107, at 453. *See generally* STEPHEN DANIELS & JOANNE MARTIN, CIVIL JURIES AND THE POLITICS OF REFORM (1995) [hereinafter DANIELS & MARTIN, CIVIL JURIES]; Stephen Daniels & Joanne Martin, *Where Have All the Cases Gone? The Strange Success of Tort Reform Revisited*, 65 EMORY L.J. 1445, 1468–72 (2016) [hereinafter Daniels & Martin, *Strange Success*]; David A. Logan, *Juries, Judges and the Politics of Tort Reform*, 83 U. CIN. L. REV. 903, 931 (2015).

109. Daniels & Martin, *The Impact*, *supra* note 107, at 472–73, 472 n.78.

110. *Id.* at 455–56, 473.

111. *Id.* at 473.

112. *Id.* at 473–74; James Gilbert, Stuart Ollanik & David Wenner, *Overcoming Juror Bias in Voir Dire*, TRIAL, July 1997, at 42.

113. 93 P.3d 904 (Wash. Ct. App. 2004).

114. *Id.* at 905.

115. *Id.* at 907.

"[t]he test is whether the court permitted the plaintiff here to ferret out bias and partiality."[116]

Two other important scholars have contended that "the identification of potential biases in prospective jurors is one of the most important tasks in the trial."[117] Such biases can be particularly important in medical malpractice cases, and therefore, trial court methods of choosing an impartial jury must be attentive to "case-specific" factors: "If a hospital patient is suing a surgeon for medical malpractice, attitudes toward authority figures and especially the medical profession become salient."[118] The Florida courts have, in numerous instances, overturned trial courts' arbitrary voir dire time limits of forty-five or thirty minutes.[119]

4. Right to Jury Trial and Damage Caps

When various "tort reform" measures included caps on, most commonly, noneconomic damages, challenges were brought based on the state constitutional guarantee that the right to a jury trial in civil litigation must remain "inviolate."[120] The Oregon Supreme Court ruled in *Lakin v. Senco Products, Inc.*,[121] that such a damage cap was unconstitutional as violative of the successful plaintiffs' jury trial rights. The court reviewed the origins of the right to jury trial in civil cases, dating from England, and concluded that the jury's fact-finding function included a full assessment of damages, including noneconomic

116. *Id.* at 908. *See also* Kozlowski v. Rush, 828 P.2d 854, 859–62 (Idaho 1992) (approving voir dire questions concerning the "malpractice crisis" in childbirth medical malpractice case); Borkoski v. Yost, 594 P.2d 688, 694 (Mont. 1979) (permitting questions on voir dire about potential jurors' views of the effects of jury awards on insurance rates); Capoferri v. Children's Hosp. of Phila., 2006 PA Super 16, 893 A.2d 133 (upholding questions about knowledge of "tort reform"); Hyundai Motor Co. v. Vasquez, 189 S.W.3d 743, 752–53 (Tex. 2006) (contrasting improper questions about the weight potential jurors will place on certain evidence from proper questions "about bias or prejudice resulting from a societal influence outside the case—namely, tort reform"); Barrett v. Peterson, 868 P.2d 96, 101 (Utah Ct. App. 1993) (holding that in medical malpractice cases, plaintiff's counsel must be permitted to inquire into potential jurors' exposure generally to "tort reform" propaganda to uncover not only actual, but also subconscious, bias even "absent any particular showing of specific campaigns, advertisements, or literature offered for the purpose of showing potential prejudice" in order to exercise peremptory challenges).

117. AMY J. POSEY & LAWRENCE S. WRIGHTSMAN, TRIAL CONSULTING 157 (2005).

118. *Id.* at 160; *see also id.* at 172 ("[I]t seems plausible that jurors can be distinguished on the basis of a *tendency* to favor patients or to favor doctors.").

119. *See* Roberts v. State, 937 So. 2d 781, 784–85 (Fla. Dist. Ct. App. 2006) (finding improper time limit on voir dire questioning without advanced notice to attorneys); Carver v. Niedermayer, 920 So. 2d 123, 124–25 (Fla. Dist. Ct. App. 2006) (discussing similar cases).

120. *See* Peck, *supra* note 95, at 311–12.

121. 987 P.2d 463, 473–74, *modified*, 987 P.2d 476 (Or. 1999), *overruled by* Horton v. Oregon Health & Sci. Univ., 376 P.3d 998 (Or. 2016) (date interest accrues).

damages, and the statutory cap was an unconstitutional violation of the right to jury trial.[122]

Importantly, in the 2016 decision in *Horton v. Oregon Health & Science University*,[123] the Oregon Supreme Court also overruled *Lakin*:

> [W]e conclude that *Lakin* should be overruled. The text of Article I, section 17, its history, and our cases that preceded *Lakin* establish that Article I, section 17, guarantees litigants a procedural right to have a jury rather than a judge decide those common-law claims and defenses that customarily were tried to a jury when Oregon adopted its constitution in 1857, as well as those claims and defenses that are "of like nature." However, that history does not demonstrate that Article I, section 17, imposes a substantive limit on the legislature's authority to define the elements of a claim or the extent of damages available for a claim.[124]

The Supreme Court of Kansas also upheld a statute that required the court, rather than the jury, to determine the amount of punitive damages.[125] Plaintiffs argued that at common law, the amount of punitive damages was a factual issue for the jury, but the court held it was not a "cause of action," and that because there was no right to punitive damages, and the legislature could abolish punitive damages, it could require the court to determine the amount of such damages.[126] The jury trial clause still invalidates damage caps in other states.[127]

5. "Reexamination" of Facts Found by Juries

The Seventh Amendment provides, in part, 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."[128] Two states, Oregon and West Virginia, have similar provisions in their constitutions.

122. *Lakin*, 987 P.2d at 468–73; *see also* Sofie v. Fireboard Corp., 771 P.2d 711, 716, 721–22 (Wash.) (en banc), *amended by* 780 P.2d 260 (Wash. 1989).

123. 376 P.3d 998 (Or. 2016). *See supra* notes 34–41 and accompanying text. For an analysis critiquing the *Horton* decision, see Eiva, *supra* note 34.

124. *Horton*, 376 P.3d at 1044.

125. Smith v. Printup, 866 P.2d 985, 997–98 (Kan. 1993); *see* 1 FRIESEN, *supra* note 58, at 6–19 n.84.

126. *Smith*, 866 P.2d at 992–94.

127. *See, e.g.*, Watts *ex rel.* Watts v. Lester E. Cox Med. Ctrs., 376 S.W.3d 633, 636, 640 (Mo. 2012) (en banc); *Sofie*, 771 P.2d at 712.

128. U.S. CONST. amend. VII.

Oregon's clause, urged by populists and adopted in 1910, states "[i]n actions at law . . . no fact tried by a jury shall be otherwise re-examined in any court of this state, unless the court can affirmatively say there is no evidence to support the verdict."[129] This provision was added to the constitution by initiative in 1910, to supplement the original 1857 guarantee that the right to civil jury trial would remain "inviolate."[130] Oregon's "strict constitutional preference for finality in jury findings of fact" seems to have been "meant to inhibit trial courts from setting aside judgments and granting new trials whenever the court believed the verdict was excessive."[131] The *Lakin* decision had placed partial reliance on the re-examination clause in striking down a damage cap, but the recent *Horton* case also overturned this holding:

> [T]he part of Article VII (Amended), section 3, on which plaintiff relies was directed at a specific practice—a trial court's decision to grant a new trial because the court concluded that the verdict was contrary to the weight of the evidence.
>
> That practice is not present here. In applying the statutory limit on damages, the trial court was not "reexamining" a fact found by the jury, determining that the fact was contrary to the weight of the evidence, and granting a new trial for that reason. Rather, the court was applying a legal limit, expressed in the statute, to the facts that the jury had found. Article VII (Amended), section 3, does not prohibit courts from applying the law to the facts.[132]

To the extent that trial judges are seen as being too liberal in granting *remittitur* (*additur* is much rarer), a provision such as Oregon's can be a powerful tool. But post-*Horton* it cannot be invoked to invalidate legislatively enacted limits on damages.

Notably, however, The U.S. Supreme Court declared Oregon's reexamination clause partially unconstitutional in 1994, under the Supremacy Clause, to the extent it purported to bar a reexamination of *punitive damages* under Federal Constitutional substantive due process standards.[133]

129. OR. CONST. art. VII, § 3.
130. *Id.* art. I, § 17.
131. 1 FRIESEN, *supra* note 58, at 6–24.
132. Horton v. Or. Health & Sci. Univ., 376 P.3d 998, 1045–46 (Or. 2016).
133. Honda Motor Co. v. Oberg, 512 U.S. 415, 432 (1994). *See also infra* notes 151–61 and accompanying text.

West Virginia's reexamination clause provides that "[n]o fact tried by a jury shall be otherwise reexamined in any case than according to rule of court or law."[134] Attempts were made in 1991[135] and 2011[136] to invoke the state's re-examination clause to invalidate legislative caps on noneconomic damages in medical malpractice cases, but the state's supreme court of appeals held, *inter alia*, that the provision was a limitation on the judiciary, not the legislature, and could not be used to challenge the damage cap.

F. Miscellaneous State Constitutional Protections of Civil Litigation

Over the years, a number of states have inserted specific protections for aspects of civil litigation in their state constitutions. For example, Arizona's Constitution provides in article 18, section 6 that "[t]he right of action to recover damages for injuries shall never be abrogated, and the amount recovered shall not be subject to any statutory limitation."[137] Interestingly, the Arizona Constitution also provides a separate level of protection in article 2, section 31, providing: "No law shall be enacted in this state limiting the amount of damages to be recovered for causing the death or injury of any person."[138] These two sections have been "much-litigated"[139] and the Arizona Supreme Court has held that article 18, section 6 is "more specific and stronger" than open court or right-to-remedy clauses.[140] That provision is also broader in that it not only protects the cause of action itself from being "abrogated," but also bars any statutes limiting damages.[141] Further, the supreme court has stated:

134. W. VA. CONST. art. III, § 13.

135. Robinson v. Charleston Area Med. Ctr., Inc., 414 S.E.2d 877, 887–88 (W. Va. 1991), *cited in Horton*, 376 P.3d at 1043 n.45.

136. MacDonald v. City Hosp., Inc., 715 S.E.2d 405, 415 (W. Va. 2011) (challenging limits on medical malpractice damages).

137. ARIZ. CONST. art. XVIII, § 6. *See generally* JOHN D. LESHY, THE ARIZONA STATE CONSTITUTION: A REFERENCE GUIDE 310 (G. Alan Tarr ed., 1993).

138. ARIZ. CONST. art. II, § 31; LESHY, *supra* note 137, at 81.

139. LESHY, *supra* note 137, at 310.

140. Kenyon v. Hammer, 688 P.2d 961, 965–66 (Ariz. 1984) (en banc). *See generally* Watts v. Medicis Pharm. Corp., 365 P.3d 944, 952 (Ariz. 2016) (rejecting claim that the common law "learned intermediary" doctrine violated anti-abrogation clause); Roger C. Henderson, *Tort Reform, Separation of Powers, and the Arizona Constitutional Convention of 1910*, 35 ARIZ. L. REV. 535, 578 (1993).

141. *See* Cronin v. Sheldon, 991 P.2d 231, 239–40 (Ariz. 1999) (en banc) (the two provisions are slightly distinct, lest one be rendered superfluous).

> We conclude, simply, that where dealing with a right to recover damages originating exclusively in a statute, the legislature may, notwithstanding the non-limitation provisions, constitutionally restrict a *remedy* or a *theory of recovery*. The governmental power to do so is more persuasive when the cause of action, as here, is not protected by the anti-abrogation clause.[142]

Therefore, the legislature may not abrogate a common law claim but may regulate such claims.[143]

Other states have multiple provisions protecting civil litigation in state courts. For example, Kentucky's Constitution has not only a "right-to-remedy" provision[144] but also two more provisions protecting the causes of action for negligence or wrongful act,[145] as well as barring legislation limiting damages for death or injury.[146] The then Kentucky Court of Appeals, and now Supreme Court, has struck down statutes of repose under these state constitutional protections of civil litigation.[147] Construing section 241 as early as 1911, the Kentucky court stated: "[I]t is not within the power of the Legislature to deny this right of action. The section is as comprehensive as language can make it. The words 'negligence' and 'wrongful act' are sufficiently broad to embrace every degree of tort that can be committed against the person."[148]

The Oklahoma Constitution provides that the defense of assumption of risk shall be a fact question "left to the jury."[149] State constitutions have formed the basis for challenging limitations on civil

142. *Id.* at 240.

143. *Id.* at 240–41; *see also* Nunez v. Prof'l Transit Mgmt. of Tucson, Inc., 271 P.3d 1104, 1110 (Ariz. 2012) (en banc). These provisions are not violated by new statutory causes of action, such as wrongful employment termination in violation of public policy, providing exclusive remedies. *Cronin*, 991 P.2d at 240. A products-liability statute of repose, however, was struck down as violating the Anti-Abrogation Clause. Hazine v. Montgomery Elevator Co., 861 P.2d 625, 626–30 (Ariz. 1993) (en banc); *see also* Baker v. Univ. Physicians Healthcare, 296 P.3d 42, 50–51 (Ariz. 2013) (en banc).

144. KY. CONST. § 14.

145. *Id.* § 241.

146. *Id.* § 54; *see also* PA. CONST. art. III, § 18.

147. Perkins v. Ne. Log Homes, 808 S.W.2d 809, 814–15 (Ky. 1991); Saylor v. Hall, 497 S.W.2d 218, 225 (Ky. 1973). *See generally* ROBERT M. IRELAND, THE KENTUCKY STATE CONSTITUTION: A REFERENCE GUIDE 202–03 (G. Alan Tarr ed., 1999).

148. Britton's Adm'r v. Samuels, 136 S.W. 143, 144 (Ky. 1911) (quoting Howard's Adm'r v. Hunter, 104 S.W. 723, 724 (1907)).

149. OKLA. CONST. art. XXIII, § 6. *See* Reddell v. Johnson, 1997 OK 86, ¶¶ 12–13, 942 P.2d 200, 203; *see also* MONT. CONST. art. II, § 16; Connery v. Liberty Nw. Ins., Corp., 1998 MT 125, ¶¶ 11–12, 960 P. 2d 288, 290; Trankel v. State, Dep't. of Military Affairs, 938 P.2d 614, 621 (Mont. 1997).

litigation in state courts, including the wide variety of "tort reform" measures. This litigation has resulted in a rich body of law that is unrecognizable under the Federal Constitution.[150]

VI. LIMITATIONS ON PUNITIVE DAMAGES

For most of the history of civil litigation in America, "exemplary," or punitive, damages assessed by juries were relatively unregulated except by an "excessiveness" standard. Beginning in the 1980s, several justices of the United States Supreme Court began to express concern about excessive punitive damage awards by state juries.[151] Then, in 1991, the Court confronted the issue directly.[152] It declined to hold that the relatively unfettered *process* by which punitive damages were determined constituted a violation of the Federal Due Process Clause, examined Alabama's process in upholding a punitive damage award of more than four times the compensatory damages, and concluded that there was no due process violation.[153] In 1993 a plurality of the Court declined to establish a "mathematical bright line," and upheld a punitive damage award that was 526 times the compensatory damages against a claim that it was "grossly excessive" in violation of the defendant's federal substantive due process rights.[154] Actual damages were minimal, but the defendant had engaged in egregious and dishonest behavior.

In 1996, however, the Court took up the issue again. In *BMW of North America, Inc. v. Gore*,[155] the Court held that it was beyond a state court's authority to assess punitive damages to deter misconduct in other states.[156] Justice Stevens noted:

> [B]y attempting to alter BMW's nationwide policy, Alabama would be infringing on the policy choices of other States. To avoid such encroachment, the economic penalties that a State such as Alabama inflicts on those who transgress its laws, whether the penalties take the form of legislatively authorized fines or judicially imposed punitive damages, must be supported

150. *See generally* Robert F. Williams, *Foreword: Tort Reform and State Constitutional Law*, 32 RUTGERS L.J. 897 (2001); John Fabian Witt, *The Long History of State Constitutions and American Tort Law*, 36 RUTGERS L.J. 1159 (2005).

151. Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 281–83 (1989) (Brennan, J., concurring); Bankers Life & Cas. Co. v. Crenshaw, 486 U.S. 71, 87–88 (1988) (O'Connor, J., concurring in part).

152. Pacific Mut. Life Ins. v. Haslip, 499 U.S. 1, 7–12 (1991).

153. *Id.* at 18–24.

154. TXO Prod. Corp. v. All. Res. Corp., 509 U.S. 443, 458, 480 (1993) (plurality opinion).

155. 517 U.S. 559 (1996).

156. *Id.* at 572–73.

> by the State's interest in protecting its own consumers and its own economy. Alabama may insist that BMW adhere to a particular disclosure policy in that State. Alabama does not have the power, however, to punish BMW for conduct that was lawful where it occurred and that had no impact on Alabama or its residents. Nor may Alabama impose sanctions on BMW in order to deter conduct that is lawful in other jurisdictions.[157]

The Court accepted, however, the state court's *remittitur* to delete the amount of punitive damages attributable to BMW's out-of-state activities.[158] It went on to evaluate the award that was five hundred times the compensatory damages and, based on its assessment of the "degree of reprehensibility," the ratio of punitive to compensatory damages, and sanctions for comparable conduct, concluded that the award of punitive damages was a due process violation.[159] The Court still did not provide a bright-line test.

In 2003, in a case alleging bad-faith failure to settle an insurance claim,[160] the Court made the following observation in again striking down an excessive punitive damage award:

> We decline again to impose a bright-line ratio which a punitive damages award cannot exceed. Our jurisprudence and the principles it has now established demonstrate, however, that, in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process. . . . While these ratios are not binding, they are instructive. They demonstrate what should be obvious: Single-digit multipliers are more likely to comport with due process, while still achieving the State's goals of deterrence and retribution, than awards with ratios in range of 500 to 1, or, in this case, of 145 to 1.[161]

Consequently, punitive damage awards in state courts are now potentially reviewable on appeal under the United States Supreme Court's still-blurry guidelines.

157. *Id.* at 572–73.
158. *Id.* at 573–74.
159. *Id.* at 574, 582.
160. State Farm Mut. Auto. Ins. v. Campbell, 538 U.S. 408, 413–14 (2003).
161. *Id.* at 425 (citation omitted).

VII. MAJORITARIAN JUDICIAL REVIEW

Virtually all of the statutory limitations on the procedure and substance of civil litigation, in the area of torts and workers' compensation, can be seen as "special interest" or "rent-seeking" legislation.[162] The defense bar, insurance companies, and other defense-oriented actors participating in the civil justice system seem to have inordinate influence in many state legislatures. This influence has resulted in a host of limitations such as damage caps, limitations on attorneys' fees, erosion of workers' compensation benefits, mandatory defense-favoring alternative dispute resolution mechanisms, etc. Many of these can be seen as within the legitimate sphere of legislative authority over important aspects of state civil litigation. On the other hand, as outlined in this paper, there are a number of important state constitutional *limitations* on legislative (and judicial) discretion when it comes to the area of civil litigation.

When litigation is brought challenging limits on civil litigation, there is an important "big picture" element to be remembered. While defenders of limitations on civil litigation will accuse judges engaging in judicial review under their state constitutions of bringing in a new "*Lochner* era," that is simply not the case.[163] Actually, the *Lochner* era involved courts striking down majoritarian-protective statutes in favor of special interests. The type of litigation described herein, by contrast, involves state judicial review of special interest legislation, for the benefit of the majority! In the words of the editors of the *Harvard Law Review*:

> Both courts and commentators have largely ignored the possibility that judicial review might play a radically different role—that of safeguarding the interests of *majorities*. State constitutional law could be dramatically divorced from its federal counterpart if state courts were to reconceive their purpose in terms of elaborating and employing a theory of majoritarian, rather than antimajoritarian, review. In fact, there is reason to believe that state courts already have undertaken something very much like

162. Jane S. Schacter, *Metademocracy: The Changing Structure of Legitimacy in Statutory Interpretation*, 108 HARV. L. REV. 593, 638–39, 639 n.243 (1994); *see also* Williams, *Race to the Bottom*, *supra* note 4.

163. *See generally* Lochner v. New York, 198 U.S. 45 (1905); Robert G. McCloskey, *Economic Due Process and the Supreme Court: An Exhumation and Reburial*, 1962 SUP. CT. REV. 34 (1962).

> this change of direction in one area: the review of economic regulation.[164]

This form of "majoritarian judicial review," protecting the broad public interest, by contrast to *Lochner*-era judicial protection of special interests, is most evident in the sustained state-court review of state economic and regulatory enactments.[165] State decisions striking down statutes barring advertisement of drug prices, prohibiting insurance agents from discounting their commissions, and "fair trade" laws that limit price competition are all examples of judicial review benefitting the *majority* of the public. The kinds of cases described in this paper also fit that description.[166]

Lawyers seeking to protect civil litigation in state courts by relying on a variety of state constitutional provisions, and judges deciding such cases, should keep this important distinction in mind. In addition, as Professor and then Justice, Hans Linde has pointed out, provisions such as those discussed herein were the result of *political decisions* by the voters of the states at referenda to include them in the text of the state constitutions.[167] They are not, therefore, the product of "judicial activism," where judges can be accused of "making up" interpretations of vague constitutional provisions. The states' voters have *mandated* judicial review under these provisions.

Finally, most of the relevant judicial provisions should be seen as "great ordinances," which by their terms call for flexible judicial review.[168]

VIII. CONCLUSION

Hopefully, this brief survey of the reasons why state constitutions provide the primary protections for civil litigation; the kinds of specific state constitutional provisions that can, and do, protect civil litigation processes; and the contexts in which such provisions can be brought to bear on limitations on access to civil litigation remedies will bring greater visibility to these matters. There are powerful economic interests with a stake in pushing through a variety of policies limiting access to civil

164. *Developments in the Law: The Interpretation of State Constitutional Rights*, 95 HARV. L. REV. 1324, 1498–99 (1982); *see also* WILLIAMS, AMERICAN STATE CONSTITUTIONS, *supra* note 2, at 191–92.

165. WILLIAMS, AMERICAN STATE CONSTITUTIONS, *supra* note 2, at 33–34, 190–92.

166. ROBERT F. WILLIAMS & LAWRENCE FRIEDMAN, STATE CONSTITUTIONAL LAW: CASES AND MATERIALS 236–46 (5th ed. 2015).

167. Sterling v. Cupp, 625 P.2d 123, 129 (Or. 1981) (en banc).

168. WILLIAMS, AMERICAN STATE CONSTITUTIONS, *supra* note 2, at 336.

litigation. While a number of these do not raise state constitutional issues, a surprising number do raise such concerns.