

2012

## *Lebron v. Gottlieb Memorial Hospital: Why the Court Erred in Finding that Caps on Jury Awards Violate Separation of Powers*

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### Recommended Citation

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# Note

## *Lebron v. Gottlieb Memorial Hospital: Why the Court Erred in Finding that Caps on Jury Awards Violate Separation of Powers*

*Ryan Kenneth June* \*

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\* Loyola University Chicago School of Law, J.D. expected May 2012. I would like to thank Jesus Christ, my Lord and Savior, for His grace, provision, and unconditional sacrifice. I also thank my family, especially my wife, Heather, and my parents, Ken and Shirley, for their support, love, and encouragement. Finally, thank you to the editorial board and members of the *Loyola University Chicago Law Journal* for their work on this Article. The insight and criticisms that all of you provided were invaluable throughout the editing process.

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## I. INTRODUCTION

Medical malpractice liability jury awards have soared in recent years and have contributed to a serious health care crisis: costs of care are increasing while the availability and quality of care are decreasing.<sup>1</sup> From 1997 to 2006, the median jury award in medical malpractice cases

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1. AM. MED. ASSOC., MEDICAL LIABILITY REFORM—NOW! 3–7 (2008), available at <http://www.ama-assn.org/resources/doc/arc/mlr-now.pdf> [hereinafter REFORM NOW]; see also Act of Aug. 25, 2005, Pub. Act 94-677, 2005 Ill. Laws 4964, invalidated by *Lebron v. Gottlieb Mem'l Hosp.*, 930 N.E.2d 895 (Ill. 2010); *infra* notes 4–5 (describing the increasing cost of medical malpractice liability and the challenges that such costs impose on the health care system). The cost of health insurance has made it impossible or impracticable for millions of Americans to purchase insurance. Zachary J. Houghton, *Treating America's Ailing Healthcare System: Is the Illinois Covered Act a Panacea for America's Uninsured Poor?*, 58 DEPAUL L. REV. 759, 765 (2009). In 2006, forty-seven million Americans did not have insurance for the entire year. *Id.* At the same time, many doctors are facing serious financial problems that threaten their ability to practice. Parija Kavilanz, *Doctors Going Broke*, CNNMONEY (Jan. 5 2012), [http://money.cnn.com/2012/01/05/smallbusiness/doctors\\_broke/index.htm?hpt=hp\\_t3&hpt=hp\\_c1](http://money.cnn.com/2012/01/05/smallbusiness/doctors_broke/index.htm?hpt=hp_t3&hpt=hp_c1).

in the United States more than tripled, swelling from \$157,000 to \$487,500.<sup>2</sup> Unfortunately, Illinois has not been spared from this increasing malpractice liability problem.<sup>3</sup> Moreover, this is not a recent phenomenon.<sup>4</sup> Over the last forty years, medical malpractice liability costs and insurance premiums have increased significantly.<sup>5</sup> As the result of growing potential jury awards, there is even greater incentive for frivolous lawsuits, and many claims are filed without merit.<sup>6</sup> Because of the increasing costs that medical malpractice lawsuits are imposing on the health care system, Illinois needs liability reform to stop this trend.<sup>7</sup>

Opponents of limiting malpractice liability argue that there is no proven correlation between limiting such liability and overall health

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2. NAT'L ASSOC. OF SPINE SPECIALISTS, POSITION STATEMENT ON MEDICAL LIABILITY REFORM 2 (2010), available at [http://www.spine.org/Documents/Position\\_Statement\\_Liability\\_Reform.pdf](http://www.spine.org/Documents/Position_Statement_Liability_Reform.pdf).

3. See Carolyn Victoria J. Lees, *The Inevitable Reevaluation of Best v. Taylor in Light of Illinois' Health Care Crisis*, 25 N. ILL. U. L. REV. 217, 218 (2005) ("While the average jury verdict award in Cook County in 1998 was \$1.07 million, the average verdict jumped to \$4.45 million in 2003. Even more astounding is the fact that the average pain and suffering award in Cook County was \$3.12 million in 2003."). From 1998 to 2003, there was a 415% increase in noneconomic damages in Cook County. Robert M. Ackerman, *Medical Malpractice: A Time for More Talk and Less Rhetoric*, 37 MERCER L. REV. 725, 746 (1986).

4. REFORM NOW, *supra* note 1, at 4; Jane C. Arancibia, *Statutory Caps on Damage Awards in Medical Malpractice Cases*, 13 OKLA. CITY U. L. REV. 135, 136 (1988). In the 1970s, the health care system faced challenges both in availability and affordability, and the 1980s brought instability and uncertainty as premiums drastically increased for liability insurance, making health care less affordable and causing specialists to cut back on many risky procedures. REFORM NOW, *supra* note 1, at 9; see also Arancibia, *supra*, at 139 (arguing that it is inaccurate to characterize the 1980s as a crisis of affordability when the prohibitive cost of insurance made it practically unavailable).

5. Arancibia, *supra* note 4, at 137 (citing Patricia M. Danzon et al., *The Frequency and Severity of Medical Malpractice Claims: New Evidence*, 49 LAW & CONTEMP. PROBS. 57, 60 (1986)). The frequency and number of medical malpractice claims increased drastically from 1978 to 1984. *Id.* at 138. The leading medical malpractice insurance company reported a fifty-five percent increase in total number of claims from 1980 to 1984. *Id.* Additionally, the St. Paul Fire & Marine Insurance Company reported that from 1969 to 1974 it saw the number of claims increase from one claim for every twenty-three physicians to one claim for every ten physicians. Danzon, *supra*, at 57. The average amount of claims went from \$6,075 in 1969 to \$12,534 in 1975. *Id.*

6. REFORM NOW, *supra* note 1, at 6 (citing David M. Studdert, et. al., *Claims, Error, and Compensation Payments in Medical Malpractice Litigation*, 354 N. ENG. J. MED. 2024, 2024-33 (2006)). Research has shown that forty percent of closed claims are without merit (thirty-seven percent did not involve medical error and three percent did not even involve injury). *Id.*

7. See Dennis Byrne, *Supreme Court Sets Bad Public Policy*, CHI. TRIB., Feb. 9, 2010, at 15 (stating that the sky is the limit on damages in medical malpractice cases and that exorbitantly high awards are problematic in Illinois); see also *infra* note 18 (describing how malpractice liability caps have helped the health care system).

care costs or quality.<sup>8</sup> Although there is no consensus, there is research suggesting that such a correlation exists.<sup>9</sup> Moreover, whether or not there is a statistically significant relationship, the increasing severity and frequency of medical malpractice suits have unquestionably caused liability insurance rates to rise and forced physicians to practice “defensive medicine.”<sup>10</sup> Some physicians refuse to perform risky surgeries in order to avoid these costs; others simply close their practices or choose to see more patients each day to ensure they can afford rising malpractice insurance premiums.<sup>11</sup> Although there are other factors contributing to the health care crisis,<sup>12</sup> reducing malpractice liability would cut out some costs that are driving it.<sup>13</sup>

Fortunately, many states have acted to ameliorate this growing crisis by instituting caps on certain damages.<sup>14</sup> Over half of the fifty states have enacted caps on jury awards of damages in medical malpractice cases,<sup>15</sup> and since the damages crisis began, forty-nine states have

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8. See, e.g., Emily Chow, *Health Courts: An Extreme Makeover of Medical Malpractice With Potentially Fatal Complications*, 7 YALE J. HEALTH POL’Y, L. & ETHICS 387, 417 (2007) (arguing that reducing malpractice premiums does not seem to have a significant effect on the affordability of health care); Marc Galanter, *Real World Torts: An Antidote to Anecdote*, 55 MD. L. REV. 1093, 1143 (1996) (arguing that malpractice liability is not likely a significant contributor to rising health care costs because it accounts for less than one percent of total national spending on health care); Collin Sult, *Questionable Medicine—Why Federal Medical Malpractice Reform May Be Unconstitutional*, 47 ARIZ. L. REV. 195, 202 n.58 (2005) (citing H.R. REP. NO. 108–32, pt. 1, at 237–66 (2003), which discussed numerous studies that show there is no correlation between limits on liability and health care costs).

9. Thomas P. Hagen, “*This May Sting a Little*”—*A Solution to the Medical Malpractice Crisis Requires Insurers, Doctors, Patients, and Lawyers to Take Their Medicine*, 26 SUFFOLK U. L. REV. 147, 147–48 nn.1–7 (1992) (citing numerous studies that argue both in favor of and against tort reform).

10. *Id.* at 147; Alec Shelby Bayer, Comment, *Looking Beyond the Easy Fix and Delving Into the Roots of the Real Medical Malpractice Crisis*, 5 HOUS. J. HEALTH L. & POL’Y 111, 114 (2005).

11. REFORM NOW, *supra* note 1, at 10; Bayer, *supra* note 10, at 114.

12. See Bayer, *supra* note 10, at 121 (arguing that the government has oversimplified the health care crisis, blaming it all on exorbitant jury awards and narrowly arguing for damage caps).

13. Act of Aug. 25, 2005, Pub. Act 94-677, § 101, 2005 Ill. Laws 4964, 4964, *invalidated by* *Lebron v. Gottlieb Mem’l Hosp.*, 930 N.E.2d 895 (Ill. 2010); see also *supra* notes 1–5 and accompanying text (discussing the problem with growing jury awards and the benefits experienced by states who have instituted caps on damages).

14. See, e.g., COLO. REV. STAT. § 13-64-302 (2011) (limiting total damages for a single course of medical care against a health care professional to \$1,000,000.00 and limiting noneconomic damages in such cases to \$250,000.00); VA. CODE ANN. § 8.01-581.15 (2011) (limiting total damages in any medical malpractice verdict to \$1,500,000.00 with a \$50,000.00 increase in the cap each year starting July 1, 2000).

15. David A. Hyman and Charles Silver, *Medical Malpractice Litigation and Tort Reform: It’s the Incentives, Stupid*, 59 VAND. L. REV. 1085, 1091 (2006). Almost thirty states have some kind of cap on damages in medical liability actions. AM. MED. ASSOC., CAPS ON DAMAGES

enacted laws that are intended to reduce costs related to medical malpractice liability.<sup>16</sup> Opponents of caps argue that they are insufficient to control the cost of liability insurance and ensure adequate health care.<sup>17</sup> However, states that limit damages have experienced lower costs of malpractice liability insurance, lower medical expenditures, and increased availability of health care services.<sup>18</sup> It seems likely, then, that limiting medical malpractice jury awards in Illinois would effectively improve the availability and quality of health care.

Recognizing the damages crisis facing Illinois and the efficacy of limiting medical malpractice jury awards, the Illinois General Assembly has enacted damage caps three times, but in each case the Illinois Supreme Court found the caps unconstitutional.<sup>19</sup> This Note examines

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(2011), available at <http://www.ama-assn.org/resources/doc/arc/capsdamages.pdf> [hereinafter CAPS ON DAMAGES].

16. Carrie Lynn Vine, *Addressing the Medical Malpractice Insurance Crisis: Alternatives to Damage Caps*, 26 N. ILL. U. L. REV. 413, 420, 436 (2006).

17. Melissa C. Gregory, Note, *Capping Economic Damages in Medical Malpractice Suits is Not the Panacea of the "Medical Liability Crisis,"* 31 WM. MITCHELL L. REV. 1031, 1044-45 (2005); Michael S. Kenitz, *Wisconsin's Caps on Noneconomic Damages in Medical Malpractice Cases: Where Wisconsin Stands (And Should Stand) on "Tort Reform,"* 89 MARQ. L. REV. 601, 622 (2006).

18. REFORM NOW, *supra* note 1, at 9 (citing Office of the Assistant Sec'y for Planning and Evaluation, U.S. Dep't of Health and Human Servs., Special Update on Med. Liability Crisis (2002), available at <http://aspe.hhs.gov/daltcp/reports/mlupd1.htm>). The Department of Health and Human Services found that states without limits on noneconomic damages experienced significantly larger increases in liability insurance rates. *Id.* at 5. A study by Stanford University found malpractice liability reforms such as caps on noneconomic damages reduced the probability of a doctor being sued by 2.1 percent. REFORM NOW, *supra* note 1, at 12. (citing Daniel P. Kessler & Mark B. McClellan, *The Effects of Malpractice Pressure and Liability Reforms on Physicians' Perceptions of Medical Care*, LAW & CONTEMP. PROBS. 81-106 (1997)). Further, the same research shows that states that enacted these reforms saw an 8.4 percent decrease in liability insurance premiums within three years of enacting them. *Id.* Even the Congressional Budget Office found that caps on noneconomic damages are extremely effective in reducing both the amount of claims paid and medical liability insurance premiums. REFORM NOW, *supra* note 1, at 14 (citing Cong. Budget Office, Preliminary Cost Estimate, H.R. 4250, Patient Protection Act of 1998 (1998), available at <http://www.cbo.gov/ftpdocs/7xx/doc701/hr4250.pdf>). Similarly, reforms have been shown to significantly reduce medical expenditures. REFORM NOW, *supra* note 1, at 14 (citing Daniel P. Kessler & Mark B. McClellan, *Do Doctors Practice Defensive Medicine?*, 445 Q. J. OF ECON. 353, 353-390 (1996), available at <http://www.nber.org/papers/w5466.pdf>). Finally, states that have enacted malpractice liability reforms show an increased availability of health care. *Id.* (citing William E. Encinosa & Fred Hellinger, *Have State Caps on Malpractice Awards Increased The Supply of Physicians?*, HEALTH AFFAIRS, May 31, 2005, at W5-250-W5-W258, available at <http://content.healthaffairs.org/cgi/reprint/hlthaff.w5.250v1>). On average, states with caps on noneconomic damages have 2.2 percent more physicians per capita than states without these caps. *Id.*

19. See generally *Wright v. Cent. DuPage Hosp. Ass'n*, 347 N.E.2d 736 (Ill. 1976) (invalidating a \$500,000.00 cap on total damages in medical malpractice suits); *Best v. Taylor*

the most recent Illinois Supreme Court decision to do so, *Lebron v. Gottlieb Memorial Hospital*. The *Lebron* court held that a cap on jury awards for noneconomic damages<sup>20</sup> violated the separation of powers doctrine because it functioned as a remittitur—the decision of a court to order a new trial or lower the damages awarded at trial<sup>21</sup>—which the court found was an inherent power of the judiciary that cannot be limited by the General Assembly.<sup>22</sup>

Part II of this Note summarizes the previous Illinois court rulings on the constitutionality of damage caps and discusses the history of the separation of powers and remittitur doctrines in Illinois.<sup>23</sup> Part III then discusses the facts of *Lebron* and the court's majority and dissenting opinions in the case.<sup>24</sup> Next, Part IV analyzes each party's arguments and concludes, contrary to the holding in *Lebron*, that statutory damage caps do not violate the separation of powers doctrine.<sup>25</sup> Finally, Part V suggests that *Lebron's* holding will have an impermissibly detrimental effect on the Illinois health care system.<sup>26</sup> It also advocates both a constitutional amendment and statutory language that would survive the relevant constitutional considerations to enable future legislative damage caps in Illinois.<sup>27</sup>

## II. BACKGROUND

The Illinois Supreme Court and the Illinois General Assembly have clashed for more than thirty years over the power to limit the amounts of jury awards. This Part describes the background of previous Illinois

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Mach. Works, 689 N.E.2d 1057 (Ill. 1997) (invalidating 735 ILL. COMP. STAT. ANN. 5/2-1115.1 (West 1996), which limited damages for noneconomic injuries in all common law tort claims to \$500,000.00); *Lebron v. Gottlieb Mem'l Hosp.*, 930 N.E.2d 895 (Ill. 2010) (invalidating 735 ILL. COMP. STAT. ANN. 5/2-1706.5 (West 2008), which limited damages for noneconomic injuries in medical malpractice suits to \$500,000.00).

20. Noneconomic damages include any damages that are not awarded for out of pocket costs paid by the plaintiff. 22 ILL. PRACTICE SERIES, THE LAW OF MEDICAL MALPRACTICE IN ILLINOIS § 23.24, at 243 (3d ed. 2007).

21. BLACK'S LAW DICTIONARY 1409 (9th ed. 2009). The definition of remittitur in its entirety is: "1. An order awarding a new trial, or a damages amount lower than that awarded by the jury, and requiring the plaintiff to choose between those alternatives . . . . 2. The process by which a court requires either that the case be retried, or that the damages awarded by the jury be reduced." *Id.*

22. *Lebron*, 930 N.E.2d at 905.

23. *See infra* Part II.

24. *See infra* Part III.

25. *See infra* Part IV.

26. *See infra* Part V.

27. *See infra* Part V.

statutes that attempted to cap damages and the conclusions of Illinois Supreme Court cases that invalidated them.<sup>28</sup> Further, this Part discusses the important case law developing the separation of powers doctrine in Illinois—the same doctrine that the *Lebron* court relied on when it invalidated the damage cap at issue.<sup>29</sup> Next, this Part explains the incorporation of the remittitur doctrine from the English common law into American law, and it evaluates how the doctrine subsequently developed, both in Illinois and the rest of the country.<sup>30</sup> Finally, this Part highlights *Unzicker v. Kraft Foods Ingredients Corporation*,<sup>31</sup> a 2002 Illinois Supreme Court case that upheld a statutory limitation on joint and several liability.<sup>32</sup> This case is crucial to understanding the constitutional implications of damage caps because the court affirmed the right of the General Assembly to alter the judiciary's finding of liability.

*A. Previous Illinois Caps on Damages and the Court's Invalidation of Those Caps*

The Illinois General Assembly first attempted to limit a plaintiff's recovery in medical malpractice cases in 1975.<sup>33</sup> The General Assembly limited total damages—including economic damages—to \$500,000, but the cap applied *only* in medical malpractice cases.<sup>34</sup> The Illinois Supreme Court held this legislation unconstitutional in *Wright v. Central DuPage Hospital Association*<sup>35</sup> because it was “special legislation”<sup>36</sup> prohibited by article IV, section 13 of the Illinois Constitution.<sup>37</sup> Article IV, section 13 prohibits making or passing a “special or local law when a general law is or can be made applicable.”<sup>38</sup> Accordingly, the *Wright* court held that limiting the cap

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28. See *infra* Part II.A.

29. See *infra* Part II.B.

30. See *infra* Part II.C.

31. 783 N.E.2d 1024 (Ill. 2002).

32. See *infra* Part II.D.

33. ILL. REV. STAT. 1975, ch. 70, par. 101, *invalidated by Wright v. Cent. DuPage Hosp. Ass'n*, 347 N.E.2d 736 (Ill. 1976).

34. *Id.*

35. 347 N.E.2d 736 (Ill. 1976).

36. “Legislation that affects only a specific geographic area or a particular class of persons. Such legislation is unconstitutional if it arbitrarily or capriciously distinguishes between members of the same class.” BLACK’S LAW DICTIONARY 982 (9th ed. 2009).

37. *Wright*, 347 N.E.2d at 743 (citing ILL. CONST. of 1970 art. IV, § 13). The court found the damage cap to be special legislation because it applied only to medical malpractice cases. *Id.*

38. ILL. CONST. of 1970 art. IV, § 13. Article IV, section 13 further states:

Either of the following kinds of legislative actions may be held to violate the restriction



solely to medical malpractice cases created an arbitrary special privilege for those types of cases.<sup>39</sup> Notably, the court never argued or implied that the cap itself was arbitrary; rather, it determined that applying the cap solely to medical malpractice actions constituted a special law in violation of the Illinois Constitution.<sup>40</sup> Under this rationale, then, a cap that applied to all civil actions would have been valid.<sup>41</sup>

Years later, in response to the continued damages crisis and in light of *Wright's* "special privileges" restriction, the General Assembly passed section 2-1115.1 of Public Act 89-7 ("1996 cap"), which capped compensatory damages<sup>42</sup> for noneconomic injuries<sup>43</sup> in all common law tort claims at \$500,000.<sup>44</sup> Although this legislation applied to all

on local or special laws:

Making a law apply to one or more particular persons or things named in the law.

Making a law apply to a described class of person or things that is illogical and unfair.

The latter violation overlaps with the prohibition on denying equal protection of the laws in Article 1, section 2, and is determined under the same standards.

*Id.* Whether a general law is or can be made applicable is for the court to determine. *Id.*

39. *Wright*, 347 N.E.2d at 743 (citing ILL. CONST. of 1970 art. IV, § 13).

40. *See Wright*, 347 N.E.2d at 743. The court distinguished the limit on recovery at issue in *Wright* from other limits on recovery cited by the defendants, such as the Dram Shop Act and the Wrongful Death Statute. *Lees*, *supra* note 3, at 225 (citing *Wright*, 347 N.E.2d at 743). According to the court, this statute required a different conclusion because it changed the common law, whereas the other limits to recovery involved statutory claims. *Id.*

41. *See Lees*, *supra* note 3, at 494-95 (arguing that the court in *Best*, which considered a statute similar to the one in *Wright* except that it applied generally to all tortfeasors, could have distinguished the cap from the one in *Wright* on the basis that it did not apply only to health care professionals and hospitals but applied generally to all tortfeasors).

42. Compensatory damages are those that "indemnify the injured party for the loss suffered." BLACK'S LAW DICTIONARY 445 (9th ed. 2009).

43. Noneconomic damages, although difficult to assess, compensate injuries that do not compel the injured party to pay out of pocket expenses, such as pain, suffering, and loss of society. *Lebron v. Gottlieb Mem'l Hosp.*, 930 N.E.2d 895, 905 (Ill. 2010); *Drews v. Gobel Freight Lines, Inc.*, 557 N.E.2d 303, 306 (Ill. App. Ct. 1990).

44. 735 ILL. COMP. STAT. 5/2-1115.1(a) (2010), *invalidated by Best v. Taylor Mach. Works*, 689 N.E.2d 1057 (Ill. 1997). This statute stated in relevant part:

In all common law, statutory or other actions that seek damages on account of death, bodily injury, or physical damages to property based on negligence, or product liability based on any theory or doctrine, recovery of non-economic damages shall be limited to \$500,000 per plaintiff. There shall be no recovery for hedonic damages.

*Id.* Unlike the statute at issue in *Wright*, the preamble of the statute in *Best* stated the policy justifications for enacting the cap. *Compare* Act of Mar. 9, 1995, 2005 Ill. Laws 284 (stating the General Assembly's finding that states limiting noneconomic damages had experienced a decrease in health care costs), *with* Act of Sept. 12, 1975, 1975 Ill. Laws 2888 (capping noneconomic damages in medical malpractice cases to \$500,000.00 without discussing policy justifications). Similar policy discussions are common to statutory limits on damages which have been upheld in other states. *See, e.g., Zdrojewski v. Murphy*, 657 N.W.2d 721, 739 (Mich. 2002) (stating that the legislation at issue was prompted by the legislature's concern over the availability and affordability of health care in light of medical liability costs); *Arbino v. Johnson & Johnson*,

common law claims, unlike the cap at issue in *Wright*, the court found in *Best v. Taylor Machine Works* that it also was special legislation because the amount of \$500,000 was inherently arbitrary.<sup>45</sup> The court in *Best* then bolstered the case against damage caps with its separation of powers discussion.<sup>46</sup> It reasoned that a statutory limit on damages functioned as a type of remittitur instituted by the General Assembly and that remittitur was an inherent function of the judiciary.<sup>47</sup> As a result, the court argued that the General Assembly would violate the separation of powers doctrine by enacting any cap on damages in common law tort claims.<sup>48</sup>

The separation of powers analysis in *Best* was a significant leap from the court's holding in *Wright*, which did not phrase the issue in terms of separation of powers despite a nearly identical set of facts.<sup>49</sup> The finding was also unexpected because it came as unnecessary judicial dicta; the court had already resolved the case based on its finding of special legislation and went into a discussion of remittitur only to provide an additional reason for finding the statute unconstitutional.<sup>50</sup> Nonetheless, *Best* strengthened the case law against statutory caps on damages in Illinois by affirming a new constitutional argument against

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880 N.E.2d 420, 430 (Ohio 2007) (stating that the General Assembly of Ohio reviewed evidence and found that tort reform was likely to improve the economy by reducing rising costs of the tort system).

45. *Best*, 689 N.E.2d at 1072–78. The court held that the cap would arbitrarily hurt individuals with significant noneconomic damages. *Id.* Plaintiffs with nominal damages would be unfairly advantaged because in some cases the cap would not even apply to reduce their award. *Id.* This finding was unprecedented; the court in *Wright* did not find that the cap was inherently arbitrary even though it had the opportunity to make the same finding. *See generally Wright*, 347 N.E.2d 736 (finding that the cap was arbitrary solely because it applied only to medical malpractice cases). Instead, the court found that the General Assembly had authority to abolish the common law. *Id.* at 743.

46. *Best*, 689 N.E.2d at 1081.

47. *Id.* at 1079.

48. *Id.*

49. *See generally Wright*, 347 N.E.2d 743 (holding that the damage cap at issue was special legislation). The court in *Best* also evaluated *Grace v. Howlett*, 283 N.E.2d 474 (Ill. 1972) (finding a law which limited recovery for plaintiffs in automobile accidents to be unconstitutional because it was special legislation that arbitrarily limited recovery based on whether the defendant was using the vehicle for commercial or personal purposes) and *Grasse v. Dealer's Transport Co.*, 106 N.E.2d 124 (Ill. 1952) (finding that a law which limited recovery based on whether or not the tortfeasor was an employee under the Worker's Compensation Act was arbitrary special legislation). However, none of these cases held that damage caps are inherently special legislation because they have an arbitrary cut off.

50. *Lebron v. Gottlieb Mem'l Hosp.*, 930 N.E.2d 895, 906–07 (Ill. 2010); *Best*, 689 N.E.2d at 1078–80. Even the majority opinion in *Lebron* acknowledged that this discussion regarding separation of powers was judicial dictum. *Lebron*, 930 N.E.2d at 906–07.

these caps: that they function as a form of legislative remittitur and unduly infringe on the inherent power of the judiciary to remit jury awards.<sup>51</sup>

However, the *Best* holding did not deter the General Assembly, which enacted another cap on damages in 2005, section 2-1706.5 of Public Act 94-677 (“2005 cap”). The 2005 cap provided:

(1) In a case of an award against a hospital and its personnel or hospital affiliates, as defined in Section 10.8 of the Hospital Licensing Act, the total amount of noneconomic damages shall not exceed \$1,000,000 awarded to all plaintiffs in any civil action arising out of the care.

(2) In a case of an award against a physician and the physician’s business or corporate entity and personnel or health care professional, the total amount of non-economic damages shall not exceed \$500,000 awarded to all plaintiffs in any civil action arising out of the care.<sup>52</sup>

Given the General Assembly’s struggle with the court on this issue, it is no surprise that the constitutionality of the 2005 cap would eventually be called into question by *Lebron*.

### *B. Description of the Separation of Powers Doctrine in Illinois*

The separation of powers clause of the Illinois Constitution states that “[t]he legislative, executive and judicial branches are separate. No branch shall exercise power properly belonging to another.”<sup>53</sup> However, as with the U.S. Constitution and other state constitutions,<sup>54</sup>

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51. *Best*, 689 N.E.2d at 1078–80; see also *Lebron*, 930 N.E.2d at 899 (discussing how the circuit court of Cook County relied on *Best* in finding that caps on noneconomic damages in medical malpractice cases were unconstitutional because of the separation of powers doctrine).

52. 735 ILL. COMP. STAT. 5/2-1706.5 (2010), *invalidated by* *Lebron v. Gottlieb Mem’l Hosp.*, 930 N.E.2d 895 (Ill. 2010).

53. ILL. CONST. of 1970 art. II, § 1.

54. *E.g.*, *Colorado Gen. Assembly v. Lamm*, 700 P.2d 508, 527 (Colo. 1985); *Norwood v. Homey*, 853 N.E.2d 1115, 1148 (Ohio 2006); *Hale v. Wellpinit Sch. Dist. No. 49*, 198 P.3d 1021, 1026 (Wash. 2009). Justice Robert H. Jackson also affirmed this principle in his concurring opinion in *Youngstown Sheet and Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring). Justice Jackson argued that the Constitution requires not just separation and autonomy but interdependence and reciprocity. *Id.* The interpretations of the separation of powers doctrine by other states are relevant because they have applied the same basic separation of powers framework. See John Devlin, *Toward a State Constitutional Analysis of Allocation of Powers: Legislators and Legislative Appointees Performing Administrative Functions*, 66 TEMP. L. REV. 1205, 1264–65 (1993) (discussing the similarities and difference between the separation of powers doctrine in different states and arguing that the similarities overwhelm the differences). Further, the U.S. Constitution and federal interpretations thereof carry value that should be considered when state courts interpret their own constitutions. Lawrence Friedman, *The Constitutional Value of Dialogue and the New Judicial Federalism*, HASTINGS CONST. L.Q. 93, 106 (2000).

the separation of powers doctrine does not require complete and absolute division of authority.<sup>55</sup> Instead, the Illinois Supreme Court has consistently held that the Illinois system of government inherently entails some powers that are shared between the three branches.<sup>56</sup> Notably, the court has held that the General Assembly has the power to legislate matters that relate to judicial authority so long as such laws do not “unduly infringe upon the inherent power of the judiciary.”<sup>57</sup> Further, the Illinois Supreme Court has consistently upheld the General Assembly’s right to repeal, change, or eliminate all or part of the judicially created common law.<sup>58</sup> Although the General Assembly is required to act within the Illinois Constitution and is bound to follow the Illinois Supreme Court’s interpretation of what laws are constitutional,<sup>59</sup> its power to alter or abate the common law is superior to that of the court.<sup>60</sup> Moreover, there is a strong presumption of constitutionality that comes with all legislative actions.<sup>61</sup> Therefore, the burden of proving the invalidity of the statute lies with the party

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55. *Strukoff v. Strukoff*, 389 N.E.2d 1170, 1172 (Ill. 1979) (stating that separation of powers does not require a “complete divorce” of the three branches of our system of government); *see also In re Barker’s Estate*, 345 N.E.2d 484, 488 (Ill. 1976) (explaining that the separation of powers doctrine does not require the powers of government to be “rigidly separated” into different compartments). The real purpose of the separation of powers doctrine is to prevent all power from being held in the hands of one branch of government. *Id.*

56. *See, e.g., Gillespie v. Barrett*, 15 N.E.2d 513, 514 (Ill. 1938) (stating that applicable provisions of the Illinois Constitution “d[o] not mean that the legislative, executive and judicial power should be kept so entirely separate and distinct as to have no connection or dependence . . . .”); *People ex rel. Witte v. Franklin*, 186 N.E. 137, 139 (Ill. 1933) (holding that with separation of power clauses “there is a theoretical or practical recognition of this maxim and at the same time a blending and admixture of different powers . . .”).

57. *People v. Taylor*, 464 N.E.2d 1059, 1062–63 (Ill. 1984). Notably, the *Taylor* court took notice of the actions of other states in reaching its conclusion. *Id.* (citing *State v. Higgins*, 592 S.W.2d 151, 155 (Mo. 1979), *overruled by Kuyper v. Stone Cnty. Comm’n*, 838 S.W.2d 436 (Mo. 1992) (on separate grounds)).

58. *People v. Gersch*, 553 N.E.2d 281, 286 (Ill. 1990) (citing *People v. Davis*, 116 N.E.2d 372, 374 (Ill. 1953)).

59. *Henson v. City of Chicago*, 114 N.E.2d 778, 782 (Ill. 1953) (stating that the power of the court to determine that legislative actions are unconstitutional is limited to deciding whether the law is within the legislature’s constitutional power); *Sutter v. People’s Gaslight & Coke Co.*, 120 N.E.2d 562, 565 (Ill. 1918) (stating that it is the plain duty of the court to find actions by the General Assembly unconstitutional when they violate the Illinois Constitution); *see also David Fink, Best v. Taylor Machine Works, The Remittitur Doctrine, and The Implications for Tort Reform*, 94 Nw. U. L. REV 227, 261 (1999) (quoting *Gersch*, 553 N.E.2d at 287) (emphasizing that the *Gersch* holding affirms that “the judiciary ‘is duty bound to strike down unconstitutional acts of the legislature’”).

60. 5 ILL. COMP. STAT. 50/1 (2010); *Gersch*, 553 N.E.2d at 286.

61. *Chi. Nat’l League Ball Club, Inc. v. Thompson*, 483 N.E.2d 1245, 1250 (Ill. 1985); *Sanelli v. Glenview State Bank*, 483 N.E.2d 226, 234 (Ill. 1985).

challenging it.<sup>62</sup> This presumption attaches to any legislative cap on damages, and the party challenging the cap bears the burden of proving that it is unconstitutional.<sup>63</sup>

### C. *Development of the Remittitur Doctrine*

The Illinois Supreme Court in *Best* found that caps on damages violated the separation of powers doctrine because they functioned as a form of legislative remittitur.<sup>64</sup> As explained above, remittitur is the exercise of reducing a jury award when the court finds that it is excessive.<sup>65</sup> An award is not subject to remittitur if the court finds that it is reasonable and supported by the facts of the case.<sup>66</sup> Further, the plaintiff must agree to the remittitur in order for it to be upheld,<sup>67</sup> and if the plaintiff is unwilling to do so, the judge must order a new trial.<sup>68</sup>

In *Best*, the court reasoned that remittitur is an inherently judicial function because of tradition,<sup>69</sup> and it primarily cited U.S. Supreme Court precedent to support this proposition.<sup>70</sup> Indeed, the judiciary has had the power to correct excessive jury verdicts in limited situations for over a century,<sup>71</sup> and the Illinois Supreme Court affirmed this power in

62. *Chi. Nat'l League*, 483 N.E.2d at 1250; *Sanelli*, 483 N.E.2d at 234.

63. *Lebron v. Gottlieb Mem'l Hosp.*, 930 N.E.2d 895, 902 (Ill. 2010). For a more detailed analysis of this presumption, see *infra* Part IV.D.

64. *Best v. Taylor Mach. Works*, 689 N.E.2d 1057, 1081 (Ill. 1997).

65. *Id.* at 1079. An award is "excessive if it falls outside the range of fair and reasonable compensation or results from passion or prejudice . . ." *Id.* (quoting *Richardson v. Chapman*, 676 N.E.2d 621, 628 (Ill. 1997) (internal quotations omitted)). In *Richardson*, the court also held that an award is excessive when "it is so large that it shocks the judicial conscience." *Richardson*, 676 N.E.2d at 628.

66. *Best*, 689 N.E.2d at 1079 (citing *Lee v. Chi. Transit Auth.*, 605 N.E.2d 493, 509–10 (Ill. 1992)). The Illinois Supreme Court also affirmed this principle in *Richardson v. Chapman*, in which it held that a determination of what is excessive involves evaluating whether the damages are supported by the record. *Richardson*, 676 N.E.2d at 628. This evaluation requires thorough scrutiny of the facts of the case. *Sandy v. Lake St. Elevated R.R. Co.*, 85 N.E. 300, 302 (Ill. 1908).

67. *Best*, 689 N.E.2d at 1079–80 (citing *Haid v. Tingle*, 579 N.E.2d 913, 916 (Ill. App. Ct. 1991)).

68. *Haid*, 579 N.E.2d at 917. Plaintiffs commonly agree to remit the jury award to avoid the costs and risks associated with a new trial.

69. See *Best*, 689 N.E.2d at 1079 ("For over a century it has been a traditional and inherent power of the judicial branch of government to apply the doctrine of remittitur, in appropriate and limited circumstances, to correct excessive jury verdicts.")

70. See *id.* (citing *Lee*, 605 N.E.2d at 480; *Dimick v. Schiedt*, 293 U.S. 474, 484–85 (1935); *Hansen v. Boyd*, 161 U.S. 397, 410 (1896)).

71. The practice was first adopted by Justice Story in 1822. See *infra* notes 73–74 and accompanying text for a more in-depth discussion of the incorporation of remittitur into American law.

1827.<sup>72</sup> However, the authority behind judicial remittitur was often questioned,<sup>73</sup> and its constitutionality was even challenged in some jurisdictions.<sup>74</sup> These questions arose because judicial remittitur was first utilized at the trial level before its legitimacy was ever established by English common law, reviewing courts, or statute.<sup>75</sup> Nevertheless, the U.S. Supreme Court eventually accepted the legitimacy of remittitur in *Dimick v. Schiedt* because it was regularly applied by the lower courts for more than a hundred years.<sup>76</sup> However, the *Dimick* Court did point out that it would have found remittitur unconstitutional if it had been addressing the issue for the first time.<sup>77</sup>

The Illinois Supreme Court provided more nuanced analysis of this issue when it distinguished between damages in civil actions created by statute from those based on common law.<sup>78</sup> In *In re Estate of Jolliff*, the court determined that a legislative floor on recovery for statutory claims was not a legislative remittitur and did not violate the separation of powers doctrine.<sup>79</sup> The court found that because the General Assembly

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72. See generally *Jones v. Lloyd*, 1 Ill. 225, 226 (1827) (holding that courts have the power to fix excessive jury verdicts). Interestingly, the court acknowledged the practice of remittitur based on a discussion of its application in New York courts. *Id.* at 226. However, the Illinois Supreme Court did not remit the jury award at issue in *Jones* because it found that the trial court was responsible for doing so. See *id.* (“The plaintiff should, at the trial, have required a correction of the verdict . . .”).

73. See *Dimick*, 293 U.S. at 483 (discussing Justice Story’s incorporation of remittitur into U.S. doctrine in *Blunt v. Little*, 3 F. Cas. 760 (D. Mass. 1822)). The *Dimick* Court found it remarkable that no cases following Justice Story’s conclusion challenged the constitutionality of judicial remittitur. *Id.* The Court pointed out that Justice Story only cited as authority for remittitur the ability of the court to grant a new trial when there are excessive damages. *Blunt*, 3 F. Cas. at 761–62. Upon this basis, Justice Story created the court’s authority to remit the jury’s award. *Id.* In *Blunt*, even Justice Story stated that he hesitated to interfere with the verdict and believed he was even going “to the very limits of the law.” *Id.* at 762. However, he held that so long as the plaintiff was willing to remit \$500 of his damages, the court would not interfere any further. *Id.*

74. Whereas the U.S. Supreme Court in *Dimick* only questioned the constitutionality of judicial remittitur, the Missouri Supreme Court banned remittitur in an *en banc* decision in 1985. *Firestone v. Crown Ctr. Redevelopment Corp.*, 693 S.W.2d 99, 110 (Mo. 1985) (*en banc*). Although the Missouri legislature subsequently reestablished judicial remittitur, MO. REV. STAT. § 537.068 (2011), the court in *Firestone* found that the application of judicial remittitur was inconsistent and confused. *Firestone*, 693 S.W.2d at 110.

75. *Dimick*, 293 U.S. at 483.

76. *Id.* at 484–85. The Court held that “the doctrine would not be reconsidered or disturbed at this late day.” *Id.* at 485.

77. *Id.* at 484.

78. See generally *In re Estate of Jolliff*, 771 N.E.2d 346, 356–57 (Ill. 2002) (finding that the legislature had power to determine a floor on damages because it had established the cause of action by statute).

79. *Id.*

created the claim, it also had the power to control the minimum amount of that claim.<sup>80</sup> Thus, the court's holding in *Jolliff* gave the General Assembly the power to force the judiciary to award a specified amount of damages to a plaintiff, even if the common law did not enable any recovery at all.<sup>81</sup>

*D. Unzicker v. Kraft Food Ingredients Corporation: Holding that the Illinois General Assembly Has Power to Limit a Defendant's Liability in Common Law Claims*

Five years after the Illinois Supreme Court determined in *Best* that caps on damages for noneconomic injuries were unconstitutional, it considered the constitutionality of section 2-1117, a statute that limited joint liability in cases where one defendant was less than 25% responsible for the injury.<sup>82</sup> In *Unzicker v. Kraft Food Ingredients Corp.*, the plaintiff challenged the trial court's apportionment of liability that resulted from the plaintiff sustaining injuries at a Kraft plant.<sup>83</sup> After being sued by the plaintiff, Kraft filed a third party claim against the plaintiff's employer, which Kraft had contracted to install steel piping in its plant.<sup>84</sup> The trial court found that Kraft was only 1% liable and that the employer was 99% liable.<sup>85</sup> Although the common law rule of joint and several liability would have allowed the plaintiff to recover the entire amount of damages from either defendant, Kraft and the employer were only severally liable for the damages under section 2-1117.<sup>86</sup> Thus, the plaintiff could only recover 1% of the damages from Kraft.<sup>87</sup>

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80. *Id.* at 357. *Jolliff* evaluated a statute that enabled relatives who had provided care for a disabled person to bring a claim against that person's estate upon their death. *Id.*; see also 755 ILL. COMP. STAT. 5/18-1.1 (2010) (addressing statutory custodial claims).

81. See *Jolliff*, 771 N.E.2d at 358 (holding that the General Assembly had power to establish statutory floors on damages in statutory causes of action). The Illinois Appellate Court made a similar finding in *Knauerhaze v. Nelson*, 836 N.E.2d 640, 665-66 (Ill. App. Ct. 2005). In *Knauerhaze*, the court held that the General Assembly had power to cap damages under a statutory claim to the defendant's maximum insurance coverage. *Id.* at 665-66. Like the court in *Jolliff*, the court found that this did not violate the separation of powers because the legislature had created the claim in the first place and therefore had authority over that claim. *Id.*

82. *Unzicker v. Kraft Food Ingredients Corp.*, 783 N.E.2d 1024, 1034-35 (Ill. 2002) (citing 735 ILL. COMP. STAT. ANN. 5/2-1117 (West 1994)) (evaluating the impact of § 2-1117 on a plaintiff's right to recovery).

83. *Id.* at 1028-29.

84. *Id.*

85. *Id.*

86. See *Coney v. J.L.G. Indus., Inc.*, 454 N.E.2d 197, 199-200 (Ill. 1983) (discussing the traditional approach taken in negligence actions).

87. *Id.* at 1029. 735 ILL. COMP. STAT. 5/2-1117 abrogates the common law approach,

Relying on *Best*, the plaintiff challenged the constitutionality of this statute by arguing that it was an arbitrary legislative remittitur in violation of the separation of powers clause.<sup>88</sup> However, the *Unzicker* court rejected this analysis and upheld the General Assembly's ability to determine "when a defendant can be held liable for the full amount of a jury's verdict."<sup>89</sup> Moreover, the court determined that lowering a defendant's liability was not a legislative remittitur.<sup>90</sup> Therefore, under *Unzicker*, the separation of powers clause in the Illinois Constitution does not limit the General Assembly's ability to abrogate the common law approach in order to limit a defendant's liability for damages.<sup>91</sup>

Prior to *Lebron*, the doctrine of remittitur was an established function of the judiciary, but its inherency was questionable.<sup>92</sup> Although there was some evidence that caps on damages would be held unconstitutional as a form of legislative remittitur in violation of the separation of powers doctrine, this was not yet clear because the reasoning in *Best* was dicta and the *Unzicker* holding supported the power of the legislature to reduce a defendant's total liability.<sup>93</sup>

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dictating that "[a]ny defendant whose fault, as determined by the trier of fact, is less than 25% of the total fault attributable to the plaintiff, the defendants sued by the plaintiff, and any third party defendant except the plaintiff's employer, shall be severally liable for all other damages." 735 ILL. COMP. STAT. 5/2-1117 (2010).

88. *Unzicker*, 783 N.E.2d at 1042.

89. *Id.*; Reply Brief of Defendants-Appellants Gottlieb Memorial Hospital and Florence Martinoz, R.N. at 9, *Lebron v. Gottlieb Mem'l Hosp.*, 930 N.E.2d 895 (Ill. 2010) (Nos. 105741, 105745), 2008 WL 7890623 (quoting *Unzicker*, 783 N.E.2d at 1042) [hereinafter Reply Brief].

90. *Unzicker*, 783 N.E.2d at 1042. The *Unzicker* court distinguished the statute it was addressing from the 1996 cap by stating that it did not reduce the amount of the jury's verdict. *Id.* The court did not, however, affirm the analysis from *Best* that caps on damages functioned as judicial remittitur in violation of the separation of powers. *See id.* (distinguishing the statute at issue in *Unzicker* from the 1996 cap without addressing the merits of the separation of powers analysis from *Best*). Thus, the separation of powers analysis from *Best* remained judicial dicta. *See Lebron*, 930 N.E.2d at 926 (Karmeier, J., concurring in part and dissenting in part) (arguing that the *Best* separation of powers analysis was judicial dicta and therefore not binding on the court).

91. *Lebron*, 930 N.E.2d at 910 (stating that the *Unzicker* court held that the General Assembly could determine when a defendant would be liable for all the damages the jury awarded to the plaintiff); *see also* Reply Brief, *supra* note 89, at 24–25 (arguing that *Unzicker* upheld the right of the General Assembly to limit a defendant's liability in common law claims and that this extended to caps on damages).

92. *See supra* notes 69–76 and accompanying text (discussing the doctrine of remittitur and whether it is an inherent function of the judiciary).

93. *See supra* Part II.A–D (discussing the separation of powers clause and the analyses from *Best* and *Unzicker*).



## III. DISCUSSION

In the controversial case of *Lebron v. Gottlieb Memorial Hospital*, the Illinois Supreme Court struck down a cap on damages for noneconomic injuries in medical malpractice cases on the grounds that it violated the separation of powers clause of the Illinois Constitution.<sup>94</sup> While the court agreed that the separation of powers analysis from *Best* was judicial dicta, it applied the court's analysis from *Best* on the basis that judicial dictum is to be followed unless it is clearly erroneous.<sup>95</sup> This Part presents the facts of *Lebron* and the findings of the trial court.<sup>96</sup> It then discusses the Illinois Supreme Court's majority and dissenting opinions.<sup>97</sup>

A. *The Facts of Lebron*

Frances Lebron was under the care of Dr. Levi-D'Ancona during her pregnancy and was admitted to Gottlieb Memorial Hospital on October 31, 2005 to deliver her baby.<sup>98</sup> Dr. Levi-D'Ancona delivered Abigaile Lebron by Caesarean section, and Florence Martinoz assisted in the delivery and provided nursing care throughout the duration of Lebron's admission.<sup>99</sup> As a result of the delivery, Abigaile sustained numerous permanent injuries, including "severe brain injury, cerebral palsy, cognitive mental impairment, inability to be fed normally, and abnormal neurological function."<sup>100</sup> The plaintiffs alleged that all injuries and resulting impairments resulted from the acts and omissions of the defendants, Gottlieb Memorial Hospital, Dr. Levi-D'Ancona, and nurse Martinoz.<sup>101</sup>

Lebron and her daughter filed a medical malpractice and declaratory

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94. *Lebron*, 930 N.E.2d at 914. The statute limited damage awards against hospitals and its personnel or hospital affiliates for noneconomic injuries to \$1,000,000. 735 ILL. COMP. STAT. 5/2-1706.5 (2010), *invalidated by* *Lebron v. Gottlieb Mem'l Hosp.*, 930 N.E.2d 895 (Ill. 2010). It also limited damage awards against a physician and his business or corporate entity to \$500,000. *Id.* The *Lebron* holding was a controversial decision that incited further debate on whether damage caps should be part of reforming the health care system and whether they are constitutional. David M. Goldhaber & David J. Grycz, *Illinois Adds Fuel to the Fiery National Healthcare Debate*, 22 HEALTH LAW. 19, 19 (2010); *see also* Bruce Japsen & Ameet Sachdev, *Medical Malpractice Law Ruled Unconstitutional*, CHI. TRIB., Feb. 5, 2010, at 23 (describing physicians who were upset with the result of *Lebron*).

95. *See infra* Part III.B.

96. *See infra* Part III.A.

97. *See infra* Part III.B–C.

98. *Lebron*, 930 N.E.2d at 899–900.

99. *Id.*

100. *Id.* at 900.

101. *Id.*

judgment action in Cook County Circuit Court against the defendants in November 2006.<sup>102</sup> According to the complaint, Abigaile sustained numerous injuries during the Caesarean section that Dr. Levi-D’Ancona performed on Lebron.<sup>103</sup> Of Lebron’s claims, the most relevant for the purposes of this Note was the claim that sought declaratory judgment on the constitutionality of the statutory damage cap that limited recovery against healthcare workers and hospitals in malpractice actions.<sup>104</sup> Specifically, Lebron sought a judicial determination that the 2005 cap was unconstitutional and did not apply to their cause of action on the basis that it violated the separation of powers clause.<sup>105</sup> Lebron contended that Abigaile sustained injuries, endured pain, and suffered damages that would exceed the 2005 cap, and thus, that the cap would displace the judiciary’s power to determine damages.<sup>106</sup> Lebron also alleged that the cap violated the prohibition of improper special legislation, the right to a trial by jury, the due process clause, the equal protection clause, and the right to a certain and complete remedy—all provisions of the Illinois Constitution.<sup>107</sup>

The 2005 cap challenged by Lebron was part of Public Act 94-677, a focused effort by the Illinois General Assembly to remedy the health care crisis.<sup>108</sup> The General Assembly found that health care costs were increasing at unsustainable rates and that the availability of such care was simultaneously declining, thereby threatening the health and safety of Illinois citizens.<sup>109</sup> To combat this trend, the General Assembly made changes to the Illinois Insurance Code, the Medical Practice Act of 1987, and the Good Samaritan Act.<sup>110</sup> It also initiated the “Sorry Works! Pilot Program Act” to determine if health care professionals’ prompt apologies and settlement offers affected the costs of malpractice

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102. *Id.* at 899.

103. *Id.* at 900.

104. *Id.* The constitutional challenge most relevant for this Note was the separation of powers challenge. *See id.* (citing ILL. CONST. of 1970 art. II, § 1) (discussing the constitutional challenge in *Lebron*).

105. *Id.* (citing ILL. CONST. of 1970 art. II, § 1).

106. *Id.*

107. *See id.* (discussing the plaintiff’s complaint).

108. Act of Aug. 25, 2005, Pub. Act 94-677, 2005 Ill. Laws 4964, 4964-65 (describing the Act as a comprehensive reform package intended to address the health care crisis), *invalidated by* *Lebron v. Gottlieb Mem’l Hosp.*, 930 N.E.2d 895 (Ill. 2010).

109. *Id.* The General Assembly argued that increasing medical liability insurance costs in Illinois reduces the availability of health care by discouraging health care professionals from practicing medicine. *Id.*

110. *Lebron*, 930 N.E.2d at 903 (citing §§ 310, 315, 340, 2005 Ill. Laws at 4965-95, 5002-03, *invalidated by* *Lebron v. Gottlieb Mem’l Hosp.*, 930 N.E.2d 895 (Ill. 2010)).

claims.<sup>111</sup> Thus, the 2005 cap was just one of several reforms that the General Assembly enacted to remedy the health care crisis.<sup>112</sup>

The trial court, relying on the separation of powers analysis from *Best*, held that the 2005 cap was unconstitutional based on the separation of powers doctrine because it operated as a legislative remittitur.<sup>113</sup> Pursuant to the inseverability provision of the Act,<sup>114</sup> the trial court declared the entire Act unconstitutional both on its face, because it violated the separation of powers clause of the Illinois Constitution, and as applied to *Lebron*.<sup>115</sup> The defendants appealed directly to the Illinois Supreme Court on the basis of Supreme Court Rule 302(a).<sup>116</sup>

### B. The Majority Opinion

The Illinois Supreme Court first reversed the circuit court's finding that the 2005 cap was unconstitutional as applied because it was unnecessary in light of the court's ruling that the statute was facially invalid and because there were no evidentiary hearings or findings of fact to determine how the cap applied to *Lebron*.<sup>117</sup> The court then addressed the argument that the cap was facially invalid—that there were no circumstances under which the statute could be upheld.<sup>118</sup> The court primarily relied on its reasoning in *Best* to reach its conclusion.<sup>119</sup> However, before it addressed the substantive arguments regarding separation of powers, the court disposed of the defendants' argument that the separation of power analysis in *Best* was non-binding dicta that should not be followed.<sup>120</sup> The *Lebron* court agreed that the separation of powers analysis in *Best* was not necessary to the conclusion it

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111. *Id.* at 906 (citing §§ 401–95, 2005 Ill. Laws at 5004–05).

112. *See id.* (discussing other reforms that were included in the Act of Aug. 25, 2005).

113. *Id.* at 901.

114. The inseverability provision established that if any one provision in the Act is found unconstitutional, the entire Act must also be found unconstitutional. § 995, 2005 Ill. Laws at 5005.

115. *Lebron*, 930 N.E.2d at 899, 902–03.

116. *Id.* at 901–02 (citing 210 Ill. 2d R. 302(a)).

117. *Id.* at 902.

118. *Id.* (citing *Napleton v. Vill. of Hinsdale*, 891 N.E.2d 839, 846 (Ill. 2008)).

119. *Id.* at 900 (arguing that the court did not decide the case on a “blank slate” but had to consider the analysis from *Best* to guide its findings); Jeffrey A. Parness, *Judicial Versus Legislative Authority after Lebron*, 98 ILL. B.J. 324, 324–25 (2010); Bethany Krajelis, *Court Strikes Down Medical Malpractice Law*, CHI. DAILY L. BULL., Feb. 4, 2010, at 1. The *Lebron* court provides a detailed discussion of its decision in *Best*. *Lebron*, 930 N.E.2d at 903–06.

120. *Lebron*, 930 N.E.2d at 906–08.

reached in that case.<sup>121</sup> However, the majority distinguished between obiter dictum<sup>122</sup> and judicial dictum<sup>123</sup> and concluded that the separation of powers analysis in *Best* was the latter.<sup>124</sup> According to the court, judicial dictum was to be given much deference and applied unless the analysis was erroneous.<sup>125</sup> The court also pointed out that that the defendants only argued that the *Best* analysis was not controlling and not that the analysis was erroneous.<sup>126</sup>

The court continued by addressing the substantive constitutional issues relating to the caps on damages.<sup>127</sup> However, it did not find the statute unconstitutional on the basis that it was unlawful special legislation: in fact, the court opposed the defendants' attempts to conflate the special legislation analysis with the separation of powers analysis from *Best*.<sup>128</sup> The court also rejected the defendants' argument

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121. *Id.* at 906; see also Parness, *supra* note 119, at 324–35 (summarizing that the *Lebron* court recognized that the separation of powers analysis in *Best* was merely judicial dicta). The statute at issue in *Best* had been found unconstitutional on the basis that it was unlawful special legislation before the court addressed the separation of powers challenge. *Lebron*, 930 N.E.2d at 906.

122. Obiter dictum is a “judicial comment made while delivering a judicial opinion, but one that is unnecessary to the decision in the case and therefore not precedential (although it may be considered persuasive).” BLACK’S LAW DICTIONARY 1177 (9th ed. 2009).

123. Judicial dictum is “[a]n opinion by a court on a question that is directly involved, briefed, and argued by counsel, and even passed on by the court, but that is not essential to the decision.” BLACK’S LAW DICTIONARY 519 (9th ed. 2009) (emphasis added).

124. *Lebron*, 930 N.E.2d at 906–07. Obiter dictum is a “remark or opinion that a court uttered as an aside, and is generally not binding authority or precedent within the *stare decisis* rule.” *Id.* at 907 (citing *Exelon Corp. v. Dep’t of Revenue*, 917 N.E.2d 899, 907 (Ill. 2009)). According to the *Lebron* court, obiter dictum, which is not given much weight, is treated differently than judicial dictum. *Id.* Judicial dictum is a statement by the court that is not essential to the outcome of the opinion. *Id.* The *Lebron* court also states that judicial dictum arises only when both parties argue the issue, but the court deliberately passes on the issue. *Id.* Further, the *Lebron* court argued that these characteristics were present in *Best* because the parties briefed the issue of separation of powers and the court deliberately passed upon it. *Id.* The court also holds that the conclusion in *Best* was expressed like a holding, making it more persuasive. *Id.* (citing *Best v. Taylor Mach. Works*, 689 N.E.2d 1057, 1081 (Ill. 1997); *Unzicker v. Kraft Food Ingredients Corp.*, 783 N.E.2d 1029, 1042 (Ill. 2002)). Finally, it concludes that the defendants did not argue that the analysis from *Best* was erroneous. *Id.*

125. *Lebron*, 930 N.E.2d at 907 (citing *Exelon*, 917 N.E.2d at 907). The court’s judicial dicta is erroneous if it is incorrect or inconsistent with the law or facts. *Exelon*, 917 N.E.2d at 907; BLACK’S LAW DICTIONARY 621 (9th ed. 2009).

126. *Lebron*, 930 N.E.2d at 907.

127. See *id.* at 908–12 (analyzing the substantive constitutional issues relating to the caps on damages).

128. *Id.* at 908. The court argued that the Attorney General conflated the analysis of these two issues when it argued in the context of separation of powers that the statute at issue in *Lebron* was rationally related to the government’s purpose of addressing the growing health care crisis even though the statute in *Best* was not. *Id.* According to the court, this discussion is not relevant to

that the statute should be upheld because it was part of a comprehensive attempt by the General Assembly to ameliorate the damages crisis.<sup>129</sup> According to the court, there was one question left to be decided: whether the General Assembly violated the separation of powers doctrine by performing an inherent function of the judiciary.<sup>130</sup>

The court first distinguished *Unzicker*, the authority relied on by the defendants to support their argument that the General Assembly could limit a defendant's liability without violating the separation of powers doctrine.<sup>131</sup> The court stated that the issue in that case, unlike the issue in *Lebron*, was whether the General Assembly could enact a statute that determined when a defendant was liable for the full amount of damages awarded.<sup>132</sup> The *Lebron* court emphasized that the *Unzicker* opinion actually distinguished itself from *Best* and argued that the statute changing joint and several liability was not the same as a legislative remittitur.<sup>133</sup> The *Lebron* court also reasoned that the 2005 cap did more than limit when a defendant could be held liable for noneconomic

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the separation of powers issue and was not addressed in the separation of powers analysis from *Best*. *Id.* In addition to the special legislation challenge, the *Lebron* court did not address in its opinion due process and the right to a certain and complete remedy, other Illinois constitutional protections that were raised by the plaintiffs. *Id.*; Parness, *supra* note 119, at 324–25.

129. *Lebron*, 930 N.E.2d at 909–10. The court stated that this does not affect whether or not a statute is unconstitutional. *Id.*

130. *Id.* The court also uses this analysis to discard the defendants' argument that the statute should not be held unconstitutional because it does not burden one class of plaintiffs as did the statute at issue in *Best*. *Id.* at 909. The court did not evaluate whether the statute disadvantaged any one group. *Id.*

131. *Id.* at 910.

132. *Id.* (citing *Unzicker v. Kraft Food Ingredients Corp.*, 783 N.E.2d 1029, 1042 (Ill. 2002)); Parness, *supra* note 119, at 324–25. Defendants argued that the separation of powers clause does not prevent the General Assembly from limiting a defendant's liability even if the defendant would be liable under common law. Brief and Appendix of Defendants-Appellants Gottlieb Memorial Hospital and Florence Martinov, R.N. at 26–27, *Lebron*, 930 N.E.2d 895 (Nos. 105741, 105745), 2008 WL 7890597 [hereinafter Defendants' Brief]. In their brief, the defendants relied in part on the court's holding in *Unzicker*, where the court reasoned that altering common law joint and several liability "is simply not a legislative remittitur." *Id.* at 27 (citing *Unzicker*, 783 N.E.2d at 1042). These defendants also cite *Siegall v. Solomon*, 166 N.E.2d 5, 8 (Ill. 1960), in which the Illinois Supreme Court held that the General Assembly did not violate the separation of powers clause by limiting punitive damages. Defendants' Brief, *supra*, at 28. However, the *Lebron* court distinguished compensatory damages from punitive damages. See *infra* notes 146–148 and accompanying text (discussing how the *Lebron* court distinguished punitive damage caps from damage caps for noneconomic injuries). The court reasoned that the statute in *Unzicker* was not a cap on damages and it "did not require a trial judge to enter a judgment 'at variance with the jury's determination and without regard to the court's duty to consider, on a case-by-case basis, whether the jury's verdict is excessive.'" Parness, *supra* note 119, at 324 (citing *Lebron*, 930 N.E.2d at 911).

133. *Lebron*, 930 N.E.2d at 910.

damages.<sup>134</sup> Instead, it altogether eliminated the ability of the court to award noneconomic damages above a certain amount in any medical malpractice case regardless of the apportionment of liability.<sup>135</sup> Therefore, the court found that *Unzicker* did not apply.<sup>136</sup>

The majority opinion then distinguished the facts of *Lebron* from the facts of *Burger v. Lutheran General Hospital*, which was cited by defendants to support their position.<sup>137</sup> In *Burger*, the court addressed a statute that mandated the maintenance of medical records and regulated disclosure of those records.<sup>138</sup> Although the defendants argued that the statute in *Burger* infringed upon the court's authority over its own discovery procedures,<sup>139</sup> the *Lebron* court simply asserted that the statute did not impinge the court's power because the statute did not regulate the conduct of discovery.<sup>140</sup> Similarly, the court addressed defendants' use of *Chicago National League Ball Club, Inc. v. Thompson*,<sup>141</sup> which upheld the General Assembly's right to pass

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134. See *supra* note 132 (discussing the *Lebron* court's finding that the cap at issue went beyond just limiting liability and forced the court to enter judgment regardless of the jury's award and findings of fact).

135. *Lebron*, 930 N.E.2d at 910–11.

136. *Id.*; see also Goldhaber & Grycz, *supra* note 94, at 20 (describing how the *Lebron* court found that the cap at issue required trial courts to decrease jury awards and enter judgment in an amount equal to the cap); Helen Gunnarsson, *Illinois Supreme Court: Statutory Med-Mal Caps are Unconstitutional*, 98 ILL. B.J. 122, 122 (2010) (emphasizing the *Lebron* court's finding that the cap at issue would require the court to override a jury's award and reduce damages regardless of the particular facts of the case).

137. *Lebron*, 930 N.E.2d at 911 (citing *Burger v. Lutheran Gen. Hosp.*, 759 N.E.2d 533 (Ill. 2001)).

138. *Burger*, 759 N.E.2d at 536–38. The statute at issue in *Burger* enabled hospital staff to discuss the standard of treatment of a plaintiff with attorneys for the hospital. *Id.* at 537–38 (citing 210 ILL. COMP. STAT. ANN. 85/6.17 (West 2000)). The court held that the discussions between hospitals and their staff or agents were “intracorporate conversations” regarding the property and responsibility of the hospital. *Id.* at 548. Further, it held that this information was not triggered by litigation but promoted the general health and welfare of the public by allowing hospitals to investigate the treatment of patients. *Id.* Thus, the court held that these provisions did not regulate discovery and therefore did not impinge upon an inherent power of the judiciary. *Id.*

139. Defendants relied on *Burger* to argue that the legislature can enact a statute affecting litigation so long as the statute serves a legitimate legislative goal. *Lebron*, 930 N.E.2d at 911. The *Lebron* defendants also argued that “the separation of powers allows the legislature to enact statutes affecting the conduct of litigation if its purpose is to serve legitimate legislative goals. Defendants’ Brief, *supra* note 132, at 37–38.

140. *Lebron*, 930 N.E.2d at 911.

141. 483 N.E.2d 1245 (Ill. 1985). In *Chicago National League*, the court held that the legislature did not violate the separation of powers by enacting a statute that governed nuisance even though a private nuisance claim would typically be brought by an aggrieved party before the judiciary. *Id.* at 1248. The court held that the legislature clearly has broad discretion to enact policies that protect the public health and welfare. *Id.*

nuisance laws, and *Strukoff v. Strukoff*,<sup>142</sup> which upheld its right to regulate court proceedings that involved the Marriage and Dissolution of Marriage Act.<sup>143</sup> The court discarded the use of these cases by simply stating that they were “inapposite.”<sup>144</sup>

The heart of the court’s argument was that, although the General Assembly is empowered to change the common law and available remedies, it must do so within the purview of the Illinois Constitution.<sup>145</sup> The court first emphasized that holding the statute in question unconstitutional did not contradict prior case law in which the Illinois Supreme Court upheld the General Assembly’s power to limit punitive damages.<sup>146</sup> The court argued that punitive damages are distinguishable from compensatory damages because they only uphold the interest of society and do not function to repay an injured plaintiff.<sup>147</sup> Further, the court emphasized that a prior Illinois Supreme

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142. 389 N.E.2d 1170 (Ill. 1979). *Strukoff* addressed a provision of the Marriage and Dissolution of Marriage Act, 750 ILL. COMP. STAT. 5/403(e) (2010), which mandates the civil procedure rules in divorce cases. *Strukoff*, N.E.2d at 1171. The court recognized that the judiciary has authority to make rules which regulate the trial of cases. *Id.* However, it emphasized that the separation of powers does not prevent one branch of government from exercising functions that are traditionally exercised by another. *Id.* at 1172. Further, the Marriage and Dissolution of Marriage Act was statutory in nature, giving the legislature authority to modify the court’s rulemaking process as to that Act. *Id.* at 1172–73.

143. *Lebron*, 930 N.E.2d at 911.

144. *Id.*

145. *Id.* at 912. In arguing that the legislature is bound to act within constitutional bounds, the court pointed to *People v. Gersch*, which recognized the role of the legislature in altering the common law but also recognized the court’s obligation to overrule unconstitutional legislative action. *Id.* (citing *Gersch*, 553 N.E.2d at 286–87).

146. *Id.* Defendants cited *Bernier v. Burris*, 497 N.E.2d 763 (Ill. 1963), *Siegall v. Solomon*, 166 N.E.2d 5 (Ill. 1960), and *Smith v. Hill*, 147 N.E.2d 321 (Ill. 1958), cases in which the Illinois Supreme Court upheld the General Assembly’s right to limit punitive damages in different contexts. *Lebron*, 930 N.E.2d at 912.

147. *Lebron*, 930 N.E.2d at 912 (citing *Smith*, 147 N.E.2d at 326). It is commonly debated whether punitive damages and compensatory damages should be viewed differently by the law because of the different functions they serve—compensatory damages are intended to compensate the plaintiff for something that he has been deprived of, whereas punitive damages are intended to deter similar wrongful behavior in the future and are aimed at retribution. See Laura Clark Fey et al., *The Supreme Court Raised Its Voice: Are the Lower Courts Getting the Message? Punitive Damages Trends after State Farm v. Campbell*, 56 BAYLOR L. REV. 807, 813 (2004) (discussing *State Farm v. Campbell*, which distinguished compensatory damages and punitive damages and held that there are constitutional limits to the government’s imposition of punitive damages under the Due Process Clause and the Fourteenth Amendment). But see *Consorti v. Armstrong World Indus., Inc.*, 72 F.3d 1003, 1012 (2d Cir. 1995) (reasoning that the question of whether compensatory damages exceed what is permitted by law is not materially different from the question of whether punitive damages exceed what is permitted by law when determining whether to apply state or federal law); Mark Geistfeld, *Access to Justice: Can Business Coexist with the Civil Justice System?*, 38 LOY. L.A. L. REV. 1093, 1114–15 (2005) (describing the

Court case specifically distinguished the treatment of punitive damages from that of compensatory damages, and it therefore reasoned that this line of cases had no bearing on the cap at issue.<sup>148</sup>

In addressing comparable statutes that were upheld by the high courts of other states, the Illinois Supreme Court emphasized that the other statutes varied significantly from the one at issue in Illinois, and because the court could not know the bases upon which those statutes were upheld, the decisions from other states were not persuasive.<sup>149</sup> Although the court found that the decisions provided guidance in making its own determination,<sup>150</sup> it ultimately held that it could not base its interpretation of Illinois law on the actions of other states.<sup>151</sup>

Instead, the court relied on *Best* to reach its conclusion.<sup>152</sup> After disposing of the defendants' challenges to *Best*, the *Lebron* court applied the dicta from that case and held that the limitation on noneconomic damages in medical malpractice cases was unconstitutional because it violated the separation of powers clause of the Illinois Constitution.<sup>153</sup> The court held that remittitur has been a traditional and inherent power of the judiciary for over a century and that the determination of whether to lower a jury's award should only be considered by the courts on a case-by-case basis.<sup>154</sup> The court further held that capping noneconomic damages in medical malpractice cases functioned as a type of legislative remittitur that undercut the inherent power of the judiciary to reduce excessive verdicts.<sup>155</sup> Thus, the court

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commonly held understanding of tort law that punitive damages serve the purposes of general deterrence and private punishment as being similar to the view of compensatory damages, which provide private compensation and general deterrence).

148. *Lebron*, 930 N.E.2d at 912 (citing *Smith*, 147 N.E.2d at 326).

149. *See id.* at 913–14 (discussing CAL. CIV. CODE § 3333.2(b) (West 2009) and FLA. STAT. § 766.118 (2009) and reasoning that the caps in other states, as well as the separation of powers clauses in those states, are not the same as the ones in Illinois). The court described the California statute, which limited damages for noneconomic injuries in all medical malpractice injuries to \$250,000. *Id.* (citing CAL. CIV. CODE § 3333.2(b)). It also described the Florida statute which was more complicated and could be as low as \$150,000 or as high as \$1.5 million depending on the type of injury, the type of care that was being provided, and the class of the person who was giving treatment. *Id.* at 914 (citing FLA. STAT. § 766.118).

150. *Lebron*, 930 N.E.2d at 913–14.

151. *Id.* at 914 (citing *People v. Caballes*, 851 N.E.2d 26, 45 (Ill. 2006)).

152. *Id.*; Parness, *supra* note 119, at 324–25.

153. *Lebron*, 930 N.E.2d at 914. (citing ILL. CONST. art. II, § 1).

154. *Id.* at 908 (citing *Best v. Taylor Mach. Works*, 689 N.E.2d 1057, 1079 (Ill. 1997)). The court did acknowledge that the legislature has authority to limit certain types of damages, such as those that are recoverable based on statutory causes of action. *Id.* at 906 (citing *Best*, 689 N.E.2d at 1079).

155. *Id.* at 908 (citing *Best*, 689 N.E.2d at 1078–79). The court reasoned that although the



held that, like the 1996 cap, the 2005 cap was an unconstitutional violation of the separation of powers clause and affirmed the trial court's ruling that the statute was unconstitutional on its face.<sup>156</sup>

### C. *The Dissenting Opinion*

The dissenting opinion agreed with the majority that finding the statute unconstitutional as applied to Lebron was unnecessary, and it primarily focused on whether or not the statute was facially invalid.<sup>157</sup>

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2005 cap operates in fewer cases than the 1996 cap, the constitutional violation was the same. *Id.*

156. *Id.* at 914–17. Before concluding, however, the court addressed the dissent's challenges to subject matter jurisdiction for lack of ripeness and standing. *Id.* at 915–17. The court argued that although subject matter jurisdiction cannot be waived, objections to standing and ripeness are waived if they are not raised in a timely manner in the trial court. *Id.* at 916 (citing *Skolnick v. Alzheimer & Gray*, 730 N.E.2d 4, 19 (Ill. 2000); *In re General Order of October 11, 1990*, 628 N.E.2d 786, 788 (Ill. App. Ct. 1993)). The court then emphasized that the defendants Gottlieb and Martinez did not challenge ripeness and standing. *Id.* Further, although Dr. Levi-D'Ancona did assert these affirmative defenses, the circuit court rejected his arguments based on *Best*. *Id.* The circuit court found that the constitutionality of the damage cap was ripe for review and that plaintiffs had a sufficient and direct interest in the application of the statute just like the plaintiffs in *Best* because they had suffered from serious injuries. *Id.* (citing *Best*, 689 N.E.2d at 1066). More importantly, the court notes that Dr. Levi-D'Ancona did not renew his challenges to ripeness and standing. *Id.* The court then emphasized that under Rule 341, "points not argued in the appellant's brief are waived." *Id.* (citing 210 Ill. 2d R. 341(h)(7)). Based on this rule, the court did not address the issues further. *Id.* at 916–17. See *infra* note 157 for a discussion of the dissent's finding on the ripeness and standing issues raised in *Lebron*.

157. *Id.* at 921. Although it is not the focus of this Note, the dissent first vehemently argued that the constitutional issue before the court was not properly decided because the court did not have jurisdiction. *Id.* at 921–26. First, the dissent reasoned that the court should have exercised restraint in hearing the claim, which could still have been decided on other grounds. *Id.* at 920–22. The dissent, labeling this a jurisprudential argument, contended that a claim cannot be heard prematurely. *Id.* at 922. That is, a constitutional issue should only be resolved if it is necessary to decide the case. *Id.* (discussing *People v. Hampton*, 867 N.E.2d 957, 960 (Ill. 2007)). The dissent asserted that plaintiffs' claim could have been resolved without addressing the constitutional issues because the defendants could still have prevailed before a jury, making the statutory limit on damages irrelevant. *Id.* The dissent argued that by answering whether the cap was constitutional, the court violated fundamental principles that promote judicial economy and efficiency. *Id.* Next, the dissent questioned justiciability because the plaintiffs lacked standing and that the claim was not ripe for review. *Id.* at 922–26. It described justiciability, which requires that the controversy be appropriate for judicial review, and pointed out it must be concrete and definite rather than hypothetical or theoretical. *Id.* at 923 (citing *In re M.W.*, 905 N.E.2d 757, 769 (Ill. 2009)). In regards to standing, the dissent contended that the person in court must have an interest in the litigation. *Id.* In regards to ripeness, the dissent reasoned that timing must be proper for the court to address an issue. *Id.* For instance, the "court cannot pass judgment on mere abstract propositions of law, render an advisory opinion, or give legal advice as to future events." *Id.* at 924 (citing *Stokes v. Pekin Ins. Co.*, 698 N.E.2d 252, 254 (Ill. App. Ct. 1998)). The dissent pointed out that Dr. Levi-D'Ancona challenged ripeness and standing in the circuit court, and even though he did not argue those issues in his brief before the Supreme Court, the dissent asserted that the circuit court decision should have been reversed on the basis of these issues. *Id.* It equated these deficiencies as lack of subject matter jurisdiction and emphasized that

The dissent first described the damages crisis, which has prevented millions of Americans from obtaining health care coverage.<sup>158</sup> Citing to a speech by President Barack Obama before a joint session of the United States Congress,<sup>159</sup> the dissenting opinion described rising medical costs as an “unsustainable burden on taxpayers” and recognized medical malpractice reform as one of many potential remedies implemented by Public Act 94-677.<sup>160</sup>

The dissent then described the broad purpose of Public Act 94-677.<sup>161</sup> It described numerous provisions that were enacted to decrease costs of medical care and deter the health care crisis.<sup>162</sup> This was relevant to the dissent because it demonstrated that the 2005 cap was just one of many policy determinations over which the General

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lack of subject matter jurisdiction cannot be waived. *Id.* (citing *In re M.W.*, 905 N.E.2d at 765). Finally, the dissent cited *People v. Capitol News, Inc.*, 560 N.E.2d 303, 306 (Ill. 1990), which held that if a plaintiff does not have standing or if a claim is not ripe for review, the circuit court’s judgment must be set aside for lack of subject matter jurisdiction. *Lebron*, 930 N.E.2d at 924 (Karmeier, J., concurring in part and dissenting in part) (citing *Capitol News*, 560 N.E.2d at 306).

158. *Lebron*, 930 N.E.2d at 917 (Karmeier, J., concurring in part and dissenting in part) (citing President Barack Obama, Health Care Address to Congress (Sept. 9, 2009), available at [http://www.nytimes.com/2009/09/10/us/politics/10obama.text.html?pagewanted=1&\\_r=1](http://www.nytimes.com/2009/09/10/us/politics/10obama.text.html?pagewanted=1&_r=1)).

159. *Id.* (citing Obama, *supra* note 158). President Obama noted that health insurance premiums in America have gone up three times faster than wages. Obama, *supra* note 158. Further, one in three Americans go without health insurance at some point, and individuals that become sick are often dropped from their insurance carrier or are not covered for the full cost of care. *Id.* President Obama also stated, “I have talked to enough doctors to know that defensive medicine may be contributing to unnecessary costs. So I am proposing that we move forward on a range of ideas about how to put patient safety first and let doctors focus on practicing medicine.” *Id.*

160. *Lebron*, 930 N.E.2d at 917–18 (Karmeier, J., concurring in part and dissenting in part) (citing Act of Aug. 25, 2005, § 101(4), Pub. Act 94-677, 2005 Ill. Laws 4964, 4964–65, *invalidated by* *Lebron v. Gottlieb Mem’l Hosp.*, 930 N.E.2d 895 (Ill. 2010)) (“This health care crisis, which endangers the public health, safety, and welfare of the citizens of Illinois, requires significant reforms to the civil justice system currently endangering health care for citizens of Illinois.”) (internal citations omitted).

161. *Id.* at 918–20 (citing § 101, 2005 Ill. Laws at 4964–65).

162. *Id.* at 918 (citing 215 ILL. COMP. STAT. ANN. 5/1 et seq. (West 2004)). The dissent described provisions that increased oversight and reporting requirements for medical malpractice insurance carriers, increased availability of information pertaining to physicians’ criminal and disciplinary histories, and mandated new written report requirements for physicians. *Id.* (citing 225 ILL. COMP. STAT. ANN. 60/1 et seq. (West 2004); 735 ILL. COMP. STAT. ANN. 5/2-1704.5 (West 2006); 735 ILL. COMP. STAT. ANN. 5/2-622 (West 2004)). The court also described the amendments to the Good Samaritan Act, which made retired physicians immune from liability and provided more state funding for free clinics. *Id.* at 919 (citing 745 ILL. COMP. STAT. ANN. 49/30 (West 2006)). Finally, the Act explained two separate provisions related to apologies and explanations from health care providers after malpractice occurs—one that made these statements inadmissible as evidence and another that funded research to evaluate their effectiveness in promoting settlement. *Id.* (citing 735 ILL. COMP. STAT. ANN. 5/8-2501 (West 2006); 710 ILL. COMP. STAT. ANN. 45/401 et seq. (West 2006)).

Assembly had power,<sup>163</sup> including broad regulatory authority and discretion to determine what measures would further the public interest.<sup>164</sup> The dissent also argued that the power to determine public policy rested with the General Assembly and not in the courts because the General Assembly was uniquely positioned to gather data and information from constituents about public opinion and the impact of policy changes.<sup>165</sup> Based on the General Assembly's authority to make public policy, the dissent emphasized that the court has to give substantial deference to the legislature.<sup>166</sup> Therefore, the party challenging legislative action related to public policy has to overcome a heavy burden and must clearly establish that the law violates constitutional principles.<sup>167</sup>

Next, the dissent argued that the majority opinion erred in applying *Best* because the determination regarding separation of powers in *Best* was dicta,<sup>168</sup> and therefore, non-binding authority that did not prevent the court from reconsidering the issue at a later point.<sup>169</sup> Second, the dissent argued that the statute at issue in *Lebron* was substantially different from the one at issue in *Best* because it specifically sought to curb rising health care costs in a focused and particular way.<sup>170</sup>

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163. *Id.* at 919–20.

164. *Id.* (quoting *Burger v. Lutheran Gen. Hosp.*, 759 N.E.2d 533, 545 (Ill. 2001)).

165. *Id.* at 920. Further, the dissent pointed out that the legislature is the only branch of government with the power to weigh competing societal, economic, and policy interests. *Id.* (citing *Mohanty v. St. John Heart Clinic, S.C.*, 866 N.E.2d 85, 110 (Ill. 2006)). Moreover, the dissent contended that courts are poorly equipped to determine public policy because they do not have access to all parties, facts, or issues that are relevant to a given policy, *id.* (citing *Bd. of Educ. of Dolton Sch. Dist. 149 v. Miller*, 812 N.E.2d 688, 693 (Ill. App. Ct. 2004)), and that public policy is inherently political, the domain of the legislature rather than the courts. *Id.*

166. *Id.* (citing *People v. McCarty*, 858 N.E.2d 15, 32 (Ill. 2006)).

167. *Id.* (citing *People v. Johnson*, 870 N.E.2d 415, 421 (Ill. 2007)). The dissent also reasoned that if a court can uphold the constitutionality of a statute, it has an obligation to do so on the basis of this presumption. *Id.* (citing *Napleton v. Vill. of Hinsdale*, 891 N.E.2d 839, 846 (2008)).

168. *Id.* at 926–27. The dissent discussed the concurring opinion from *Best* written by Justice Michael A. Bilandic, which acknowledged that the separation of powers analysis was dicta. *Id.* (citing *Best v. Taylor Mach. Works*, 689 N.E.2d 1057, 1106 (Ill. 1997)) (“I write separately to state that I do not join in the majority’s discussion of the constitutionality of the damages cap under the separation of powers doctrine as that discussion is wholly unnecessary and constitutes dicta.”).

169. *Id.* at 926 (citing *Geer v. Kadera*, 671 N.E.2d 692, 699 (Ill. 1996)); *Exelon Corp. v. Dep’t of Revenue*, 917 N.E.2d 899 (Ill. 2009)).

170. *Id.* According to the dissenting opinion, the statute at issue in *Best* was distinguishable as a comprehensive tort reform package that applied broadly to all common law claims, whereas the statute at issue in *Lebron* was a focused attempt to address the health care crisis. *Id.* (discussing 735 ILL. COMP. STAT. ANN. 5/2-1115.1(a) (West 1996), *invalidated by Lebron v. Gottlieb Mem’l Hosp.*, 930 N.E.2d 895 (Ill. 2010)).

Therefore, according to the dissent, the *Best* analysis was inappropriate because statutes that differ from their predecessors should be given new consideration rather than a blind application of *stare decisis*.<sup>171</sup>

Finally, the dissent argued that *stare decisis* does not definitively or absolutely preclude reconsideration of an issue.<sup>172</sup> In fact, the court must correct its mistakes no matter how long or how many times it has been upheld.<sup>173</sup> Based on this mandate, the dissent addressed the argument that caps on damages are a legislative form of remittitur that violate the separation of powers doctrine.<sup>174</sup> First, the dissent argued that remittitur is not an inherent function of the judiciary because it was not established in the U.S. Constitution and was not incorporated into American law until 1822.<sup>175</sup> The dissent also pointed out that judicial remittitur has been questioned in the Supreme Court and was even held unconstitutional in Missouri on the basis that it violates the right to a trial by jury,<sup>176</sup> supporting the conclusion that remittitur is constitutionally suspect and not an inherent power of the judiciary.<sup>177</sup>

The dissent then argued that even if remittitur is an inherent function of the judiciary, the 2005 cap was not a form of remittitur because if a court applied the cap, it would not have reexamined the jury's verdict or its factual determinations but implemented a public policy decision to reduce liability based on what was sustainable for the health care system.<sup>178</sup> The dissent emphasized that this was not meant to replace the jury's determination as to what was reasonable but to prevent high

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171. *Id.* at 926–27 (discussing *Arbino v. Johnson & Johnson*, 880 N.E.2d 420, 429 (Ohio 2007)). The court in *Arbino* was also reviewing legislation that was tailored to address the constitutional defects of a previous tort reform package. *Arbino*, 880 N.E.2d at 429–30. While there was precedent that supported invalidating the statute on the basis that it violated separation of powers, the court found that the case required a fresh review because it was “more than a rehashing of unconstitutional statutes.” *Id.*

172. *Lebron*, 930 N.E.2d at 927 (Karmeier, J., concurring in part and dissenting in part) (“The doctrine of *stare decisis* is never an inexorable command.”).

173. *Id.* (citing *People v. Colon*, 866 N.E.2d 207, 219 (Ill. 2007)). The dissent acknowledged that *stare decisis* is important to the stability of the law. *Id.* However, it emphasized that *stare decisis* must be set aside where it would harm the public interest or where the prior reasoning is unworkable or unsound. *Id.* (citing *Tuite v. Corbitt*, 866 N.E.2d 114, 124 (Ill. 2006)).

174. *Id.* at 927–32.

175. *Id.* at 927–28 (citing *Blunt v. Little*, 3 F. Cas. 760 (D. Mass. 1822)). See *supra* notes 73–74 and accompanying text for a more in-depth discussion of the case history regarding remittitur.

176. *Lebron*, 930 N.E.2d at 928 (Karmeier, J., concurring in part and dissenting in part) (citing *Dimick v. Schiedt*, 293 U.S. 474, 484 (1935); *Firestone v. Crown Ctr. Redevelopment Corp.*, 693 S.W.2d 99, 110 (Mo. 1985) (en banc)).

177. *Id.* Specifically, the dissent stated that remittitur is not an essential part of the judiciary's power as granted to courts in the Illinois Constitution of 1970. *Id.*

178. *Id.* (citing *Estate of Sisk v. Manzanares*, 270 F. Supp. 2d 1265, 1277–78 (D. Kan. 2003)).

damages as a matter of public policy.<sup>179</sup> Further, the dissent noted that every state addressing this issue after *Best*, as well as the federal courts, rejected the *Best* separation of powers analysis, finding that caps on damages are not a form of legislative remittitur.<sup>180</sup> Although such a decision should not be made based on popularity, the dissent reasoned that it is beneficial to learn from others who provide persuasive legal analysis.<sup>181</sup>

The dissent contended that the separation of powers analysis from *Best* was also incorrect and should not have been applied in *Lebron* because it failed to recognize the General Assembly's power to repeal or change the common law.<sup>182</sup> According to the dissent, this power supersedes the judiciary's authority over the common law and justifies the General Assembly's power to limit damages as a function of public policy.<sup>183</sup> Finally, the dissent affirmed that the separation of powers

179. *Id.* “[R]eduction of an award to comport with legal limits does not involve substitution of the court’s judgment for that of the jury, but rather is a determination that a higher award is not permitted as a matter of law . . . .” *Id.* (citing *Johansen v. Combustion Eng’g, Inc.*, 170 F.3d 1320, 1330–31 (11th Cir. 1999)).

180. *Id.* at 928–30. The dissent cited to a Note written by a Northwestern University Law School student contending that the court’s separation of powers analysis in *Best* would be a powerful weapon for those who opposed caps on damages. *Id.* at 929 (citing *Fink*, *supra* note 59, at 272)). According to the dissent, “the weapon proved to be a dud.” *Id.* The dissent then cited numerous state cases holding that caps on damages are not legislative remittitur and are a valid exercise of legislative authority. *Id.* (citing *Evans ex rel. Kutch v. State*, 56 P.3d 1046, 1055 (Alaska 2002); *Garhart ex rel. Tinsman v. Columbia/Healthone, L.L.C.*, 95 P.3d 571, 581–82 (Colo. 2004); *Kirkland v. Blaine Cnty. Med. Ctr.*, 4 P.3d 1115, 1122 (Idaho 2000); *Gourley ex rel. Gourley v. Neb. Methodist Health Sys., Inc.*, 663 N.W.2d 43, 77 (Neb. 2003); *Rhyne v. K-Mart Corp.*, 594 S.E.2d 1, 10 (N.C. 2004); *Arbino v. Johnson & Johnson*, 880 N.E.2d 421, 444–45 (Ohio 2007); *Judd v. Drezga*, 103 P.3d 135, 145 (Utah 2004); *Pulliam v. Coastal Emergency Servs. of Richmond, Inc.*, 509 S.E.2d 307, 317 (Va. 1999); *Verba v. Ghaphery*, 552 S.E.2d 406, 413 (W. Va. 2001); *Owens-Corning v. Walatka*, 725 A.2d 579, 596 (Md. Ct. Spec. App. 1999), *abrogated by John Crane, Inc. v. Scribner*, 800 A.2d 727 (Md. 2002); *Zdrojewski v. Murphy*, 657 N.W.2d 721, 737 (Mich. Ct. App. 2002); *Waste Disposal Ctr., Inc. v. Larson*, 74 S.W.3d 578, 590 (Tex. Ct. App. 2002); *Guzman v. St. Francis Hosp., Inc.*, 623 N.W.2d 776, 786 (Wis. Ct. App. 2000)).

181. *Lebron*, N.E.2d at 930 (quoting Sophocles, *Antigone* (trans. Elizabeth Wyckoff), in *THE COMPLETE GREEK TRAGEDIES VOL. 2*, 159 (David Grene & Richmond Lattimore eds., 1960)).

182. *Id.*

183. *Id.* at 930–31. For this proposition, the dissent cited to the Illinois Common Law Act, which states in relevant part that “[t]he common law of England . . . shall be the rule of decision, and shall be considered as of full force until repealed by legislative authority.” *Id.* (citing 5 ILL. COMP. STAT. ANN. 50/1 (West 2008)). Further, the dissent discussed the Illinois Constitution, which dictates that the General Assembly has legislative authority in Illinois. *Id.* (citing ILL. CONST. of 1970 art. IV, § 1). Finally, the dissent showed that even the Illinois Supreme Court has recognized the authority of the General Assembly to eliminate or change the common law. *Id.* The court has held that “[t]he Illinois General Assembly has the inherent power to repeal or change the common law, or do away with all or part of it.” *Id.* (citing *People v. Gerasch*, 553

clause of the Illinois Constitution was to be interpreted based on the Illinois framers' intent, but it emphasized that this did not prevent the court from considering the decisions of other states regarding similar laws, which are useful and appropriate for deciding similar cases in Illinois.<sup>184</sup>

Thus, the dissent argued that the 2005 cap should have been found constitutional because the separation of powers analysis from *Best* was non-binding dicta, the 2005 cap was not a legislative remittitur, and even if it was, remittitur is not an inherent judicial function.

#### IV. ANALYSIS

The decision in *Lebron* reinforced Illinois's position as the only state that views legislative caps on damages as an unconstitutional violation of the separation of powers.<sup>185</sup> Moreover, it made this interpretation binding precedent,<sup>186</sup> whereas it had previously only been judicial dicta.<sup>187</sup> Although the court addressed *Unzicker* in its opinion, it did not recognize the contradiction between *Unzicker* and *Best* when it relied on *Best* to find the 2005 cap unconstitutional.<sup>188</sup>

Accordingly, this Part critiques the court's finding in *Lebron* and argues that the 2005 cap was not an unconstitutional violation of the separation of powers doctrine. First, this Part focuses on the separation of powers analysis in *Best*, arguing that it was erroneous and that *Lebron* should not have applied it to the 2005 cap.<sup>189</sup> This Part then

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N.E.2d 281, 286 (Ill. 1990)). The dissent noted that the General Assembly's power to limit common law remedies is itself limited by article I, section 12 of the Illinois Constitution. *Id.* (citing ILL. CONST. of 1970 art. I, § 12). However, the dissent argued that this has not stopped the court from upholding the General Assembly's authority to limit the time in which actions can be brought, raising the standard of care for tort liability, and restricting the type or amount of damages a party may recover. *Id.* (citing *Bilyk v. Chi. Transit Auth.*, 531 N.E.2d 1, 7 (Ill. 1988)).

184. *Id.* at 932. The dissent cited to numerous Illinois cases in which the court found it appropriate to analyze applicable legal conclusions from other state courts. *Id.* (citing, for example, *People v. Pawlaczyk*, 724 N.E.2d 901, 912 (Ill. 2000); *P.R.S. Int'l, Inc. v. Shred Pax Corp.*, 703 N.E.2d 71, 78 (Ill. 1998)).

185. See Goldhaber & Grycz, *supra* note 94, at 21 (describing the strong ruling in *Lebron* as a serious blow to the effort for caps on noneconomic damages and stating that it may be the last word from the Illinois Supreme Court on the issue).

186. See *Lebron*, 930 N.E.2d at 908–17 (holding that the 2005 cap was unconstitutional on the grounds that it violated the separation of powers clause of the Illinois Constitution).

187. *Id.* at 906–07; Parness, *supra* note 119, at 324.

188. See *infra* notes 258–259 and accompanying text (arguing that *Best* and *Unzicker* contradicted each other because *Best* held that limits to liability were never permissible because of the separation of powers clause, whereas *Unzicker* upheld a statute that limited a defendant's liability).

189. See *infra* Part IV.A (arguing that damage caps are not a form of legislative remittitur and

contends that the *Lebron* court erred because it did not give adequate consideration to the General Assembly's power to modify or eliminate the common law when it struck down the 2005 cap as unconstitutional.<sup>190</sup> Finally, this Part analyzes the weight that *Lebron* should have given the *Best* separation of powers analysis in light of the fact that it was non-binding dicta,<sup>191</sup> and asserts that this analysis is significantly outweighed by the strong presumption favoring a statute's constitutionality.<sup>192</sup>

#### *A. The Separation of Powers Analysis from Best Was Erroneous*

The *Lebron* court heavily relied on *Best* to find that statutory caps on damages are unconstitutional. This Subpart argues that such reliance was misguided because damage caps are inherently very different from judicial remittitur based both upon their function and effect.<sup>193</sup> Even if a damage cap is a legislative remittitur, however, this Subpart describes the historical development of remittitur and its treatment by the American court system to show that remittitur is not an inherent function of the judiciary.<sup>194</sup> To reinforce these two arguments, this Subpart explains that every other state that has considered this issue has found that damage caps do not violate the separation of powers doctrine.<sup>195</sup>

##### 1. Damage Caps are Not a Form of Legislative Remittitur

The *Lebron* majority's application of *Best* is problematic because the holding in *Best* is itself problematic: the conclusion that the General Assembly unconstitutionally violates the separation of powers clause when it passes a statutory cap on damages incorrectly assumes that caps are a form of legislative remittitur. Those who vehemently oppose damage caps have occasionally done so based in part on the grounds that they violate the separation of powers doctrine.<sup>196</sup> They favor total

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that remittitur is not an inherent function of the judiciary as has been recognized by numerous other states).

190. See *infra* Part IV.B.

191. See *infra* Part IV.C.

192. See *infra* Part IV.D.

193. See *infra* Part IV.A.1.

194. See *infra* Part IV.A.2.

195. See *infra* Part IV.A.3.

196. See Edward J. Kionka, *Things to Do (Or Not) to Address the Medical Malpractice Insurance Problem*, 26 N. ILL. U. L. REV. 469, 502–03 (2006) (arguing that because remittitur must be considered on a case-by-case basis, legislative damage caps violate separation of powers); Robert S. Peck, *Tort Reform's Threat to an Independent Judiciary*, 33 RUTGERS L.J.

independence of the judiciary in this area of law, and they typically do not give adequate weight to the role of checks and balances in our system of government.<sup>197</sup> The Illinois Supreme Court has long rejected the notion that each branch of government should exercise its authority completely independent of the other branches.<sup>198</sup> Instead, it is well recognized that the three branches of government have shared and overlapping powers.<sup>199</sup> Thus, merely exercising a similar function of government is not sufficient to constitute a separation of powers

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835, 917 (2002) (arguing that the judiciary needs independence from the legislature). Peck argues that history demonstrates the purpose of separation of powers and that letting the judiciary have too much power will essentially lead to authoritarianism. Peck, *supra*, at 917; *accord* Fink, *supra* note 59, at 268–69 (arguing that the remittitur analysis from *Best* is powerful and could be applied in other states to find statutory caps on damages unconstitutional). David Fink argued that all thirteen states that have upheld the constitutionality of damage caps on noneconomic damages did not address a possible separation of powers violation. Fink, *supra* note 59, at 268. However, Fink conveniently failed to acknowledge a recent case in the Supreme Court of Virginia, which held that remittitur was an entirely different function than damage caps. Pulliam v. Coastal Emergency Servs. of Richmond, Inc., 509 S.E.2d 307, 313 (Va. 1999). In part on that basis, the court rejected the claim that statutory limits on damages violated separation of powers. *Id.* Further, since Fink’s article was published, at least six state supreme court cases have upheld damage caps despite a challenge on the basis of separation of powers. Evans *ex rel.* Kutch v. State, 56 P.3d 1046, 1055 (Alaska 2002); Garhart *ex rel.* Tinsman v. Columbia/Healthone, L.L.C., 95 P.3d 571, 581–82 (Colo. 2004); Kirkland v. Blaine Cnty. Med. Ctr., 4 P.3d 1115, 1122 (Idaho 2000); Gourley *ex rel.* Gourley v. Neb. Methodist Health Sys., Inc., 663 N.W.2d 43, 77 (Neb. 2003); Rhyne v. K-Mart Corp., 594 S.E.2d 1, 10 (N.C. 2004); Verba v. Ghaphery, 552 S.E.2d 406, 411 (W. Va. 2001). Although there are several states that have not addressed remittitur arguments at all, every state other than Illinois that has addressed this question has rejected the analysis and conclusion from *Best*. Lebron v. Gottlieb Mem’l Hosp., 930 N.E.2d 895, 929–30 (Ill. 2010) (Karmer, J., concurring in part and dissenting in part). A federal court, applying Maryland state law, has also rejected this premise. Franklin v. Mazda Motor Corp., 704 F.Supp. 1325 (D. Md. 1989).

197. *People v. Walker*, 519 N.E.2d 890, 892 (Ill. 1988); *Gillespie v. Barrett*, 15 N.E.2d 513, 514 (Ill. 1938); *see also* *Guzman v. St. Francis Hosp., Inc.*, 623 N.W.2d 776, 786 (Wis. Ct. App. 2000) (arguing that even if the caps on damages are a type of remittitur, the sharing of powers between the three branches of government has always been upheld in Wisconsin). The federal separation of powers framework also demonstrates that there needs to be certain shared powers between the three branches of government. *See* Morton Rosenberg, *Congress’s Prerogative over Agencies and Agency Decisionmakers: The Rise and Demise of the Reagan Administration’s Theory of the Unitary Executive*, 57 GEO. WASH. L. REV. 627, 634 (1989) (arguing that the American political system involves a “delicately balanced scheme of separated but shared powers” and that Congress was to be the dominant policymaking body in this constitutional scheme).

198. *Gillespie*, 15 N.E.2d at 514; *see also* *People ex rel. Witte v. Franklin*, 186 N.E. 137, 139 (Ill. 1933) (reasoning that the separation of powers clause is not meant to be read so literally that it prevents absolutely all overlapping between the branches of government). The court in *Gillespie* stated that the “true meaning [of the separation of powers doctrine], both in theory and in practice, is that the whole power of two or more of these departments shall not be lodged in the same hands, whether of one or many.” *Gillespie*, 15 N.E.2d at 514.

199. *Gillespie*, 15 N.E.2d at 514; *Franklin*, 186 N.E. at 139.



violation; rather, the “General Assembly has the power to enact law governing judicial practices when the laws do not *unduly* infringe upon the inherent powers of the judiciary.”<sup>200</sup>

Remittitur originated as a means for the judge to limit damages when it believed that the jury’s award was unreasonable and against the manifest weight of evidence.<sup>201</sup> Still, assessments of damages are primarily a determination for the jury, and the court’s authority to intervene is limited solely to instances where the jury award is excessive.<sup>202</sup> Notably, the Illinois Supreme Court has held that remittitur requires a case-by-case determination of what damages are reasonable.<sup>203</sup> In contrast, the General Assembly enacted the 2005 cap in a way that made such a determination unnecessary; the cap was a prospective blanket policy applicable to all cases irrespective of the facts in an effort to lower costs to the health care system.<sup>204</sup> Remittitur

200. *People v. Davis*, 442 N.E.2d 855, 860 (Ill. 1982) (citing *People v. Youngbey*, 413 N.E.2d 416, 419 (Ill. 1980)); see also *Lebron*, 930 N.E.2d at 908 (holding that the 2005 cap was an encroachment of the judiciary’s inherent power of remittitur).

201. *Best v. Taylor Mach. Works*, 689 N.E.2d 1057, 1079–80 (Ill. 1997); David Baldus et al., *Improving Judicial Oversight of Jury Damages Assessments: A Proposal for the Comparative Additur/Remittitur Review of Awards for Nonpecuniary Harms and Punitive Damages*, 80 IOWA L. REV. 1109, 1119 (1995). Remittitur can only be utilized if there is a problem with the jury’s fact finding or evidence that the jury acted with passion or prejudice against the defendant. Sandra Sperino, *Judicial Preemption of Punitive Damages*, 78 U. CIN. L. REV. 227, 256 (2009-2010).

202. Philip H. Corboy et al., *Illinois Courts: Vital Developers of Tort Law As Constitutional Vanguard, Statutory Interpreters, and Common Law Adjudicators*, 30 LOY. U. CHI. L.J. 183, 209–10 (1999). The Illinois Supreme Court has consistently held that the jury is responsible for determining damages because it is a question of fact. *Lee v. Chi. Transit Auth.*, 605 N.E.2d 493, 509–10 (Ill. 1992); *Baird v. Chi., Burlington & Quincy R.R. Co.*, 349 N.E.2d 413, 417–18 (Ill. 1976); Corboy, *supra*, at 209–10. Great weight must be given to the jury’s determination. *Snelson v. Kamm*, 787 N.E.2d 796, 816 (Ill. 2003). Although there is substantial authority behind the judiciary’s right to determine damages, remittitur ensures the longevity of the jury even when some juries misbehave. *Sunray Oil Corp. v. Allbritton*, 187 F.2d 475, 478 (5th Cir. 1951) (quoting William Blackstone’s Commentaries).

203. *Richardson v. Chapman*, 676 N.E.2d 621, 628 (Ill. 1997); Fink, *supra* note 59, at 232–33 (citing Morton J. Horwitz, *THE TRANSFORMATION OF AMERICAN LAW 1780-1860: THE CRISIS OF LEGAL ORTHODOXY 2* (1978)) (arguing that judicial remittitur is based on the manifest weight of evidence, a fact-based determination); Richard W. Murphy, *Separation of Powers and the Horizontal Force of Precedent*, 78 NOTRE DAME L. REV. 1075, 1151 (2003); see also *Best*, 689 N.E.2d at 1079–82 (citing *Haid v. Tingle*, 579 N.E.2d 913, 914–16 (Ill. App. Ct. 1991)) (describing how the court remitted damages based on its determination that the jury award was excessive). Even the majority opinion in *Lebron* recognized that remittitur requires a focused examination of the facts of each case. *Lebron*, 930 N.E.2d at 906 (citing *Best*, 689 N.E.2d at 1080). Because the historical premise for remittitur is based on the need to correct aberrant errors of the jury, clearly remittitur can only be exercised on a case-by-case basis. Fink, *supra* note 59, at 242.

204. 735 ILL. COMP. STAT. 5/2-1706.5 (2010), *invalidated by Lebron v. Gottlieb Mem’l*

inherently involves weighing evidence,<sup>205</sup> and the absence of such a case-by-determination differentiates the basic function of the 2005 cap from the function of remittitur.<sup>206</sup> Indeed, the cap had a legislative effect and purpose that applied prospectively to all citizens and all cases, such that the cap was more analogous to the legislative repeal of a cause of action or its corresponding remedies.<sup>207</sup>

In the statute's legislative history, the General Assembly argued that increasing medical liability insurance costs were contributing to the increasing cost of health care.<sup>208</sup> It noted that a cap on noneconomic damages in medical malpractice cases was one of the many reforms that would maintain the ability of the health care system to protect the safety and welfare of Illinois citizens by reducing the harmful impact of excessive damages awards.<sup>209</sup> Thus, the objective of the 2005 cap was significantly different from that of judicial remittitur.<sup>210</sup> Whereas remittitur is a mechanism used to prevent jury awards that shock the judicial conscience because they are unreasonable in light of the case, the 2005 cap was properly within the scope of legislative power as a policy mechanism to reduce medical liability costs to a sustainable level and increase availability of health care in Illinois.<sup>211</sup>

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Hosp., 930 N.E.2d 895 (Ill. 2010). The 2005 cap functioned this way because it applied “[i]n any medical malpractice action or wrongful death action based on medical malpractice in which economic and non-economic damages may be awarded.” *Id.* The circumstances of each case were irrelevant under the 2005 cap. *See id.* (applying to all medical malpractice actions and describing the policy justifications for enacting the cap).

205. Blunt v. Little, 3 F. Cas. 760, 761–72 (D. Mass. 1822). Justice Story described the exercise of remittitur as one “of discretion full of delicacy and difficulty.” *Id.* at 761–72. He described the careful process of weighing evidence that justified his determination. *Id.*

206. The 2005 cap is inherently different from remittitur because it does not require the jury to act against the manifest weight of evidence; indeed, the cap could have applied where a jury reasonably and justifiably awarded damages in excess of the cap. *See* 735 ILL. COMP. STAT. 5/2-1706.5 (2010) (stating that the statute would apply to “any” jury award), *invalidated by* Lebron v. Gottlieb Mem’l Hosp., 930 N.E.2d 895 (Ill. 2010).

207. *See* Franklin v. Mazda Motor Corp., 704 F. Supp. 1325, 1331 (D. Md. 1989) (finding that because the legislature has the power to “define, augment, or even abolish complete causes of action,” the legislature also has the “power to define by statute what damages may be recovered”); Kirkland v. Blaine Cnty. Med. Ctr., 4 P.3d 1115, 1122 (Idaho 2000) (citing *Franklin*, 704 F. Supp. at 1331) (drawing a distinction between prospective legislative action that applies to all parties and an individualized judicial determination).

208. Act of Aug. 25, 2005, § 101, Pub. Act 94-677, 2005 Ill. Laws 4964, 4964–65, *invalidated by* Lebron v. Gottlieb Mem’l Hosp., 930 N.E.2d 895 (Ill. 2010).

209. *Id.*

210. *See* Lebron, 930 N.E.2d at 927 (Karmeier, J., concurring in part and dissenting in part) (arguing that caps on damages are not a determination of what is reasonable but what is allowable as a matter of policy).

211. Lees, *supra* note 3, at 232 (discussing the findings of REFORM NOW, *supra* note 1, at 28).

The opposing viewpoint is that remittitur and caps on damages have the same effect, making them practically the same exercise of power: in both cases, the government is reducing the amount of damages a plaintiff recovers.<sup>212</sup> However, the question of whether the General Assembly infringes on the inherent power of the judiciary is a question about the power itself and not the effects of exercising that power.<sup>213</sup>

Remittitur also functions *only* when the plaintiff agrees to it because the judge, after making the factual determination of what amount is reasonable, gives the plaintiff a choice between accepting that amount and proceeding to a new trial.<sup>214</sup> This was not the case with the 2005 cap, which was enacted by the General Assembly to apply to all cases irrespective of the parties' wishes or the jury's findings.<sup>215</sup> This prospective application of the 2005 cap differed from the retrospective judicial function of remittitur, and the 2005 cap therefore did not displace the judiciary's power to determine whether the jury award was fair and reasonable in each particular case.<sup>216</sup>

## 2. Remittitur is Not an Inherent Power of the Judiciary

Moreover, the historical development and constitutional challenges to the judiciary's exercise of remittitur clearly show that the function is not an inherent power of the judiciary.<sup>217</sup> The Illinois Constitution did not explicitly give the judiciary power to remit jury awards.<sup>218</sup>

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212. Stephen B. Presser, *Separation of Powers and Civil Justice Reform: A Crisis of Legitimacy for Law and Legal Institutions*, 31 SETON HALL L. REV. 649, 656 (2000–2001) (describing the conclusion in *Best* as being premised on the idea that the legislature took away the judiciary's remittitur role when it reduced damages).

213. ILL. CONST. of 1970 art. II, § 1 (stating that no branch shall exercise the power that belongs to another).

214. Murphy, *supra* note 203, at 1151; *Correction of Damage Verdicts by Remittitur and Additur*, 44 YALE L.J. 318, 319–20 (1934).

215. 735 ILL. COMP. STAT. 5/2-1706.5 (2010) (stating that the jury “shall” be informed of the 2005 cap), *invalidated by* *Lebron v. Gottlieb Mem’l Hosp.*, 930 N.E.2d 895 (Ill. 2010).

216. *See* Lees, *supra* note 3, at 232 (arguing that courts still have the power of remittitur even when damages are capped). Instead, the cap on damages set an “outer parameter by which wholly subjective damages are limited.” *Best v. Taylor Mach. Works*, 689 N.E.2d 1057, 1080 (Ill. 1997) (discussing the argument made by the *Best* appellants).

217. *See supra* note 59 and accompanying text (discussing the historical development of remittitur).

218. Not only does the Illinois Constitution not grant the power to remit jury awards to the judiciary, but also the exercise of remittitur is constitutionally suspect. *Lebron*, 930 N.E.2d at 928 (Karmeier, J., concurring in part and dissenting in part); *see also supra* notes 73–74 and accompanying text. This is relevant because the Illinois Supreme Court often looks to whether the Illinois Constitution provides a particular power to a branch of government in determining whether that power is inherent. *See, e.g., People ex rel. Baricevic v. Wharton*, 556 N.E.2d 253, 257 (Ill. 1990) (stating that the judiciary has inherent authority to administer and supervise the

Furthermore, other state and federal courts—which are persuasive but not binding on Illinois courts<sup>219</sup>—have not always exercised the power of remittitur, and since it was incorporated into American law in 1822, the constitutionality of remittitur has been questioned by courts and challenged by legal scholars as a violation of the right to a trial by jury.<sup>220</sup> Ultimately, remittitur was accepted as a legitimate judicial function because it was applied by the lower courts for many years—not on the basis that the judiciary had an inherent power to exercise it.<sup>221</sup> Although it is now widely accepted that remittitur does not violate the right to a trial by jury,<sup>222</sup> its checkered past demonstrates that it is far from being an inherent power of the judiciary.<sup>223</sup>

The duration for which judicial remittitur has now been upheld in the federal courts has widely been used to argue that remittitur is an inherent judicial function—a proposition which inaccurately conflates two distinct issues.<sup>224</sup> While the duration of time for which a power has

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court system in part because Illinois Constitution specifically vests this power in the court); *Polich v. Chi. Sch. Fin. Auth.*, 402 N.E.2d 247, 251 (Ill. 1980) (stating that the power to tax was firmly in the General Assembly because it was an inherent power and was specifically granted in the Constitution).

219. *People v. Fern*, 607 N.E.2d 951, 1039 (Ill. App. Ct. 1993).

220. See *supra* notes 73–74 and accompanying text for a more in-depth discussion of these questions and challenges to remittitur. Numerous legal scholars have also challenged the constitutionality of remittitur. Fink, *supra* note 59, at 238–39. Professor Irene Deaville Sann argues that tradition is not sufficient to justify the continue practice of remittitur and that it should therefore be abolished. Irene Deaville Sann, *Remittiturs (and Additurs) in the Federal Courts: An Evaluation with Suggested Alternatives*, 38 CASE W. RES. L. REV. 157, 172, 221 (1988). According to Sann, tradition should not prevent the Court from upholding the constitution no matter how engrained a particular practice may be. *Id.* Further, Professor Leo Carlin has argued that remittitur is unconstitutional because it undermines the right of the judiciary to award damages. Leo Carlin, *Remittiturs and Additurs*, 49 W. VA. L. REV. 1, 24 (1942). Fink argued that remittitur's suspect constitutionality actually weakens the case for legislative caps. Fink, *supra* note 59, at 298. Fink argued that if judicial remittitur was unconstitutional, it would in fact mean that the legislature could not limit damages either. *Id.*

221. *Dimick v. Schiedt*, 293 U.S. 474, 483 (1935).

222. The Illinois Supreme Court has established that remittitur is constitutional in Illinois. *Richardson v. Chapman*, 676 N.E.2d 621, 628 (Ill. 1997).

223. *Lebron*, 930 N.E.2d at 928 (Karmeier, J., concurring in part and dissenting in part).

224. See *Best v. Taylor Mach. Works*, 689 N.E.2d 1057, 1079–80 (Ill. 1997) (arguing that remittitur is an inherent judicial function because it has been upheld in federal courts for over a century); Corboy, *supra* note 202, at 209–10 (asserting that Illinois courts are to use remittitur “by tradition, and as an inherent power of the judicial branch”). In *Best*, the court merely cited to a U.S. Supreme Court case that remitted a jury award to support the proposition that remittitur is inherent to the judiciary. *Best*, 689 N.E.2d at 1079 (citing *Hansen v. Boyd*, 161 U.S. 397, 412 (1896)). The court also cited to and discussed *Dimick*, which itself questioned the constitutionality of remittitur. See *supra* notes 73–74 and accompanying text (discussing the *Dimick* Court's analysis of remittitur as being constitutionally suspect). Similarly, Corboy cited to *Richardson*, 676 N.E.2d at 628 (Ill. 1997), to support this proposition, but the *Richardson* court

been exercised may *support* a finding that the power is inherent, it is not *sufficient* to warrant such a conclusion because an inherent power is plainly one that is critical to the exercise of all other powers.<sup>225</sup> This element is crucial to understanding why remittitur is not inherent to the judiciary as courts are able to administer justice and execute their other powers without the exercise of judicial remittitur.<sup>226</sup> Even if remittitur did not exist, the court could still administer justice by ordering a new trial without the alternative of accepting a lower damage award.<sup>227</sup>

### 3. The *Lebron* Court Did Not Give Adequate Weight to the Separation of Powers Analyses from Other States

The *Lebron* holding also came as a surprise because the majority of states that have addressed statutes similar to the 2005 cap found that damage caps are constitutional.<sup>228</sup> Of these states, several have specifically found that caps on damages are not comparable to legislative remittitur and do not violate the separation of powers.<sup>229</sup>

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merely applied the remittitur doctrine without holding that it was inherent to the judiciary. See *Richardson*, 676 N.E.2d at 628–29 (finding that it was appropriate to remit the jury award to an amount that did not depart from the record).

225. See *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 764 (1980) (holding that that inherent powers are “those which are necessary to the exercise of all others”) (internal quotation marks omitted) (citation omitted). The *Roadway Express* Court identified a contempt sanction as a prominent inherent power because it is necessary to maintain order and dignity in the court. *Id.* The court then concluded that assessing attorney’s fees against counsel is an inherent judicial function because that power is necessary for the court to manage its own affairs. *Id.* at 765.

226. *Dimick*, 293 U.S. at 483.

227. See *Blunt v. Little*, 3 F. Cas. 760, 761 (D. Mass. 1822) (implementing a remittitur on the grounds that the court could otherwise order a new trial anyway). The court has always been able to order a new trial if it found the damage award excessive, and remittitur was merely a modification of that principle because it gave the plaintiff the choice between a new trial and accepting a lower damage award. See *id.*

228. CAPS ON DAMAGES, *supra* note 15.

229. *Evans ex rel. Kutch v. State*, 56 P.3d 1046, 1055 (Alaska 2002); *Garhart ex rel. Tinsman v. Columbia/Healthone, L.L.C.*, 95 P.3d 571, 581–82 (Colo. 2004); *Kirkland v. Blaine Cnty. Med. Ctr.*, 4 P.3d 1115, 1121–22 (Idaho 2000); *Gourley ex rel. Gourley v. Neb. Methodist Health Sys., Inc.*, 663 N.W.2d 43, 76 (Neb. 2003); *Judd v. Drezga*, 103 P.3d 135, 145 (Utah 2004); *Verba v. Ghaphery*, 552 S.E.2d 406, 411 (W. Va. 2001); *Owens-Corning v. Walatka*, 725 A.2d 579, 590–92 (Md. Ct. Spec. App. 1999), *abrogated by John Crane, Inc. v. Scribner*, 800 A.2d 727 (Md. 2002); *Zdrojewski v. Murphy*, 657 N.W.2d 721, 739 (Mich. Ct. App. 2002). Of these eight cases, four specifically identified and rejected the reasoning from *Best*. E.g., *Gourley*, 663 N.W.2d at 76; *Owens-Corning*, 725 A.2d at 590–92. In *Gourley*, the Supreme Court of Nebraska acknowledged *Best*’s finding that damage caps impermissibly give the legislature power to remit verdicts and judgments. *Gourley*, 663 N.W.2d at 76. However, the Supreme Court of Nebraska pointed out the overwhelming number of courts that have found that damage caps do not violate separation of powers. *Id.* It then argued in favor of this analysis because damage caps do not function as legislative remittitur. *Id.* The court argued that damage caps do not require the legislature to evaluate a case and determine the amount of damages. *Id.* Rather, it is a limit to

Although the opponents of caps argue that other states do not dictate Illinois law,<sup>230</sup> the Illinois Supreme Court has on numerous occasions considered the findings of other states to inform its conclusion.<sup>231</sup> These conclusions should be considered in Illinois because the statutes at issue and the separation of powers clauses of those states are similar to both the 2005 cap and Illinois separation of powers clause, demonstrating that the conclusions of the high courts in those states would not only have been reasonable but the most appropriate outcome in *Lebron*.<sup>232</sup> These decisions also represent the reality that surging jury awards need to be remedied and that the legislature is the most appropriate government body to deal with such policy.

The Supreme Court of Virginia found that remittitur was not the same as a damage cap because they do not apply in the same circumstances.<sup>233</sup> A court only applies remittitur after it determines that, based on an excessive jury award, the defendant did not receive a fair and proper jury trial, whereas the cap is applied after a proper trial.<sup>234</sup> Further, the cap on damages does not coincide with a right to a new trial, as is the case with remittitur.<sup>235</sup> Similarly, the Supreme Court

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recovery as a matter of policy without regard to individual facts. *Id.* at 77. As a result of this distinction, the court held that the damage cap in Nebraska did not violate its separation of powers clause in the Nebraska Constitution. *Id.*

230. *Lebron v. Gottlieb Mem'l Hosp.*, 930 N.E.2d 895, 914 (Ill. 2010); *Best*, 689 N.E.2d at 1077–78.

231. *See, e.g., People v. Pawlaczyk*, 724 N.E.2d 901, 912 (Ill. 2000) (reasoning that decisions from other jurisdictions and law reporters supported the court's determination); *P.R.S. Int'l, Inc. v. Shred Pax Corp.*, 703 N.E.2d 71, 78 (Ill. 1998) (“We also find support in the judgments of other state courts which have reached the same conclusion in construing similar rules.”).

232. The court can rely on the analysis of sister states because of the profound underlying similarities between the states. *Devlin, supra* note 54, at 1264–65. Although there are small differences between the text of state constitutions and the historical circumstances in which those constitutions were drafted, these small differences do not overcome the basic similarities in which the constitutions were drafted. *Id.* at 1265. Ten state constitutions follow the federal framework by not expressly requiring separation of powers. *Id.* at 1236. Twelve states expressly dictate that there should be separation of powers, and the remaining states expressly mandate separation of powers doctrine and go even further by stating that no person exercising power under one branch can hold office or exercise power under another branch. *Id.* at 1236–37. This is one of numerous differences between the state constitutions; however, despite the differences, all states share the same basic separation of powers doctrine. *Id.* at 1236–41. According to *Devlin*, these fundamental similarities overcome the textual differences and warrant comparison between states when evaluating allocation of powers between branches in state government. *Id.* at 1264–65. Notably, most state court decisions that address separation of powers cite and rely on the determinations of other states. *Id.* at 1241.

233. *Pulliam v. Coastal Emergency Servs. of Richmond, Inc.*, 509 S.E.2d 307, 313 (Va. 1999).

234. *Id.*

235. *Id.*

of Idaho held that damage caps do not infringe upon the power of the judiciary even if they limit the rights of plaintiffs.<sup>236</sup> The court emphasized the similarity between damage caps and other legislative modifications to the common law such as statutes of limitations, statutes of repose, and the creation of new causes of action.<sup>237</sup> The court found that the relevant damage cap did not violate the separation of powers because it was not a form of remittitur and was nothing more than a change to the common law.<sup>238</sup>

The *Lebron* majority argued that the statutes in other states vary widely, making them inapplicable.<sup>239</sup> However, this argument dodged the fact that the other state supreme courts have still asked the same question: Is a statutory limit on damages a legislative remittitur that impermissibly violates the separation of powers clause of the state constitution?<sup>240</sup> Contrary to the finding in *Best*, damage caps are not a legislative remittitur, and Illinois is greatly outnumbered by those states that have reached this conclusion.<sup>241</sup>

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236. *Kirkland v. Blaine Cnty. Med. Ctr.*, 4 P.3d 1115, 1122 (Idaho 2000).

237. *Id.*

238. *Id.* The Supreme Court of Appeals of West Virginia also determined in *Verba v. Ghaphery*, 552 S.E.2d 406 (W. Va. 2001), that legislative caps on damages do not violate the separation of powers doctrine because of the legislature's power to abrogate the common law. *Id.* at 410–11. The Illinois General Assembly's authority to change the common law and the Illinois separation of powers clause are substantially similar to those in other states, so the court in *Lebron* should have considered them more closely in its conclusion. See *People v. Gersch*, 553 N.E.2d 281, 286 (Ill. 1990) ("The Illinois General Assembly has the inherent power to repeal or change the common law, or do away with all or part of it."). Similarly, the Supreme Court of North Carolina held that the "common law may be modified or repealed by the General Assembly." *Rhyne v. K-Mart Corp.*, 594 S.E.2d 1, 8 (N.C. 2004) (internal quotation marks omitted) (citation omitted). Also, the Illinois Constitution states that "[t]he legislative, executive and judicial branches are separate. No branch shall exercise power properly belonging to another." ILL. CONST. of 1970 art. II, § 1. This provision is very similar to the North Carolina Constitution, which states that "[t]he legislative, executive, and supreme judicial powers of the State government shall be forever separate and distinct from each other." N.C. CONST. art. I, § 6. However, the North Carolina Constitution even goes one step further, stating that "[t]he General Assembly shall have no power to deprive the judicial department of any power or jurisdiction that rightfully pertains to it as a co-ordinate department of the government . . ." N.C. CONST. art. IV, § 1. This specifically limits the General Assembly in North Carolina; yet, the North Carolina Supreme Court still rejected the separation of powers analysis and held that a statutory limit on damages was not legislative remittitur. *Rhyne*, 594 S.E.2d at 9.

239. *Lebron v. Gottlieb Mem'l Hosp.*, 930 N.E.2d 895, 913 (Ill. 2010).

240. See, e.g., *Garhart ex rel. Tinsman v. Columbia/Healthone, L.L.C.*, 95 P.3d 571, 575 (Colo. 2004) (explaining that the HCAA damage caps do not infringe impermissibly on judicial remittitur, nor do they violate separation of powers); *Kirkland v. Blaine Cnty. Med. Ctr.*, 4 P.3d 1115, 1116 (Idaho 2000) (explaining that the court intended to answer the question of whether the statute violated the separation of powers clause).

241. Not only can the court consider the analysis of sister states as one of many factors in its determination, but it *should* rely on relevant precedent from other states as persuasive authority.

The findings and analyses from other state courts in similar cases based on similar separation of powers clauses indicate that the conclusion in *Best* was assailable and could be overturned as unsound reasoning.<sup>242</sup> As described above, those holdings definitively explained why remittitur is not an inherent judicial function and damage caps do not function as a form of legislative remittitur. Considering that every other state and federal jurisdiction to evaluate the separation of powers analysis from *Best* has rejected it,<sup>243</sup> it is astonishing that the *Lebron* court reaffirmed it, and it is evident that the *Lebron* holding was misguided.<sup>244</sup>

*B. The General Assembly Has Power to Abrogate or Eliminate the Common Law*

It is a foundational principle of Illinois law that the General Assembly has the authority to eliminate or change the common law when it sees a policy justification for doing so, and this principle has long been upheld by the Illinois Supreme Court.<sup>245</sup> The Illinois General Assembly has on numerous occasions modified the common law, including some modifications that affect the plaintiff's right to recover for common law claims such as the imposition of statutes of limitation, the statute of repose, the Good Samaritan Act, and Worker's Compensation Act.<sup>246</sup> The General Assembly's authority to change or

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Devlin, *supra* note 54, at 1264–65.

242. *Lees, supra* note 3, at 227; *see also Lebron*, 930 N.E.2d at 931–32 (Karmeier, J., concurring in part and dissenting in part) (stating that although the court's view of the separation of powers doctrine should be dictated by the intent of the framers of the Illinois Constitution, “[t]he preeminence of that intent . . . does not preclude reference to how other courts have analyzed similar provisions under similar circumstances”).

243. *Franklin v. Mazda Motor Corp.*, 704 F.Supp. 1325, 1331–35 (D. Md. 1989). *See generally* CAPS ON DAMAGES, *supra* note 15 (detailing the status of damage caps within each of the fifty states and any cases that have overturned them).

244. *Lebron*, 930 N.E.2d at 931 (Karmeier, J., concurring in part and dissenting in part); *see also supra* note 241 and accompanying text (explaining that Illinois is hopelessly outnumbered by other states and the federal courts in the question of whether caps on damages violate separation of powers).

245. *See* 5 ILL. COMP. STAT. 50/1 (2010) (giving the legislative authority the power to repeal the common law).

246. *See, e.g.*, 735 ILL. COMP. STAT. 5/13-213(b) (2010) (limiting the time within which a cause of action could be brought in products liability cases); 735 ILL. COMP. STAT. 5/13-214.3(c) (limiting the time within which a cause of action could be brought against an attorney); Good Samaritan Act, 745 ILL. COMP. STAT. 49/1-120 (2010) (eliminating common law negligence for certain health care professionals and individuals who voluntarily try to save the life of another); Recreational Use of Land and Water Areas Act, 745 ILL. COMP. STAT. 65/1-7 (eliminating negligence liability in certain instances for owners of land and water areas who make these areas available to members of the public). The court has rarely interfered with the legislature's right to



eliminate the common law is reinforced by the conclusions of other states, which have strongly affirmed this power when upholding the constitutionality of damage caps.<sup>247</sup>

Indeed, the General Assembly has authority over the common law because it is uniquely positioned to make policy decisions.<sup>248</sup> As the former Illinois Supreme Court Chief Justice Michael A. Bilandic once stated, public policy “should emanate from the legislature . . . [because] it is the only entity with the power to weigh and properly balance the many competing societal, economic, and policy considerations involved.”<sup>249</sup> The General Assembly can access resources and information that are unavailable to the judiciary, and it hears the needs and desires of the people, enabling it to weigh the costs and benefits of various policies.<sup>250</sup> Most importantly, the General Assembly prospectively creates rules that it determines will prevent problems in tort law, whereas courts are limited to ruling based on circumstances that have already occurred and brought the parties to court.<sup>251</sup> This difference enables the legislature to better avoid public harms and to provide “fair notice” to those who are affected.<sup>252</sup> Thus, the judiciary should give significant deference to the General Assembly’s authority to change the common law when such authority is used to affect public policy—something the *Lebron* court failed to do when it invalidated

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change the common law. Victor E. Schwartz et al., *Illinois Tort Law: A Rich History of Cooperation and Respect Between the Courts and the Legislature*, 28 LOY. U. CHI. L.J. 745, 753–55 (1997); see also *Mega v. Holy Cross Hosp.*, 490 N.E.2d 665, 669–71 (Ill. 1986) (finding that the statute of repose is constitutional because it only restricts when the action is brought and does not eliminate the cause of action altogether).

247. Kevin J. Gfell, *The Constitutional and Economic Implications of a National Cap on Non-Economic Damages in Medical Malpractice Actions*, 37 IND. L. REV. 773, 789 (2004); see also *supra* notes 237–238 and accompanying text (discussing other state supreme court cases that held damage caps were not an unconstitutional violation of separation of powers but were an exercise of the legislative authority to change the common law).

248. Schwartz, *supra* note 246, at 751; Lisa Raufer, *Education—State Supreme Court Upholds School Finance System as Constitutional Under Article X, Section 3 and Article I, Section 1 of the Wisconsin Constitution*. Vincent v. Voight, 614 N.W.2d 388 (Wis. 2000), 32 RUTGERS L.J. 1194, 1207–08 (2001) (citing Vincent, 614 N.W.2d at 407); Andrew C. Bernasconi, Comment, *Beyond Fingerprinting: Indicting DNA Threatens Criminal Defendants’ Constitutional and Statutory Rights*, 50 AM. U. L. REV. 979, 1036 (2001).

249. *Charles v. Seigfried*, 651 N.E.2d 154, 160 (Ill. 1995).

250. Schwartz, *supra* note 246, at 750–52; see also *supra* note 165 and accompanying text (describing the General Assembly’s ability to weigh social, economic, and policy interests). When additional information is needed to make a policy determination, the legislature can recall witnesses, and it has broader latitude in researching policy. Schwartz, *supra* note 246, at 751–52.

251. Schwartz, *supra* note 246, at 751–52.

252. *Id.* at 752 (citing *BMW of N. America, Inc. v. Gore*, 517 U.S. 559, 574 (1996)).

Public Act 94-677.<sup>253</sup>

Moreover, the court should have upheld the cap in *Lebron* based on *Unzicker*, which affirmed the right of the General Assembly to restrict when a defendant can be held liable for the entire amount of a verdict.<sup>254</sup> Although it could be argued that the court logically focused on *Best* because the 1996 cap was most similar to the 2005 cap, the underlying question in *Unzicker*—whether the General Assembly can alter the common law to reduce the liability of a defendant—is the same question that underlay *Lebron*.<sup>255</sup> Just like the statute at issue in *Unzicker*, the 2005 cap “determines when a defendant can be held liable for the full amount of a jury’s verdict.”<sup>256</sup> More importantly, the separation of powers analysis from *Unzicker*—unlike *Best*—was part of a binding judicial holding, and the *Lebron* court should have treated it accordingly.<sup>257</sup>

The separations of powers analyses in *Best* and *Unzicker* contradicted each other on the question of whether the General Assembly could reduce a defendant’s liability.<sup>258</sup> *Best* suggested that the General Assembly had no authority to reduce civil damages, whereas *Unzicker*

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253. See *Lebron v. Gottlieb Mem’l Hosp.*, 930 N.E.2d 895, 912 (Ill. 2010) (acknowledging that the General Assembly may change the common law, but arguing that that is not the central issue of the case). The *Lebron* court says that the only question is whether the legislature’s attempt to limit damages is a violation of separation of powers. *Id.* However, this argument neglects the fact that the legislature’s authority over the common law is part of the separation of powers determination. See *Charles*, 651 N.E.2d at 160–62 (analyzing a separation of powers challenge in light of the General Assembly’s power to change or eliminate the common law).

254. *Unzicker v. Kraft Food Ingredients Corp.*, 783 N.E.2d 1024, 1037–38 (Ill. 2002). For further discussion of the presumption favoring constitutionality of statutes, see *infra* Part IV.D.

255. Compare *Unzicker*, 783 N.E.2d at 1042 (finding that the legislature may limit “when a defendant can be held liable for the full amount of a jury’s verdict”), with *Lebron*, 930 N.E.2d at 908 (“Under [the 2005 cap], the court is required to override the jury’s deliberative process and reduce any noneconomic damages in excess of the statutory cap, irrespective of the particular facts and circumstances . . .”).

256. *Unzicker*, 783 N.E.2d at 1042.

257. *Id.*; see also Parness, *supra* note 119, 324–25 (describing how the *Lebron* court distinguished *Unzicker*).

258. Compare *Unzicker*, 783 N.E.2d at 1042 (finding that the legislature does not violate separation of powers by enacting a statute that limits a defendant’s liability based on the percentage of his fault regardless of the amount the jury award and the common law rule of joint and several liability), with *Best v. Taylor Mach. Works*, 689 N.E.2d 1057, 1080 (Ill. 1997) (reasoning that the legislature cannot interfere with the judiciary’s right to remit excessive verdicts); see also Reply Brief, *supra* note 89, at 4 (discussing plaintiff’s brief, which argued that *Best* precluded the legislature from limiting liability in all circumstances, and arguing that under this view, *Best* could not be reconciled with *Unzicker*). If *Lebron*’s holding had been applied to *Unzicker*, the Illinois Supreme would have invalidated the statute in *Unzicker* as well as the Innkeeper Protection Act, 740 ILL. COMP. STAT. 90/1–9 (2010)). Reply Brief, *supra* note 89, at 4.

held that the General Assembly could reduce a defendant's liability even if it contradicted the existing common law.<sup>259</sup> Therefore, when it decided *Lebron*, the court could only rely on one case or the other, and the court erred in applying *Best* because it gave insufficient weight to the legislature's well-established authority to change the common law.<sup>260</sup>

*C. The Separation of Powers Analysis from Best was Non-Binding  
Judicial Dicta*

The majority and dissenting opinions in *Lebron* discuss at length whether the separation of powers analysis from *Best* was judicial dictum or obiter dictum.<sup>261</sup> In either case, the analysis was unquestionably dicta because it was not essential to the court's conclusion as it had already found that the *Best* cap was "special legislation" prohibited by the Illinois Constitution.<sup>262</sup> Because the court resolved the case based on that issue, it did not need to proceed to the separation of powers analysis.<sup>263</sup> Although it seems evident that the *Best* separation of powers analysis was in fact judicial dicta because it was directly involved in the case and was briefed and argued by both parties,<sup>264</sup> even judicial dictum is not binding and can be disregarded by the court in future decisions if the analysis is erroneous.<sup>265</sup> As demonstrated above, the *Lebron* court should not have applied *Best* because its separation of powers analysis was erroneous: remittitur is not an inherent judicial function and damage caps do not function the same as remittitur.<sup>266</sup>

259. See *supra* note 258 and accompanying text.

260. See *Lebron*, 930 N.E.2d at 906–07, 910–11 (considering the precedential value of *Best* and *Unzicker* and invalidating the 2005 cap on the basis of the judicial dicta from *Best*). See *supra* Part II.A–D for a more detailed description of the propositions in *Unzicker* and *Best*.

261. *Lebron*, 930 N.E.2d at 906–07, 926 (citing *Best*, 689 N.E.2d at 1106).

262. See *Best*, 689 N.E.2d at 1076 (finding that the damage cap at issue in *Best* was special legislation that violated the Illinois Constitution).

263. See *supra* notes 50, 124, and 167 (describing the separation of powers analysis in *Best* as judicial dicta because the issue was not necessary to resolution of the case but was briefed by the parties and addressed by the court); see also Matthew W. Light, Comment, *Who's the Boss?: Statutory Damage Caps, Courts, and State Constitutional Law*, 58 WASH. & LEE L. REV. 315, 340–41 (2001) (criticizing the court's special legislation analysis in *Best* without acknowledging the fact that the court discussed separation of powers in its holding).

264. See *Best*, 689 N.E.2d at 1078 ("Plaintiffs also assert that section 2-1115.1 violates the separation of powers clause . . .").

265. *Exelon Corp. v. Dep't of Revenue*, 917 N.E.2d 899, 907 (Ill. 2009); *Cates v. Cates*, 619 N.E.2d 715, 717 (Ill. 1993).

266. The majority again tried to dodge the core issue by arguing that the defendants did not claim that the finding in *Best* was erroneous. *Lebron*, 930 N.E.2d at 907. According to the majority, the defendants merely argued that section 2-1706.5 was distinguishable from the statute

*D. The Lebron Court Did Not Give Sufficient Weight to the Heavy Presumption Favoring the Constitutionality of Statutes*

In order to evaluate *Lebron*, it is crucial to consider the enduring presumption in favor of a statute's constitutionality.<sup>267</sup> The party challenging a statute *must* show that it is unconstitutional in order for the court to reach that conclusion.<sup>268</sup> The court has made this a heavy burden and a strong presumption, and all doubts are to be resolved in favor of the statute's validity.<sup>269</sup> Accordingly, the Illinois Supreme Court has repeatedly relied on the presumption to uphold the constitutionality of statutes.<sup>270</sup>

Considering the separation of powers analysis above, it is clear that rejecting this constitutional challenge to the 2005 cap would have been reasonable. Furthermore, the court's holding in *Unzicker* and its dicta in *Best* contradicted each other as to whether the Illinois General Assembly could limit a plaintiff's recovery in a common law claim, and in light of any discrepancy, *Unzicker* should have controlled.<sup>271</sup> Nonetheless, the *Lebron* court inexplicably reached the conclusion that the statute was unconstitutional even though it recognized the strong presumption favoring statutes.<sup>272</sup> In light of the numerous legal and policy justifications for the statute, the court simply did not afford sufficient weight to the presumption of constitutionality, but rather

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at issue in *Best*. *Id.* Although Gottlieb and Florence Martinoz did not argue that the analysis from *Best* was erroneous, Dr. Levi-D'Ancona claimed that the circuit court "erroneously conflated the power of remittitur with a statutory limitation on damages. . . . [A] damages limitation and a remittitur are very different animals." Brief and Appendix of Defendant-Appellant Roberto Levi-D'ancona, M.D. at 37, *Lebron*, 930 N.E.2d 895 (Nos. 105741, 105745), 2008 WL 3857550. While this brief may not have specifically stated that *Best* was erroneous, it made arguments that implied that conclusion. *Id.*

267. *E.g.*, *Sanelli v. Glenview State Bank*, 483 N.E.2d 226, 234 (Ill. 1985); *Livingston v. Ogilvie*, 250 N.E.2d 138, 141 (Ill. 1969).

268. *Polyvend, Inc. v. Puckorius*, 395 N.E.2d 1376, 1383 (Ill. 1979).

269. *See Reed v. Farmers Ins. Grp.*, 720 N.E.2d 1052, 1057 (Ill. 1999) (explaining that when the legislature declares the public policy of the state by law, the judiciary must "remain silent"); *see also, e.g.*, *Cont'l Ill. Nat'l Bank & Trust Co. v. Ill. State Toll Highway Comm'n.*, 251 N.E.2d 253, 256-58 (Ill. 1969) (choosing to interpret the amended version of a statute that did not contain a constitutional violation so as to uphold the statute); *Ill. Crime Investigating Comm. v. Buccieri*, 224 N.E.2d 236, 239-40 (Ill. 1967) (inferring that the General Assembly meant to include notice and hearing requirements in a statute that enabled the circuit court to assist in requiring attendance and testimony of witnesses so that the court could uphold the statute's constitutionality).

270. *See supra* note 269 for a discussion of applicable cases.

271. *See supra* notes 258-259 and accompanying text (comparing *Unzicker* and *Best*).

272. *Lebron*, 930 N.E.2d at 902 (citing *In re Marriage of Miller*, 879 N.E.2d 292 (Ill. 2007); *In re Estate of Jolliff*, 771 N.E.2d 346 (Ill. 2002)).

chose to rely solely on a tenuous separation of powers analysis based on an erroneous application of the remittitur doctrine.

## V. IMPACT

Some commentators have suggested that *Lebron* could be the death knell for damage caps in Illinois.<sup>273</sup> This Part discusses in detail how the decision in *Lebron* indeed strengthened the law against caps on damages in Illinois.<sup>274</sup> The focus of this Part, however, is how Illinois might still enact a statutory cap on damages.<sup>275</sup> First, this Part argues that Illinois should adopt a constitutional amendment giving the General Assembly power to enact caps on damages.<sup>276</sup> Second, it suggests that a statute could be drafted without a constitutional amendment in a way that would limit damages and still withstand constitutional scrutiny, and it proposes how such a difficult feat might still be accomplished—even after *Lebron*.<sup>277</sup>

### A. *The Separation of Powers Analysis from Lebron Has Entrenched the Illinois Supreme Court's Stance on Damage Caps and Made Any Change Difficult*

Unfortunately, the court's mistake in *Lebron* entrenches the separation of powers analysis against damage caps because the court did not leave many questions unanswered.<sup>278</sup> It broadly held that any statute forcing a court to reduce damages is a form of legislative remittitur violating the separation of powers doctrine, regardless of whether the statute is broadly written or narrowly tailored to medical malpractice claims.<sup>279</sup> Moreover, *Lebron* made this binding law unlike the analysis from *Best*. Thus, *Lebron* seriously harmed the effort to curb liability costs and control the damages crisis in Illinois.<sup>280</sup>

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273. Goldhaber & Grycz, *supra* note 94, at 20–21.

274. *See infra* Part V.A.

275. *See infra* Part V.B–C.

276. *See infra* Part V.B.

277. *See infra* Part V.C.

278. Goldhaber & Grycz, *supra* note 94, at 19; Gunnarsson, *supra* note 136, at 122 (statement of ISBA President John O'Brien) (“The court has spoken on this issue in defense of our constitution and the role of the judiciary and juries.”); Allen Adomite, *Court Hands Gift to Trial Lawyers*, CHI. TRIB., Feb. 18, 2010, at 23 (arguing that the court ended an eight year struggle for tort reform with a single sentence).

279. *See supra* Part III.B (discussing the *Lebron* majority opinion).

280. Goldhaber & Grycz, *supra* note 94, at 21; *see also* Lynne Marek, Ill. *High Court Uncaps Medical Malpractice Damages Again*, 241 LEGAL INTELLIGENCER, no. 26, Feb. 9, 2010, at 4 (statement of Robert Peck, President of the Center for Constitutional Litigation) (“I would hope

Unless *Lebron* is somehow reversed or overcome, high medical malpractice jury awards will continue to add to surging health care costs.<sup>281</sup> Physicians and health care professionals will continue to have difficulty finding affordable malpractice insurance, and this cost will drive up the price of health care for citizens of Illinois.<sup>282</sup> Almost every other state in the United States has enacted some statute to reduce the costs of health care in order to increase its accessibility, but Illinois will continue to face increasing costs and decreasing availability of health care if it does not somehow limit medical malpractice liability.<sup>283</sup>

*B. Illinois Should Pass a Constitutional Amendment Giving the General Assembly Power to Limit Damages in Medical Malpractice Cases*

However, there is still a glimmer of hope for controlling these costs.<sup>284</sup> Passing a constitutional amendment is arguably the most difficult but also the most effective means of enacting a statutory limit on damages.<sup>285</sup> Texas faced a similar predicament after the Texas Supreme Court invalidated a statutory limit on damages in *Lucas v. United States*,<sup>286</sup> which held that such a cap was unconstitutional.<sup>287</sup> In

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that the Legislature now, having gone to the well three times in Illinois, would understand that this is a non-starter constitutionally.”).

281. See *supra* notes 10, 13 and accompanying text (discussing the correlation between increasing jury awards and increasing health care costs generally and arguing that increased liability forces doctors to practice defensive medicine).

282. Arancibia, *supra* note 4, at 136 (citing Shirley Qual, *A Survey of Medical Malpractice Tort Reform*, 12 WM. MITCHELL L. REV. 417, 420–21 (1986)).

283. Act of Aug. 25, 2005, § 101, Pub. Act 94-677, 2005 Ill. Laws 4964, 4964–65 (stating that reducing malpractice liability would help reduce prohibitive costs of health care), *invalidated by* *Lebron v. Gottlieb Mem’l Hosp.*, 930 N.E.2d 895 (Ill. 2010); June Smith Tyler, Comment, *Medical Malpractice Statutes: Special Protection for a Privileged Few?*, 12 N. KY. L. REV. 295, 307–08 (1985) (arguing that tort reform statutes reduce costs and increase availability of health care).

284. See *infra* Part V.B–C (discussing other alternatives that might reduce the surging costs of medical liability insurance).

285. Goldhaber & Grycz, *supra* note 94, at 21; see also FRANK KOPECKY & MARY SHERMAN HARRIS, UNDERSTANDING THE ILLINOIS CONSTITUTION 59–60 (2001 ed.) (stating that constitutions require some inflexibility to ensure that changes are properly considered).

286. 757 S.W.2d 687 (Tex. 1988).

287. *Id.* at 690. *Lucas* invalidated the Medical Liability and Insurance Act passed in 1977, which limited noneconomic damages in medical malpractice cases. Michael J. Cetra, *Damage Control: Statutory Caps on Medical Malpractice Claims, State Constitutional Challenges, and Texas’ Proposition 12*, 42 DUQ. L. REV. 537, 551 (2003–2004). The statute limited noneconomic damages to \$500,000 in 1975 and was indexed to the Consumer Price Index. *Id.* The court held that the statute was an unconstitutional violation of the Texas Open Courts doctrine, which guarantees access to the court system. *Id.* (citing TEX. CONST. art. I, § 13 (2003)). The Open Courts doctrine provides that “[a]ll courts shall be open, and every person for an injury done him, in his lands, goods, person or reputation, shall have remedy by due course of law.” TEX. CONST.

response, the legislature enacted H.B. 4, another cap on damages in medical malpractice claims.<sup>288</sup> Knowing that the Texas Supreme Court would likely invalidate the second cap, Governor Rick Perry successfully campaigned in support of Proposition 12, a proposed constitutional amendment that would give the Texas legislature the power to determine limits of liability for noneconomic damages in all medical malpractice claims brought against health care providers.<sup>289</sup>

Constitutions are expressions of the collective will regarding the structure of government and the balance of powers therein;<sup>290</sup> they are a mechanism to secure faith in and stability of the government.<sup>291</sup> Although the United States Constitution is relatively brief and provides for only the most fundamental protections, state constitutions provide more detail and more depth, addressing many local concerns.<sup>292</sup> The greater length of state constitutions can largely be attributed to the fact that they are easier to amend or change; in fact, they are changed frequently and have regularly been expanded to address political or social concerns of the state.<sup>293</sup> This is true in Illinois where there have been four constitutions—the latest adopted in 1970—as well as ten successful constitutional amendments and seven unsuccessful

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art. I, § 13.

288. Cetra, *supra* note 287, at 551.

289. *Id.* at 552 (citing Erica Pitz, *Proposition 12 Passes by Narrow Margin* (Sept. 14, 2003)). Proposition 12 became article III, section 66 of the Constitution of the State of Texas. TEX. CONST. art. III, § 66 (2003).

290. JOHN ALEXANDER JAMESON, A TREATISE ON CONSTITUTIONAL CONVENTIONS: THEIR HISTORY, POWERS, AND MODES OF PROCEEDING 84 (Callaghan & Co. 4th ed. 1887); *see also*, e.g., U.S. CONST. pmb. (“We the People . . .”); James A. Gardner, *Consent, Legitimacy and Elections: Implementing Popular Sovereignty Under the Lockean Constitution*, 52 U. PITT. L. REV. 189, 202–10 (1990–1991) (describing Lockean theory of popular sovereignty and how the Constitution reflects the popular will). According to Professor Gardner, the language throughout the U.S. Constitution reflects the idea that the document represents the popular will. *Id.*

291. *See* Letter from George Washington to the Marquis de Lafayette (Feb. 7, 1788), in 2 THE DEBATE ON THE CONSTITUTION 178, 179 (Library of America 1993) [hereinafter Letter from George Washington] (arguing that the powers granted in the U.S. Constitution were distributed between branches of government so as to prevent oppression or abuse of power).

292. Lawrence Schlam, *State Constitutional Amending, Independent Interpretation, and Political Culture: A Case Study in Constitutional Stagnation*, 43 DEPAUL L. REV. 269, 275–76 (1993–1994) (citing Donald S. Lutz, *The Purposes of American State Constitutions*, 12 PUBLIUS: J. FEDERALISM 27, 41 (1982)). Lutz described the three reasons that state constitutions tend to be longer: they spend time addressing local and county government, they address local public concerns that arise from the Tenth Amendment residuary power, and they have been expected to “exalt a way of life.” *Id.* (citing Lutz, *supra*, at 41) (internal citations omitted).

293. There have been over 230 state constitutional conventions and 5198 state constitutional amendments in the United States. Janice C. May, *Constitutional Amendment and Revision Revisited*, 17 PUBLIUS: J. FEDERALISM 153, 162–64 (1987).

amendment proposals to the 1970 Illinois Constitution.<sup>294</sup> Not only is the Illinois Constitution flexible, but it is structured to encourage change: the 1970 Constitution provides for an automatic proposal to revise the constitution every twenty years.<sup>295</sup>

State constitutional amendments are not only common, but they are useful because they enable states to enact different policies,<sup>296</sup> thereby making it easier to determine which are effective and should be adopted more expansively.<sup>297</sup> Further, constitutional amendments allow citizens to check the powers of the government where it does not reflect the will of the people or support the welfare of the state.<sup>298</sup> In Illinois,

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294. KOPECKY & HARRIS, *supra* note 285, at 59; *see also* Kristopher N. Classen & Jack O'Malley, *Filling the Void: The Case for Repudiating and Replacing Illinois' Void Sentence Rule*, 42 LOY. U. CHI. L.J. 427, 430–36 (2011) (discussing the development of the Illinois Constitution as it relates to the Void Sentence Rule). Through 1985, seven constitutional amendments were proposed to the 1970 constitution, three of which were approved. KOPECKY & HARRIS, *supra* note 285, at 62; CONSTITUTION OF THE STATE OF ILLINOIS: AMENDMENTS AND CONVENTIONS PROPOSED, <http://www.ilga.gov/commission/lrb/conampro.htm> (last visited Apr. 21, 2012) [hereinafter “AMENDMENTS AND CONVENTIONS”]. Since 1986, there have been an additional ten amendment proposals and seven of those proposals were approved. *Id.* Notably, the 1970 constitutional convention was the sixth constitutional convention in Illinois: the other four conventions failed to produce new constitutions. JANET CORNELIUS, *CONSTITUTION MAKING IN ILLINOIS: 1818–1970*, at 138–39 (1972). There were also two failed proposals for constitutional conventions after 1985. AMENDMENTS AND CONVENTIONS, *supra*. Constitutional amendments and even constitutional conventions are commonly discussed in Illinois, and although the Illinois Constitution is not easy to amend, it was structured to give voters the ability to change the constitution even if the legislature is unwilling to do so. KOPECKY & HARRIS, *supra* note 285, at 60.

295. KOPECKY & HARRIS, *supra* note 285, at 60.

296. *See supra* note 293 and accompanying text (discussing how state constitutions are often amended to reflect political and social concerns).

297. *See New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (“It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”); *see also* Shirley S. Abrahamson, *Criminal Law and State Constitutions: The Emergence of State Constitutional Law*, 63 TEX. L. REV. 1141, 1141–42 (1985) (discussing the Brandeis laboratory metaphor and the opposing viewpoints amongst judges as to what extent a state should experiment). States are able to adopt unique provisions based on what their culture allows or encourages; some states may be more inclined toward a given policy than others, and the states can serve as an experiment for those policies. Hans A. Linde, *E. Pluribus—Constitutional Theory and State Courts*, 18 GA. L. REV. 165, 193–200 (1983–1984).

298. *See* G. Alan Tarr, *Constitutional Theory and State Constitutional Interpretation*, 22 RUTGERS L.J. 841, 860–61 (1990–1991) (discussing the unique nature of constitutional amendments and advocating the utilization of amendments to incorporate a broader, more modern understanding of equality into state constitutions); *see also* Letter from George Washington, *supra* note 291, at 179 (defending the Constitution). The ability of the people to exercise a greater level of control over state constitutions is important because these constitutions limit state governmental authority; this is unlike the U.S. Constitution, which primarily grants specific federal powers. Jameson, *supra* note 290, at 86–88; Robert F. Williams, *State Constitutional Law Processes*, 24 WM. & MARY L. REV. 169, 178–79 (1983). Thus, the amendment process should



government abuses of power have in the past led to the enactment of constitutional provisions designed to check that power.<sup>299</sup> There have also been constitutional amendment proposals that dealt with the allocation of powers and amendments that addressed issues as specific as collecting delinquent taxes or eliminating the possibility of bail in criminal cases where life imprisonment was a possible sentence.<sup>300</sup> Illinois should follow Texas's example and pass a similar constitutional amendment under the procedure and authority already enumerated in its state constitution so that the General Assembly can enact another cap on damages in medical malpractice cases.<sup>301</sup>

It is true that reckless, hasty amendments to constitutions erode their stability and undermine the importance of a social consensus on values.<sup>302</sup> Further, any constitutional amendment carries with it self-interest that promotes the welfare of some at the expense of others.<sup>303</sup> However, constitutions can never be perfect, and although they should

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be complicated enough to ensure changes are properly considered, but simple enough to allow for amendments to pass. KOPECKY & HARRIS, *supra* note 285, at 59.

299. By the late 1860s, the number of private bills proposed in the General Assembly far outnumbered the public bills, resulting in an abdication to private interests. CORNELIUS, *supra* note 294, at 56; *see also* People v. Meech, 101 Ill. 200, 204 (Ill. 1881) (describing how the government wrongly granted special privileges under the authority of the Constitution of 1848). As a result of these abuses of power, Illinois enacted a constitutional amendment that prohibited the legislature from enacting special legislation. ILL. CONST. of 1870 art. IV, § 22 (amended 1970).

300. KOPECKY & HARRIS, *supra* note 285, at 62. A constitutional amendment was proposed but failed in 1974 to reduce the governor's amendatory veto power. *Id.* Another amendment, which required two non-judicial members to sit on the Courts Commission, was passed in 1998 after James Heiple of the Illinois Supreme Court refused to recuse himself from voting on the appointment of another justice to the Commission even though Heiple knew that the appointee would oversee an impeachment hearing against him. ILL. CONST. of 1970 art. VI, § 15 (amended Nov. 3, 1998); Jerome B. Meites & Steven F. Pflaum, *Justice James D. Heiple: Impeachment and the Assault on Judicial Independence*, 29 LOY. U. CHI. L.J. 741, 786 (1998).

301. *See supra* Part I (discussing the policy justifications for a damage cap in Illinois). The procedure and authority for such an amendment comes from article XIV, section 3 of the Illinois Constitution. ILL. CONST. of 1970 art. XIV, § 3. It provides that amendments "may be proposed by a petition signed by a number of electors equal in number to at least eight percent of the total votes cast for candidates for Governor in the preceding gubernatorial election. . . . If the petition is valid and sufficient, the proposed amendment shall be submitted to the electors at that general election and shall become effective if approved by either three-fifths of those voting on the amendment or a majority of those voting in the election." *Id.*

302. *See* Michael G. Colantuono, Comment, *The Revision of American State Constitutions: Legislative Power, Popular Sovereignty, and Constitutional Change*, 75 CAL. L. REV. 1473, 1475 (1987) (advocating rigid, inflexible constitutions averse to change because they represent the collective will of all people rather than particularized interests of some). Colantuono also argues that inflexible constitutions promote stable constitutional law and confidence in government. *Id.* at 1509.

303. *Id.* at 1507-08.

be resistant to reactionary change, some flexibility is important to reflect the broad public welfare in light of empirical data and political discourse.<sup>304</sup>

Passing an amendment that allows the General Assembly to deal with growing jury awards would stabilize the burgeoning liability insurance costs and ensure more affordable health care for Illinoisans.<sup>305</sup> Although such an amendment would promote the interests of hospitals, doctors, and insurance companies at the expense of those suffering serious injury from negligent care,<sup>306</sup> it would slow the exodus of capable medical practitioners from Illinois, thereby promoting the welfare of the general public.<sup>307</sup> Further, a constitutional amendment would clarify the struggle for power over damage caps between the judiciary and the General Assembly.<sup>308</sup> The General Assembly is most equipped to reflect the will of Illinois citizens,<sup>309</sup> and there is a mandate from the people of Illinois to limit growing jury awards.<sup>310</sup> In light of

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304. KOPECKY & HARRIS, *supra* note 285, at 59; Kenneth Ward, *Originalism and Democratic Government*, 41 S. TEX. L. REV. 1247, 1272 (2000); *see also* Judith Olans Brown et al., *The Failure of Gender Equality: An Essay in Constitutional Dissonance*, 36 BUFF. L. REV. 573, 621 (citing *Shapiro v. Thompson*, 394 U.S. 618 (1969)) (stating that a majority of people insisted on a flexible approach to the equal protection laws so as to reflect modern egalitarian values).

305. *See* Cetra, *supra* note 287, at 552 (explaining that the amendment granted the Texas Legislature the authority to pass legislation capping medical malpractice damages). Although such a constitutional amendment would be ideal for addressing the health care crisis, it is admittedly a very difficult process. *See* Colantuono, *supra* note 302, at 1475, 1509 (discussing the rigid nature of constitutions and the reasons for maintaining rigidity). Proposition 12, for instance, was debated heavily and was only passed with 51% of the vote. Cetra, *supra* note 287, at 552.

306. *See* Luke Ledbetter, "It's the [Tort System], Stupid": *Consumer Deductibles: How to More Equitably Distribute the Risks of Medical Malpractice and Adequately Compensate Victims Without Statutory Damage Caps*, 6 APPALACHIAN J.L. 51, 51 (2006) (arguing that caps on damages cause harm to injured plaintiffs, especially those who are seriously injured); Nancy S. Marder, *The Medical Malpractice Debate: The Jury as Scapegoat*, 38 LOY. L.A. L. REV. 1267, 1279–80 (2005) (arguing that a statutory cap on damages would harm low-income victims more so than high-income victims because the latter can still receive damages for economic loss).

307. *See supra* note 18 and accompanying text (citing to several studies that showed lower medical malpractice liability insurance rates and higher per capita rates of physicians in states that had damage caps). Similarly, the 2005 cap was enacted to prevent physicians from leaving Illinois. Shirley Chiu, Comment, *A Critical Look at the Non-Economic Damage Cap of the HEALTH Act of 2005 and its Impact on Consumers*, 18 LOY. CONSUMER L. REV. 85, 95 (2005).

308. *See supra* Parts II.A & III.B (describing the General Assembly's three attempts to enact a statutory limit on damages in certain circumstances and the Illinois Supreme Court's invalidation of each attempt).

309. *See supra* notes 249–251 and accompanying text (discussing the General Assembly's superior access to a breadth of information and ability to balance competing social and political interests to reflect the will of the people).

310. *See* Marek, *supra* note 280, at 4 (quoting a statement from the American Tort Reform Association, which argued that the Illinois Supreme Court ignored the will of the citizens as

the overwhelming support for caps on damages that would promote the public welfare, Illinois must pass a constitutional amendment giving the legislature authority to enact such a cap.<sup>311</sup>

*C. The Illinois General Assembly Should Enact a Statute that is Carefully Drafted to Reduce Medical Malpractice Liability but Survive the Lebron Separation of Powers Analysis*

Alternatively, the Illinois General Assembly should enact another statute to limit liability in a way that is tailored to avoid any separation of powers challenges similar to those in *Best* and *Lebron*.<sup>312</sup> This would be a difficult task, but the urgency of the problem requires that the General Assembly take any action that will reduce the cost of medical malpractice liability and slow down the health care crisis.<sup>313</sup> The court's continued support for the holding in *Unzicker* suggests that the most promising drafting technique would be to enact another limit on liability that applies in a manner similar to the statute in that case.<sup>314</sup>

Using this precedent, the General Assembly could at the very least enact a statute that makes defendants only severally liable for a plaintiff's injuries regardless of how much they contributed to those injuries.<sup>315</sup> Broadening several liability would effectively decrease the

expressed through their representatives who enacted the cap); Dean Olsen, *State Health Plan Bother Official*, STATE J.-REG., Jan. 14, 2008, at 15 (quoting Dr. Rodney Osborn, who said that the Illinois Supreme Court should consider public opinion regarding skyrocketing medical liability insurance rates). A 1994 public opinion poll by Voter/Consumer Research of Bethesda, Maryland showed that 92% of Illinois voters believe that frivolous lawsuits have caused higher medical costs and 94% of voters believe that those lawsuits directly cost them in higher insurance premiums. Ray Quintanilla, *Group Again Seeks Limits on Lawsuits*, CHI. TRIB., July 26, 1994, at 3.

311. See *supra* note 310 and accompanying text (describing the overwhelming support for damage caps); *supra* note 18 (describing how damage caps would benefit the public welfare).

312. See Goldhaber & Grycz, *supra* note 94, at 21 (describing the political discussion that took place among Republicans and Democrats in the Illinois General Assembly after the *Lebron* decision). Members of the legislature have already proposed a number of bills—including a constitutional amendment—to address the health care crisis. *Id.*

313. See Act of Aug. 25, 2005, § 101, Pub. Act 94-677, 2005 Ill. Laws 4964, 4964-65 (discussing the urgency of the health care crisis), *invalidated by* *Lebron v. Gottlieb Mem'l Hosp.*, 930 N.E.2d 895 (Ill. 2010); Goldhaber & Grycz, *supra* note 94, at 21 (describing the flurry of legislative activity and debate in the wake of *Lebron* trying to find solutions to the health care crisis).

314. *Unzicker v. Kraft Food Ingredients Corp.*, 783 N.E.2d 1024, 1042-43 (Ill. 2002).

315. This statute would be distinguishable from the statute in *Unzicker* because it would hold defendants severally liable no matter what percentage they contributed to the injury. See *Unzicker*, 783 N.E.2d at 1042. (holding that the General Assembly has the authority to limit a defendant's liability based on his contribution). Although this statute could be applied solely to noneconomic damages, it should apply to all damages so that defendants are only forced to pay

amount of damages paid by medical professionals and health care providers.<sup>316</sup> However, any legislation abolishing joint and several liability state would have to be applied generally and could not exclusively address medical malpractice cases.<sup>317</sup> Otherwise, the court would likely invalidate the statute for being special legislation as it did in *Best* when it struck down a provision abolishing joint and several liability for all cases of death, bodily injury, and property damage *except* those involving medical malpractice.<sup>318</sup> So long as the legislature is mindful of this holding, several liability would effectively slow down the growth of liability costs.

Many argue that the cost savings from these types of tort reform would just be hoarded by insurance companies so that doctors continue paying high insurance premiums and the public interest is not promoted.<sup>319</sup> Indeed, health care costs have continued to rise even in

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damages for which they are actually liable. *See infra* note 325 and accompanying text (arguing that defendants should only be liable for injuries that they cause).

316. Nancy L. Manzer, *1986 Tort Reform Legislation: A Systematic Evaluation of Caps on Damages and Limitations on Joint and Several Liability*, 73 CORNELL L. REV. 628, 647–49 (1988) (stating that several liability lowers the amount of damages plaintiffs can actually recover to the amount for which solvent defendants are actually liable). Opponents to several liability have argued that when defendants expect to pay out less in damages, they merely take less precaution, which ultimately leads to greater likelihood of injury. *Id.* at 647–49 (citing Comment, *The Case of the Disappearing Defendant: An Economic Analysis*, 132 U. PA. L. REV. 145, 166–67 (1983)). However, this effect is significantly limited by defendants' aversion to incurring any liability at all. *Id.* Moreover, the level of care is economically efficient when a defendant is held liable only for the damages that he causes because he will not be forced to take additional precaution for the possibility of being held liable for the torts of others. *Id.* Therefore, eliminating joint liability would reduce the cost to the health care system of duplicative precautionary measures. *Id.*

317. *See Best v. Taylor Mach. Works*, 689 N.E.2d 1057, 1084–89 (Ill. 1997) (invalidating the abolition of joint and several liability in cases of death, bodily injury, and property damage except those involving medical malpractice because it was special legislation that uniquely preferred medical malpractice plaintiffs). The statute at issue in *Best* replaced joint and several liability with proportionate several liability for all cases of death, bodily injury, and property damage. *Id.* at 1084–85. However, the statute reversed this abolition for medical malpractice cases in the event that the damage cap in the legislation was found unconstitutional. *Id.* Because the court did so, it also found the exception for medical malpractice cases unconstitutional as special legislation. *Id.* at 1088–89. Notably, although the court found that treating medical malpractice uniquely made the statute special legislation, it did not imply that the statute would have otherwise been special legislation for applying only in cases of death, bodily injury, and property damage even though it acknowledged this aspect of the statute before considering the constitutionality of the medical malpractice exception. *See generally id.*

318. *Id.* at 1084–89.

319. Jaclyn Edgar, Comment, *Doctor v. Attorney: Why are Attorneys and Injured Patients Being Blamed for the Rising Costs of Healthcare? Instead of Tort Reform, Why Medical Reform is a Better Solution*, 73 UMKC L. REV. 773, 789 (2005).

states that have tort reform.<sup>320</sup> However, some studies show that states with damage caps have seen medical liability insurance costs increase at a lower rate than states without similar reforms.<sup>321</sup> In addition, health care practitioners are more available in states with caps on damages.<sup>322</sup> These trends are clearly beneficial and support the proposition that broader use of several liability would improve the quality of health care in Illinois.<sup>323</sup>

Further, several liability is more equitable; although it is unjust for an injured plaintiff to go without compensation, insolvent defendants are responsible for this injustice.<sup>324</sup> Allocating liability based on responsibility apportions the risk to the truly negligent and away from careful hospitals or non-negligent physicians, which typically absorb these costs before passing them on to the public through the increasing cost of care.<sup>325</sup> Internalizing liability costs up to the amount for which an individual is liable more accurately coincides with the deterrence and justice objectives of tort law because a defendant should not be held liable for the torts of another.<sup>326</sup>

The General Assembly should also consider passing a statutory cap on damages in medical malpractice cases that can be waived by the judiciary.<sup>327</sup> Concerns over the separation of powers and other

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320. *Id.* at 786–90. Edgar argues that the median medical liability insurance premium in states that have capped damages has actually increased at a higher rate than in states without caps on damages. *Id.* at 788 (citing Adam D. Glassman, *The Imposition of Federal Caps in Medical Malpractice Liability Actions: Will They Cure the Current Crisis in Health Care?*, 37 AKRON L. REV. 417, 461 (2004)); see also *supra* note 8 (describing the argument that there is no correlation between damage caps and decreasing health care costs).

321. See *supra* note 18 and accompanying text (citing to several studies that showed lower medical malpractice liability insurance rates in states that had caps on damages). *But see* Cathleen B. Tumulty, *Capping Non-Economic Damages: Is It Really What the Doctor Ordered? Predicting the Effect of Federal Tort Reform by Examining the Impact of Tort Reform at the State Level*, 39 SUFFOLK U. L. REV. 817, 818 (2006) (suggesting that there is evidence supporting both opponents and proponents of damage caps).

322. See *supra* note 18 and accompanying text (citing to several studies that showed higher per capita rates of physicians in states that have caps on damages).

323. See *supra* note 316 and accompanying text (arguing that several liability would decrease the costs incurred by health care providers).

324. See Manzer, *supra* note 316, at 645 (arguing that the legal system does not and cannot guarantee plaintiffs will have a solvent defendant from which to recover damages and that the legal system does not shift a defendant's liability to a non-party when only one defendant exists).

325. *Id.* at 644–46, 651.

326. *Id.* at 651.

327. Gfell, *supra* note 247, at 798–99. This policy alternative has been advocated by scholars and was even included in a 1993 congressional proposal. *Id.* (citing Patricia J. Chupkovich, Comment, *Statutory Caps: An Involuntary Contribution to the Medical Malpractice Insurance Crisis or a Reasonable Mechanism for Obtaining Affordable Healthcare?*, 9 J. CONTEMP.

constitutional challenges would be minimized when the court can decide whether or not to apply the cap to a particular case.<sup>328</sup> Yet, the cap would lower damage awards in medical malpractice cases if it were crafted so that the waiver was used sparingly.<sup>329</sup> For instance, the statute might permit a court to award damages in excess of the statutory limitation “if, upon good cause shown, the court determines that the present value of past and future economic damages would exceed such limitation and that the application of such limitation would be unfair.”<sup>330</sup> Even if the courts over-utilize such a waiver provision, the mere existence of a damage cap would guide juries as to what amount of damages is sustainable for the health care system.<sup>331</sup> This is important because damage awards have increased drastically in recent years as juries have struggled to determine what amount of damages is reasonable and have focused narrowly on the facts of the case before them without considering the broader implications of their award.<sup>332</sup>

Swelling jury awards are threatening the quality and affordability of the Illinois health care system, and the general public overwhelmingly supports damage caps to combat this trend. Even if Illinois is unable to pass a constitutional amendment to permit legislative caps on damages, the General Assembly must enact legislation to reduce liability that would likely survive constitutional scrutiny as outlined above.

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HEALTH L. & POL’Y 337, 371–75 (1993)) (arguing in favor of the Healthcare Liability Reform and Quality of Care Improvement Act of 1992, which provided for a national liability cap that the Secretary of Health and Human Services had discretion to waive).

328. *Id.*

329. Chupkovich, *supra* note 327, at 372.

330. COLO. REV. STAT. § 13-64-302 (2011). Although this statute applies to economic damages, it could be modified according to the desire of the Illinois General Assembly. The legislature might also enact a stricter waiver provision. For example, the statute could prevent the court from waiving the damage cap except when applying the cap would be a gross miscarriage of justice. Both of these examples would at least be stricter than the one written by the U.S. House of Representatives in the Healthcare Liability Reform and Quality of Care Improvement Act of 1992, H.R. 3037, 102d Cong. (1st Sess. 1991), which allowed the Secretary of Health and Human Services to waive a damage cap “for good cause.” *Id.* § 204(a). A stricter waiver provision would increase the likelihood of invalidation for violating the separation of powers, but leaving the final determination with the judiciary would nonetheless decrease that likelihood. Gfell, *supra* note 247, at 798–99. See Chupkovich, *supra* note 327, at 371–73 for a more in-depth discussion of the Healthcare Liability Reform and Quality of Care Improvement Act of 1992 and the implications of its waiver provision.

331. See Ackerman, *supra* note 3, at 746 (arguing that consistency is very difficult to achieve when there are no guiding principles to determine damages).

332. Chupkovich, *supra* note 327, at 341 (citing David Burda, *AHA Offers Solutions to Malpractice Crisis*, HOSPITALS, May 5, 1986, at 53); see also Mulliken v. Lewis, 615 N.E.2d 25, 26 (Ill. App. Ct. 1993) (holding that the jury should have considered public policy interests).

## VI. CONCLUSION

In *Lebron v. Gottlieb Memorial Hospital*, the Illinois Supreme Court reinforced the separation of powers analysis from *Best v. Taylor Machine Works*. Although the *Best* analysis was non-binding judicial dicta, *Lebron* firmly held that statutory damage caps in medical malpractice cases violate the separation of powers clause in the Illinois Constitution. The court held that caps on jury awards of damages function as a legislative remittitur and that remittitur is an inherent function of the judiciary. However, legislative caps on jury awards are prospective policy determinations that apply in all cases, whereas remittitur is inherently a case-by-case determination as to whether a jury's award of damages is excessive. Although both actions lower damages, they function differently and serve different purposes—one legislative, the other judicial. Moreover, remittitur is not an inherent power of the judiciary; rather, the judiciary's constitutional authority to remit jury awards of damages has constantly been questioned by the courts and scholars as an unconstitutional violation of the jury's power to determine damages. Therefore, the *Lebron* court erred in finding that remittitur was an inherent power of the judiciary and that the 2005 cap infringed on that power. The countless state and federal holdings that rejected *Best* support this conclusion.

In light of the presumption favoring the constitutionality of statutes, the legislature's authority to change or eliminate the common law, and the fact that *Best*'s separation of powers analysis was merely judicial dicta, *Lebron*'s application of *Best* was shocking. Further, despite the *Lebron* holding, Illinois should strive to enact other limits to liability. First, the people of Illinois should pass a constitutional amendment giving the General Assembly authority to enact caps on jury awards of damages. Alternatively, the General Assembly should enact other statutes that would limit liability while avoiding constitutional challenges. This could be accomplished by both a damage cap that the courts could waive and an expansion of several liability.

Illinois is in the midst of a health care crisis whereby costs are increasing and availability of health care providers is decreasing. Surging damage awards in medical malpractice cases are contributing to this crisis, and taking action to reverse or limit *Lebron*'s impact will help slow it down.