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The Right to Trial by Jury as a Fundamental and Substantive Right and Other Civil-Trial Constitutional Protections

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INTRODUCTION

Jury trials and access to the courts more generally have sustained unwarranted decades-long attacks. Assaults on these fundamental cornerstones of our civil justice system have not just warped the views of the public and policymakers, but also insinuated themselves into the outlooks of the academy and the judiciary, undermining the fundamental and critically important role that juries and litigation play in securing liberty, equality, and justice. Fed by a political operation that seeks to tilt the legal playing field in its favor, judicial decisions, rules governing lawsuits, and the law itself have come to embrace ahistorical and empirically invalid entreaties, skewing the law and its operation in favor of the most powerful interests at the expense of those who most need the civil justice system to provide a neutral forum to resolve disputes.

For the civil justice system to serve all and survive, decision makers need to undergo a more critical examination of the claims, self-serving history, and policy consequences often urged upon them. Not just large-scale readjustments, but small-bore tinkering, can seem like useful or practical responses to specific concerns yet still create permanent systemic damage. Too often, small steps can become a trend for which the incrementalism masks significant realignments that produce massive changes that would not have received support if proposed when the journey down that road began. Moreover, these changes are usually considered in isolation, without consideration of other forces at work that can make the proposed change unnecessary or that can exacerbate its effects in ways its progenitors would never have intended.

In this cycle of perceived problems and expedient solutions, policymakers eschew the lessons of history that manifest themselves only over longer periods of time. The past, instead, is treated as an endlessly manipulated story, incomplete and shaped as mere advocacy tools. When it supports a predetermined end, it is flaunted as dispositive. When it appears as a round peg that will not fit the square hole, it is derided as leaving too many open questions and requiring further study. Yet, as a country founded upon principles emanating from the rule of law, centuries of experience ought to inform the

choices we make now, allowing us to realize more fully the tenets that launched the American experiment. While some of those institutions that comprise the civil justice system may seem quaint or antiquated, the wisdom of their continued operation, even if tweaked to comport with modern sensibilities, cannot be denied. The system must serve plaintiffs and defendants alike, though it best serves its high calling when it shows special solicitude to those who suffer harm that cannot be remedied or deterred through the halls of political power. For them, courts of law with the democratic element of trial by jury serve as their only hope of justice.

Particularly with respect to the status and responsibilities we place on juries, history provides an important guide. Sir William Blackstone, for example, proclaimed jury trials the "principal bulwark of our liberties," "the glory of the English law," and "the most transcendent privilege which any subject can enjoy."[1] The American colonists, who fought a revolution to secure the "rights as Englishmen"[2] to themselves, took Blackstone's observations to heart,[3] as it also reflected their experience in resisting the oppression that gave birth to our independence.[4]

Too much of that history and experience has faded from the collective American memory, permitting anti-jury and anti-litigation campaigns to override constitutional protections intended to serve as a bulwark against interference with fundamental rights[5] and overcome judicial biases.[6] The American legal system should not treat juries and litigation as mere artifacts of an earlier, less complex time period, too cumbersome, too inexpert, and too slow for modern needs. To be sure, access to courts for the vast number of Americans remains more an

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1 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE COMMON LAW OF ENGLAND *350, *379.

2 William F. Swindler, *"Rights of Englishmen" Since 1776: Some Anglo-American Notes*, 124 U. PA. L. REV. 1083, 1083 (1976).

3 Blackstone's *Commentaries* were widely accepted as "the most satisfactory exposition of the common law of England . . . . [U]ndoubtedly, the framers of the Constitution were familiar with it." Schick v. United States, 195 U.S. 65, 69 (1904). In fact, Blackstone's *Commentaries* had wide circulation in the colonies with an incredible 2500 copies bought in the colonies before the American Revolution. Brian J. Moline, *Early American Legal Education*, 42 WASHBURN L.J. 775, 790 (2002).

4 *See infra* Part I.

5 *See* Sheldon Whitehouse, *Restoring the Civil Jury's Role in the Structure of Our Government*, 55 WM. & MARY L. REV. 1241, 1254 (2014).

6 *See* Dmitry Bam, *Restoring the Civil Jury in a World without Trials*, 94 NEB. L. REV. 862, 863 (2016).

aspiration than a realization and demands attention and innovation to fulfill its promise. Still, with a frequency duplicated nowhere else in the world, the American system of civil justice holds the promise that

> an injured individual, neither wealthy nor well-connected, can hale a huge multinational conglomerate into court to hold it accountable for its wrongful and harmful actions. Only in an American courtroom, and not in legislative chambers or executive offices, can an individual seek full redress, standing at the bar on an equal basis with a powerful and influential adversary. That opponent's money, clout, powerful allies, and legions of lobbyists, all of which provide an insurmountable advantage in the political arena, count for naught in this legal one.[7]

Unfortunately, the debasement of juries and lawsuits pushed the civil justice system in the wrong direction, limiting court access and chipping away at the authority constitutionally invested in juries. The modern judicial use of motions to dismiss, motions for summary judgment, and motions for judgment as a matter of law have both been a manifestation of distrust of juries on the part of repeat defendants, largely giant corporations, who abhor the second-guessing of economic and safety decisions that result in liability for them. The barons of business employ a variety of public-relations tactics to ridicule verdicts by reshaping the facts to give juries a Robin Hood image of going after deep pockets merely because of sympathy for the injured party. The public, policymakers, and jurists hear that constant drumbeat and adopt that same unwarranted distrust of juries to limit the constitutionally consecrated authority reposed in that panel of ordinary citizens, even while also intensifying the movement away from jury trials.[8] Increased use of mandatory arbitration provides another stark example of harms visited upon public justice by invocation of a private arbitration system that is inherently biased in favor of frequent corporate users[9] and

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[7] Robert S. Peck, *Tort Reform's Threat to an Independent Judiciary*, 33 RUTGERS L.J. 835, 838 (2002).

[8] For an account of the seismic shift toward early disposition of cases and away from jury trials, see Arthur R. Miller, *Simplified Pleading, Meaningful Days in Court, and Trials on the Merits: Reflections on the Deformation of Federal Procedure*, 88 N.Y.U. L. REV. 286, 287 (2013).

[9] For empirical studies concluding that repeat player bias occurs in arbitration, see, e.g., Lisa B. Bingham, *On Repeat Players, Adhesive Contracts, and the Use of Statistics in Judicial Review of Employment Arbitration Awards*, 29 MCGEORGE L. REV. 223, 224 (1998); Shauhin A. Talesh, *How Dispute Resolution System Design Matters: An Organizational Analysis of Dispute Resolution Structures and Consumer Lemon Laws*, 46 L. & SOC'Y REV. 463 (2012).

against individual consumers and workers, while providing a ready means to avoid juries and independent courts.[10]

These movements away from jury trials, often in the name of efficiency, build off the corporate campaign against juries and lawsuits.[11] In fact, the drumbeat against juries has become so steady and pronounced that it has had a measurable influence on judges, resulting in an anti-litigation attitude in the courts[12] and leading to lawsuit roadblocks and limits on explicit constitutional rights. On the rare occasions where the courts have realized that the erroneous assumptions about runaway juries, skyrocketing verdicts, and a litigation explosion[13] that motivated the changes stem from fractured anecdotes and the rhetoric of a campaign,[14] new justifications are

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10 For detailed discussions of arbitration and its impact on civil justice institutions and rights, see, e.g., Judith Resnik, *Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights*, 124 YALE L.J. 2804 (2015) (arguing that widespread adoption of arbitration clauses discourages vindication of protections against powerful adversaries, undermines statutory and common law rights, and hurts the functioning of courts); Jean R. Sternlight, *Rethinking the Constitutionality of the Supreme Court's Preference for Binding Arbitration: A Fresh Assessment of Jury Trial, Separation of Powers, and Due Process Concerns*, 72 TUL. L. REV. 1, 100 (1997) (contending that Supreme Court decisions favoring arbitration ignores constitutional infirmities under Article III, the Seventh Amendment, and the Fifth and Fourteenth Amendments' Due Process Clauses).

11 *See generally* THOMAS F. BURKE, LAWYERS, LAWSUITS, AND LEGAL RIGHTS: THE BATTLE OVER LITIGATION IN AMERICAN SOCIETY 26 (2002) ("The notoriety of tort litigation, combined with the powers of persuasion of corporate and professional interests, has put personal injury lawsuit reform at the top of the antilitigation agenda."); David A. Logan, *Juries, Judges, and the Politics of Tort Reform*, 83 U. CIN. L. REV. 903 (2015). Two scholars from the American Bar Foundation also studied the corporate campaign to influence attitudes about the civil justice system and the consequence that these efforts have achieved results even when it fails to enact formal changes. *See* Stephen Daniels & Joanne Martin, *The Strange Success of Tort Reform*, 53 EMORY L.J. 1225 (2004). Recently, they updated their findings and concluded that tort reform succeeded in diminishing the number of cases filed, even it not the number of injuries that might be remedied through lawsuits. *See* Stephen Daniels & Joanne Martin, *Where Have All the Cases Gone? The Strange Success of Tort Reform Revisited*, 65 EMORY L.J. 1445, 1490 (2016).

12 Even early on, observers noticed that "those arguing in favor of litigation and access to the courts have won even fewer cases under the Roberts Court than their counterparts under the Rehnquist Court." Andrew M. Siegel, *From Bad to Worse?: Some Early Speculation About the Roberts Court and the Constitutional Fate of the Poor*, 59 S.C. L. REV. 851, 862 (2008) (footnoted omitted).

13 Amongst the literature taking these claims to task are John T. Nockleby, *How to Manufacture a Crisis: Evaluating Empirical Claims Behind "Tort Reform,"* 86 OR. L. REV. 533 (2007); Marc Galanter, *The Day After the Litigation Explosion*, 46 MD. L. REV. 3 (1986). For more recent literature, see *infra* note 15.

14 *See* Exxon Shipping Co. v. Baker, 554 U.S. 471, 497–99 (2008) (acknowledging the "audible criticism" aimed at so-called skyrocketing punitive damages awards but stating that

imagined, and no attempt is made to retrace the steps already taken down that rabbit hole.

The attacks on civil juries not only had a doctrinal impact, but also encouraged legislation designed to take constitutionally secured prerogatives away from the jury.[15] Once ubiquitous in the courts, today, jury trials comprise fewer than one percent of all state court civil dispositions.[16] This is not to say that the reduction in jury trials is a new phenomenon. It may well have started in the nineteenth century.[17] However, recent developments have undoubtedly accelerated the retreat from juries.

There is an extreme cost to the disappearance of jury trials. We lose the wisdom that jurors, reflecting different experiences and different approaches to problems, can collectively bring to decision making, and we lose the democratic element of our justice system. Jurors, despite the Sturm und Drang to the contrary, do a remarkably good job at ferreting out responsibility and in assessing damages.[18]

Oregon was once a leader in safeguarding the right to trial by jury, a guarantee that appears twice in the Oregon Constitution. In its Bill of Rights, the Oregon Constitution declares: "In all civil cases the right of Trial by Jury shall remain inviolate,"[19] language common to most state

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recent scholarship undercuts the criticism and instead demonstrates an overall restraint on the part of juries).

15 *See, e.g.*, Marc Galanter, *A World Without Trials?*, 2006 J. DISP. RESOL. 7, 7–9 (2006) (providing statistics that evidence a significant decline in federal and state civil trials); Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459, 464 (2004) (documenting the decreasing number of federal civil jury trials); John H. Langbein, *The Disappearance of Civil Trial in the United States*, 122 YALE L.J. 522, 524 (2012).

16 *See* Brian J. Ostrom et al., *Examining Trial Trends in State Courts: 1976–2002*, 1 J. EMPIRICAL LEGAL STUD. 755, 768 (2004). The same trend is evident in criminal trials. Where nearly every criminal case was tried before juries at the time of the nation's founding, pleas now take place in about ninety-five percent of cases brought. Ronald F. Wright, *Trial Distortion and the End of Innocence in Federal Criminal Justice*, 154 U. PA. L. REV. 79, 91–100 (2005). Whatever sense the typicality of plea bargaining makes in the criminal context, early disposition through judicial rulings, as opposed to settlement, makes far less sense in civil cases. Though it may go too far to suggest that the widespread use of summary judgment is an unconstitutional usurpation of the civil-jury right, one scholar has made a powerful case on why it abridges that right. *See also* Suja A. Thomas, *Why Summary Judgment Is Unconstitutional*, 93 VA. L. REV. 139 (2007).

17 *See* Note, *The Changing Role of the Jury in the Nineteenth Century*, 74 YALE L.J. 170, 170–71 (1964).

18 *See* Marc Galanter, *Real World Torts: An Antidote to Anecdote*, 55 MD. L. REV. 1093 (1996).

19 OR. CONST. art. I, § 17.

constitutions.[20] By initiative in 1910, Oregon voters adopted a second jury-trial guarantee, framed in language derived from the Seventh Amendment.[21] It provides, in pertinent part:

> In actions at law, where the value in controversy shall exceed $750, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of this state, unless the court can affirmatively say there is no evidence to support the verdict.[22]

Based on this double protection of the jury-trial right, the Oregon Supreme Court jealously protected jury determinations against interference. In one telling instance, that court refused to engage in a post-verdict due-process review of a punitive damage award, finding that the "application of objective criteria [during jury consideration of their verdict] ensures that sufficiently definite and meaningful constraints are imposed on the finder of fact and ensures that the resulting award is not disproportionate to a defendant's conduct and to the need to punish and deter."[23] The court's insistence on a narrow scope of appellate review of the award reflected a longstanding attitude about the prevailing process in the state as "a system of trial by jury in which the judge is reduced to the status of a mere monitor."[24]

The Supreme Court of the United States held that Oregon's approach to excessive damages to be at odds with the common practice in the federal courts and every other state.[25] The Court recognized that Oregon's unique approach was not the product of error but of the construction of its 1910 constitutional amendment forbidding reexamination of verdicts that gave the state what the Oregon court described as a "lonely eminence" in that respect.[26] While Oregon had

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[20] Forty-eight states guarantee the right to a civil jury trial, with Colorado and Louisiana the sole exceptions. Robert S. Peck, *Violating the Inviolate: Caps on Damages and the Right to Trial by Jury*, 31 U. DAYTON L. REV. 307, 311 & nn.30 & 31 (2006). Thirty-eight of those states declare the right to trial by jury to be "inviolate." *Id.*

[21] U.S. CONST. amend. VII provides: "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

[22] OR. CONST. art. VII, § 3.

[23] Oberg v. Honda Motor Co., 316 Or. 263, 283, 851 P.2d 1084, 1096 (1993), *rev'd*, 512 U.S. 415 (1994).

[24] Van Lom v. Schneiderman, 187 Or. 89, 113, 210 P.2d 461, 471 (1949), *quoted in Oberg*, 512 U.S. at 421.

[25] *Oberg*, 512 U.S. at 426.

[26] *Id.* at 427 (quoting *Van Lom*, 187 Or. at 113, 210 P.2d at 471).

every right to provide a higher protection of the jury-trial right than other states, the U.S. Supreme Court held that the state jury-trial right had to yield to federal due process's demand for judicial review of excessive punitive damage verdicts. Yet, outside the new federal punitive damage jurisprudence in which due process places an amorphous "substantive limit on the size of punitive damages awards,"[27] Oregon's dual constitutional protection of the jury right remains proper and plainly second to none.

As with the jury-trial right, Oregon similarly pioneered one of the more thoughtful approaches to guaranteeing access to the courts. The Oregon Constitution, in a formulation familiar to a number of states,[28] provides: "No court shall be secret, but justice shall be administered, openly and without purchase, completely and without delay, and every man shall have remedy by due course of law for injury done him in his person, property, or reputation."[29]

As early as 1908, the Oregon Supreme Court construed the provision as guaranteeing access to the courts for all on the same terms and held that "it certainly would be a violation of both the letter and spirit of this constitutional provision for a state court to refuse its aid, when invoked to protect the rights of a suitor, on the sole ground that the party seeking

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[27] *Id.* at 420.

[28] Similar provisions, variously referred to as right to remedy, open courts, or access to courts clauses, are found in the constitutions of at least thirty-seven states. JENNIFER FRIESEN, STATE CONSTITUTIONAL LAW: LITIGATING INDIVIDUAL RIGHTS, CLAIMS, AND DEFENSES 347 n.11 (3d ed. 1996). Others counting the number of provisions concluded that the number may be as high as thirty-nine or forty states. *See* Thomas R. Phillips, Chief Justice, Supreme Court of Tex., The Constitutional Right to a Remedy, Speech at Justice William J. Brennan Lecture on State Courts and Social Justice, *in* 78 N.Y.U. L. REV. 1309, 1310 (2003); David Schuman, *The Right to a Remedy*, 65 TEMP. L. REV. 1197, 1201 n.25 (1992). The state provisions stating or implying this right include: ALA. CONST. art. I, § 13; ARIZ. CONST. art. II, § 11; ARK. CONST. art. II, § 13; COLO. CONST. art. II, § 6; CONN. CONST. art. I, § 10; DEL. CONST. art. I, § 9; FLA. CONST. art. I, § 21; GA. CONST. art. I, § 1, para. 12; IDAHO CONST. art. I, § 18; ILL. CONST. art. I, § 12; IND. CONST. art. I, § 12; KAN. CONST. Bill of Rights, § 18; KY. CONST. § 14; LA. CONST. art. I, § 22; ME. CONST. art. I, § 19; MD. CONST., art. XIX; MASS. CONST. pt. I, art. XI; MINN. CONST. art. I § 8; MISS. CONST. art. III, § 24; MO. CONST. art. I, § 14; MONT. CONST. art. II, § 16; NEB. CONST. art. I, § 13; N.H. CONST. pt. I, art. XIV; N.C. CONST. art. I, § 18; N.D. CONST. art. I, § 9; OHIO CONST. art. I, § 16; OKLA. CONST. art. XI, § 6; OR. CONST. art. I, § 10; PA. CONST. art. I, § 11; R.I. CONST. art. I, § 5; S.C. CONST. art. I, § 9; S.D. CONST. art. VI, § 20; TENN. CONST. art. I, § 17; TEX. CONST. art. 1, § 13; UTAH CONST. art. I, § 11; VT. CONST. ch. I, art. IV; WASH. CONST. art. I, § 10; W. VA. CONST. art. III, § 17; WIS. CONST. art. I, § 9; WYO. CONST. art. I, § 8. Other states interpreted their constitutions to provide a similar right. *See, e.g.*, Richardson v. Carnegie Library Rest., Inc., 763 P.2d 1153, 1157 (N.M. 1988), *overruled on other grounds by* Trujillo v. City of Albuquerque, 965 P.2d 305 (1988).

[29] OR. CONST. art. I, § 10.

its aid was an Indian."[30] Seventy years later, Justice Hans Linde explained the provision as "a plaintiffs' clause, addressed to securing the right to set the machinery of the law in motion to recover for harm already done to one of the stated kinds of interest."[31] Linde noted the provision's ancient origin, tracing it "by way of the original state constitutions of 1776 back to King John's promise in Magna Charta" that justice would not be sold, denied, or delayed.[32] Subsequently, a further exploration of its history and meaning occurred in *Smothers v. Gresham Transfer, Inc.*,[33] where the Oregon Supreme Court held that because "Article I, section 10, guarantees a remedy for any injury to absolute common-law rights respecting person, property, or reputation, the legislature does not have the authority to deny a remedy for such injuries."[34]

Despite the mature reflection and longstanding understandings Oregon entertained about the jury and remedy rights, and despite the usual appeal that *stare decisis* commands, the Oregon Supreme Court jettisoned that strong heritage in *Horton v. Oregon Health & Science University*,[35] transforming the explicit and venerable constitutional guarantees of jury trials and remedies into mere procedural exhortations, lacking the substance that warranted their inclusion in the Oregon's Bill of Rights and those of most states.

This Article will first look at the way powerful interests debased juries and litigation, reconfigured precedent, and shaped the legislative agenda outside of Oregon. It will then examine how similar forces led to *Horton's* evisceration of longstanding Oregon doctrine and its implications for the pursuit of justice under the Oregon Constitution. Finally, the Article will place the rights to a jury trial and of access to justice rendered impotent by *Horton* in the stream of constitutional history and explain why they remain deserving of strict adherence.

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30 Smith v. Mosgrove, 51 Or. 495, 497, 94 P. 970, 971 (1908).

31 Davidson v. Rogers, 281 Or. 219, 223, 574 P.2d 624, 625 (1978) (Linde, J., concurring).

32 *Id.*

33 Smothers v. Gresham Transfer, Inc., 332 Or. 83, 23 P.3d 333 (2001), *overruled by* Horton v. Or. Health & Sci. Univ., 359 Or. 168, 188, 376 P.3d 998, 1010 (2016).

34 DeMendoza v. Huffman, 334 Or. 425, 433, 51 P.3d 1232, 1237 (2002) (characterizing the holding in *Smothers*).

35 *Horton*, 359 Or. at 168, 376 P.3d at 998.

I
THE INFLUENCE OF PUBLIC RELATIONS CAMPAIGNS ON DOCTRINAL THINKING

Just as campaigns employing half-truths and outright factual distortions can influence politics and governance,[36] similar tactics have become part and parcel of modern legal advocacy.[37] Nearly thirty years ago, two scholars documented the "quiet revolution" of "questionable, if not false, premises" propagated by industry leaders seeking to lower their liability for defective products.[38] They demonstrated that the public-relations effort brought forth federal products liability proposals, state legislation restricting lawsuits, and doctrinal changes that placed "significant limitations on plaintiffs' rights to recover in tort for product-related injuries."[39]

The playbook Professors James Henderson and Theodore Eisenberg identified continues to operate in much the way they observed. They concluded that the "general shift in attitude [toward litigation] suggests that the tort reform movement of the 1970s and 1980s may have succeeded in a broader sense even if it failed to achieve many of its more specific legislative goals."[40] The campaigners "reshape[d] public opinion about products liability law," "successfully linked products liability cases to the mid-1980s insurance crisis," "persuaded individual judges, as it tried to convince the public, that reform was needed," and fostered a "judicial perception of the need for reform [that] may have depressed plaintiffs' success rates."[41]

The same interests promoting products liability and tort "reform" have employed the identical strategy to impose due-process limits on punitive damages, despite solid empirical evidence that the problem the limits addressed did not actually exist.[42] The same tactics helped

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36 *See, e.g.*, D. SUNSHINE HILLYGUS & TODD G. SHIELDS, THE PERSUADABLE VOTER: WEDGE ISSUES IN PRESIDENTIAL CAMPAIGNS (2008).

37 *See generally* STEPHEN DANIELS & JOANNE MARTIN, CIVIL JURIES AND THE POLITICS OF REFORM (1995) (describing the political clout, resources, and propaganda directed at the public and policymakers to create a false impression about runaway juries and a system gone awry); Daniels & Martin, *supra* note 11.

38 Theodore Eisenberg & James A. Henderson, Jr., *Inside the Quiet Revolution in Products Liability*, 39 UCLA L. REV. 731, 733 (1992); James A. Henderson, Jr. & Theodore Eisenberg, *The Quiet Revolution in Products Liability: An Empirical Study of Legal Change*, 37 UCLA L. REV. 479, 480–81 (1990).

39 Henderson & Eisenberg, *supra* note 38, at 481.

40 Eisenberg & Henderson, *supra* note 38, at 734.

41 *Id.* at 734–35.

42 *Id.*

change a liberalization in the use of expert evidence into a restrictive bar on that evidence.[43] And those same interests also mounted a public relations campaign to label certain jurisdictions as "judicial hellholes,"[44] based solely on results considered adverse to corporate defendants, whether appropriate or not.[45] Along with false claims of widespread frivolous lawsuits, the campaign resulted in legislation that seeks to repeat a failed experiment in mandatory Rule 11 sanctions through the Orwellian named Lawsuit Abuse Reduction Act,[46] despite stalwart opposition from both the federal judiciary[47] and the American Bar Association.[48]

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[43] *Id.*

[44] The Judicial Hellholes® sobriquet was the invention of the American Tort Reform Association (ATRA) and its sister organization, the American Tort Reform Foundation. The groups, which advocate for restrictions on tort law, first published its annual report deriding certain states, counties, or courts for decisions disliked by its corporate constituency in 2002 and now maintains a website. *See About*, JUDICIAL HELLHOLES, http://www.judicialhellholes.org/about/ (last visited Jan. 7, 2018). Its membership includes hundreds of corporations, which provide its funding. *See* Elizabeth G. Thornburg, *Judicial Hellholes, Lawsuit Climates and Bad Social Science: Lessons from West Virginia*, 110 W. VA. L. REV. 1097, 1097 n.1 (2008). As part of its proprietary approach the group takes to the issue, they registered the service mark they developed to publicize their efforts. For a response to that point of view, see *Poking Holes in Judicial Hellholes, ATRA's Annual Fake News Story*, CTR. FOR JUSTICE & DEMOCRACY, http://centerjd.org/system/files/HellholeFactsheet2016.pdf (last visited Jan. 7, 2018).

[45] For example, Florida landed on the hellhole list after its supreme court decided Estate of McCall v. United States, 134 So.3d 894 (Fla. 2014). The decision struck down an aggregate state noneconomic damage cap in medical malpractice cases on equal-protection grounds. The declaration of unconstitutionality was consistent with earlier precedent, St. Mary's Hospital, Inc. v. Phillipe, 769 So. 2d 961, 972 (Fla. 2000), which held that an aggregate cap "offends the fundamental notion of equal justice under the law." The decision to paint Florida as a "hellhole" on the basis of *McCall*, a single judicially sound constitutional ruling anchored in precedent, demonstrates that no real criteria guides the labelling of an entire state as a "hellhole." *See 2014/2015 Executive Summary*, JUDICIAL HELLHOLES, http://www.judicialhellholes.org/2014-2015/executive-summary/ (last visited Jan. 7, 2018) (placing Florida at number 4 on the list of hellholes). In the interest of disclosure, one of the authors of this Article was counsel in *McCall*.

[46] The current version of this bill is H.R. 720, 115th Cong. (2017) (as passed by House, Mar. 10, 2017).

[47] Letter from David G. Campbell, U.S. Dist. Judge, Dist. Ariz., Chair, Advisory Comm. on Rules of Practice & Procedure, & John Bates, U.S. Dist. Judge, Dist. D.C., Chair, Advisory Comm. on Civil Rules, to John Conyers, Jr., Ranking Member, House Comm. on the Judiciary (Feb. 1, 2017), *in* H.R. REP. NO. 115–16, at 19 n.2 (2017).

[48] Letter from Thomas M. Susman, Dir., Governmental Affairs Office, Am. Bar Ass'n, to Bob Goodlatte (R-Va.), Chair, & John Conyers, Jr., Ranking Member, House Comm. on the Judiciary (Feb. 1, 2017), *in* H.R. REP NO. 115-16, at 19 n.3 (2017).

A. The Punitive Damages Gambit

By 1851, punitive damages, based on "the enormity of his offence rather than the measure of compensation to the plaintiff,"[49] achieved such a high level of acceptance against claims of illegality that the Supreme Court held "if repeated judicial decisions for more than a century are to be received as the best exposition of what the law is, the question will not admit of argument."[50] Though rarely awarded, and when awarded it is assessed in small amounts,[51] the threat of punitive damages provided considerable deterrent effect to dissuade corporations from cutting corners on safety as part of a cost-benefit analysis that made it more profitable to use more problematic materials, manufacturing shortcuts, or questionable designs. Without punitive damages, companies could calculate failure rates and absorb estimated liabilities without going to the expense of correcting the flaws.[52] Courts castigated manufacturers for their calculus that would allow businesses to forego incorporation of a part costing pennies, despite knowing that its omission would produce horrific injuries in a significant number of product users.[53] Even so, punitive damages became a cause célèbre among frequent corporate defendants, who initiated a campaign asserting that juries awarded punitive damages too regularly and in

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49 Day v. Woodworth, 54 U.S. 363, 371 (1851).

50 *Id.*

51 *See* THOMAS H. COHEN & KYLE HARBACEK, PUNITIVE DAMAGES IN STATE COURTS, 2005 1 (Mar. 2011), https://www.bjs.gov/content/pub/pdf/pdasc05.pdf (reporting that "[p]unitive damages were awarded in 700 (5%) of the 14,359 trials where the plaintiff prevailed" and that the "median punitive damage award for the 700 trials with punitive damages was $64,000 in 2005").

52 *See* Jane Mallor & Barry S. Roberts, *Punitive Damages: On the Path to a Principled Approach?*, 50 HASTINGS L.J. 1001, 1003 (1999) ("If a punitive damages award can be known with certainty in advance of the conduct, the very sort of callousness that is to be corrected by a punitive award would be facilitated; the defendant would be able to calculate his maximum exposure to liability and determine whether to disregard the interests of the plaintiff."); *see also* Marc Galanter & David Luban, *Poetic Justice: Punitive Damages and Legal Pluralism*, 42 AM. U. L. REV. 1393, 1430 (1993); Anthony Geraci, *Gore's Metamorphosis in* State Farm v. Campbell*: When Guideposts Make a Detour*, 17 SAINT THOMAS L. REV. 1, 19–22 (2004).

53 *See, e.g.*, Grimshaw v. Ford Motor Co., 174 Cal. Rptr. 348, 388 (Cal. Ct. App. 1981) (characterizing the automobile manufacturer's misconduct as "reprehensible in the extreme," "exhibit[ing] a conscious and callous disregard of public safety in order to maximize corporate profits," and indicating evidence showed "Ford could have corrected the hazardous design defects at minimal cost but decided to defer correction of the shortcomings by engaging in a cost-benefit analysis balancing human lives and limbs against corporate profits").

extraordinary amounts.[54] A full-fledged litigation strategy accompanied the campaign to influence the courts through articles and corporate solidarity in opposition to punitive damages.[55]

At first, that strategy sought to curtail the size of punitive damages in litigation by asserting that they were awarded with a frequency and in an amount that violated the Excessive Fines Clause of the Eighth Amendment.[56] The argument made its way to the Supreme Court in a case involving a judgment of $51,146 in compensatory damages and $6 million in punitive damages,[57] where the Court characterized the question presented as "whether the Excessive Fines Clause of the Eighth Amendment applies to a civil-jury award of punitive or exemplary damages, and, if so, whether an award of $6 million was excessive in this particular case."[58] The Court answered the Eighth Amendment inquiry with a resounding "no," holding that the Excessive Fines Clause "does not constrain an award of money damages in a civil suit when the government neither has prosecuted the action nor has any right to receive a share of the damages awarded."[59]

As an alternative argument, the underlying defendant in the case asked the Court to consider whether Due Process provides an upper limit to a punitive damage judgment.[60] However, having not raised the issue in the lower courts, the Supreme Court reserved the question for "another day."[61] Even so, Justice Sandra Day O'Connor, regarded as a critical swing vote on the Court, laid down a marker for that other day in dissent, decrying "skyrocketing" punitive damages awards and their supposed adverse effect on product innovation.[62]

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54 *See* PETER W. HUBER, LIABILITY: THE LEGAL REVOLUTION AND ITS CONSEQUENCES 3–10 (1988).

55 *See, e.g.*, Andrew L. Frey, *No More Blind Man's Bluff on Punitive Damages: A Plea to the Drafters of Pattern Jury Instructions*, 29 LITIG. 24 (2003); Andrew L. Frey & Evan M. Tager, *Punitive Damages, the Constitution, and Due Process*, RECORDER, Sept. 9, 1993.

56 U.S. CONST. amend. VIII. The Eighth Amendment provides that "[e]xcessive bail shall not be required, nor excessive fines imposed." *Id.* Those challenging punitive damage awards as excessive argued the damages were "sufficiently criminal in nature to afford the constitutional protections of the criminal defendant to the civil defendant." 1 JAMES D. GHIARDI & JOHN J. KIRCHNER, PUNITIVE DAMAGES LAW AND PRACTICE § 3.06 (Supp. 1994).

57 Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 262 (1989).

58 *Id.* at 259.

59 *Id.* at 264.

60 *See id.* at 276.

61 *Id.* at 277.

62 *Id.* at 282 (O'Connor, J., dissenting). In support of her claim that airplane and motor vehicle designers abandoned projects for fear of a punitive damage award, she cited a former

Like O'Connor, who otherwise cited a handful of large unrepresentative verdicts,[63] judges have drawn an anti-punitive damage attitude from a determined public policy campaign that relies on fractured anecdotes to claim that punitive damage verdicts are out of control.[64] The cacophony so influenced members of the Supreme Court that O'Connor's concern about "skyrocketing" punitive damages soon made it into a majority opinion that restricted punitive damages deemed "grossly excessive."[65]

At first, however, the Court hesitatingly waded into the punitive damages thicket, opining at one point without mandating it that a four-to-one ratio "may be close to the [outer constitutional] line,"[66] while shortly thereafter letting stand a 526-to-one ratio.[67] Despite the Court's vacillation on the punitive-damage question, the campaign's persistence paid off as the Court succumbed to the anti-punitive damage bias and adopted a substantive due-process yardstick[68] through which courts could evaluate the size of the punitive damages award.

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law clerk's book. *Id.* (citing HUBER, *supra* note 54, at 152–71). Huber has been a steady campaigner in the litigation wars. *See* Gary Edmond & David Mercer, *Trashing "Junk Science,"* 1998 STAN. TECH. L. REV. 3, 4 (1998) (describing Huber's contributions to the literature as "polemical works").

63 *See* Steven Garber, *Product Liability, Punitive Damages, Business Decisions and Economic Outcomes*, 1998 WIS. L. REV. 237 (1998) (detailing how business decision makers substantially overestimate the frequency and magnitude of punitive damages by relying on unrepresentative news reports of verdicts that may be reduced before judgment or settled for lesser sums and then call for punitive damage reform).

64 *See generally* Stephen Daniels & Joanne Martin, *Punitive Damages, Change, and the Politics of Ideas: Defining Public Policy Problems*, 1998 WIS. L. REV. 71 (1998) (describing the political campaign to turn decision makers away from the best available empirical evidence, which indicates that there is no punitive damage crisis, and instead to subscribe to the false notion that there is a problem of great magnitude).

65 *See* BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 574 (1996).

66 Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 23 (1991).

67 TXO Production Corp. v. Alliance Resources Corp., 509 U.S. 443, 462 (1993).

68 *See BMW*, 517 U.S. at 574. Though framed as a problem of fair notice to the defendant, *id.*, Justice Antonin Scalia in dissent, called the majority's ruling the "identification of a 'substantive due process' right against a 'grossly excessive' award," *id.* at 599 (Scalia, J., dissenting), and most commentators have also regarded the decision from that rubric. *See, e.g.*, F. Patrick Hubbard, *Substantive Due Process Limits on Punitive Damages Awards: "Morals Without Technique"?*, 60 FLA. L. REV. 349, 351 (2008) (characterizing the imposition of substantive due process standards as being a "lack of clarity and consistency, an inadequate basis in terms of theory and policy, and an ad hoc approach to the application and construction of the framework" for review of punitive damages). Substantive due process was invoked even though "the Court has always been reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended," Collins v. City of Harker Heights, 503 U.S. 115, 125 (1992), and because of the concept's unhealthy association with the discredited decision in Lochner v. New York, 198 U.S. 45 (1905).

Courts were instructed to examine a punitive-damage verdict whenever it "raise[s] a suspicious judicial eyebrow."[69] The guideposts established tested the punitive damage award by considering the underlying conduct's reprehensibility, the amount's proportionality to the compensatory damages, and the amount's comparability to civil penalties and other punitive damage awards for similar misconduct.[70]

Adopting the guideposts, however, created a new issue about the jury's role in determining punitive damages. Could a verdict be reexamined without violating the Seventh Amendment? The Court answered yes by transforming the jury's role in punitive damages, from

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[69] *BMW*, 517 U.S. at 583 (quoting *TXO*, 509 U.S. at 481 (O'Connor, J., dissenting)). The subjectivity of that standard recalls Potter Stewart's famous expression about obscenity, where he observed that the Court was attempting to define something that was undefinable but "I know it when I see it . . . ." Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring). The observation set off a continuous flow of cases involving obscenity to the Supreme Court in which a number of justices felt obligated to view the subject film in a small theatre at the Court. According to Justice Thurgood Marshall, Justice John Harlan Jr., though blind and unable to see the film, nonetheless attended screenings out of duty, whereby Marshall assigned himself the task of narrating the action so he could get a rise out of Harlan. Richard Blumenthal, *A Tribute to Justice Harry A. Blackmun*, 97 DICK. L. REV. 613, 617 (1993). It was only after the Court adopted a community standards approach that kicked the issue back to the states in Miller v. California, 413 U.S. 15 (1973), that the Court was able to stem the steady flow of obscenity cases. After *BMW*, the Court received a similarly endless set of petitions seeking review of punitive-damage judgments, which became de rigueur for disappointed defendants, so that the Court appeared to be stuck as the court of last resort in every punitive-damage case unless it would adopt a *Miller* strategy of allowing for local variation.

[70] *BMW*, 517 U.S. at 575. Of the three, reprehensibility serves as the "most important indicium of the reasonableness of a punitive damages award . . . ." State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 419 (2003) (quoting *BMW*, 517 U.S. at 575). In *State Farm,* the Court continued to "reject[] the notion that the constitutional line is marked by a simple mathematical formula . . . ." *Id.* at 424. While it did suggest single-digit ratios were "more likely to comport with due process . . . than awards with ratios in range of 500 to 1," the formulation does not rule out higher ratios because "there are no rigid benchmarks that a punitive damages award may not surpass . . . ." *Id.* at 425. To prevent confusion generated by its discussion of ratios, the Court stressed that its referenced ratios "are not binding . . . ." *Id.* The third guidepost, comparability, seems to have little gravitational pull, as the discussion in *State Farm* found a miniscule comparative number that did not influence the Court's analysis, see *id.* at 428, and this factor did not provide a basis for a return to the Court after remand. Campbell v. State Farm Mut. Auto. Ins. Co., 98 P.3d 409 (Utah 2004), *cert. denied*, 543 U.S. 874 (2004) (leaving intact a punitive judgment that was 900 times greater than the most relevant civil sanction). Studies confirmed that the comparability guidepost yielded little useful information. *See, e.g.*, Michael Rustad & Thomas Koenig, *The Historical Continuity of Punitive Damages Awards: Reforming the Tort Reformers*, 42 AM. U. L. REV. 1269, 1325 n.282 (1993) ("The total of all CPSC fines in its history is the functional equivalent of a parking ticket for a Fortune 500 firm.").

Dissenting in *BMW*, Justice Scalia mocked the guideposts as "a road to nowhere; they provide no real guidance at all." *BMW*, 517 U.S. at 605 (Scalia, J., dissenting).

judges of damages to representatives of the community's degree of moral outrage, thereby silently overriding its 1851 decision that the determination of punitive damages was the province of the jury.[71] If it had not done so, the Seventh Amendment's Reexamination Clause would have required that the judicial reevaluation of the punitive damages be treated the same way that remittitur is treated. Remittitur avoids a court-ordered new trial when a plaintiff accepts a lesser amount as a trade-off.[72] However, a court may not unilaterally reduce the jury's verdict without alternatively allowing the plaintiff the option of a new jury trial.[73] In other words, for a judicial remittitur to take effect, the plaintiff must waive the right to jury-determined damages and voluntarily accept the judge's suggestion of a lesser amount to avoid the expense and effort of trying the case anew before another jury.

In *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*,[74] the issue of whether a court wishing to reduce a punitive damage verdict must offer the same alternative of a new jury trial came up in a patent dispute. The infringement case resulted in an award of $50,000 in compensatory damages and $4.5 million in punitive damages.[75] In reviewing the award, the Ninth Circuit used a deferential abuse of discretion standard and sustained the award. The Supreme Court, however, held that a reviewing court must examine the constitutionality of the punitive damages awarded *de novo*.[76] Because *de novo* review treats the issue as a matter of law, permitting the reviewing court to set the amount of punitive damages and take the decision away from the jury, the Court reduced the jury's role in assessing punitive damages. While compensatory damages represent a "jury's assessment of the extent of a plaintiff's injury" and constitutes "a factual determination" subject to the Seventh Amendment, the Court held that the jury's "imposition of punitive damages is an expression of its moral condemnation."[77] To elaborate, the Court differentiated punitive damages from compensatory damages, "which presents a question of

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71 Day v. Woodworth, 54 U.S. 363, 371 (1851).

72 *See* Dimick v. Schiedt, 293 U.S. 474, 482 (1935) (describing Justice Joseph Story's use of remittitur in Blunt v. Little, 3 F. Cas. 760 (C.C.D. Mass. 1822)).

73 Hetzel v. Prince William Cty., 523 U.S. 208, 211 (1998).

74 Cooper Indus., Inc. v. Leatherman Tool Grp., Inc., 532 U.S. 424 (2001).

75 *Id.* at 429.

76 *Id.* at 431.

77 *Id.* at 432.

historical or predictive fact."[78] In contrast, a "jury's award of punitive damages does not constitute a finding of 'fact,'" and therefore "does not implicate the Seventh Amendment."[79]

The Court justified its new attitude about punitive damages being outside the purview of the jury by asserting that "punitive damages have evolved somewhat" from a time in the nineteenth century when punitive damages compensated for intangible injuries that otherwise would not generate compensatory damages.[80] In the Court's view, the availability of noneconomic damages as compensation shifted punitive damages "toward a more purely punitive (and therefore less factual) understanding."[81] Meanwhile, respecting the jury-trial guarantee, the Court noted that "nothing in our decision today suggests that the Seventh Amendment would permit a court, in reviewing a punitive damages award, to disregard [any specific factual] jury findings."[82]

No constitutional language had changed to require this development. Moreover, the conceit adopted—that punitive damages had evolved into something new and no longer served the compensatory purpose that once justified entrustment to a jury—turns out more imagined than real. One scholar examined the Court's determination and concluded that noneconomic damages were indeed distinct from punitive damages, which were always designed to make an example of the misconduct and deter its repetition.[83]

This doctrinal change, transforming the jury's role in assessing punitive damages into an advisory one, developed from a decades-long campaign to curtail its award.[84] Yet, when the Court was finally

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[78] *Id.* at 437 (quoting Gasperini v. Ctr. for Human. Inc., 518 U.S. 415, 459 (1996) (Scalia, J., dissenting)).

[79] *Id.*

[80] *Id.* at 437–38 n.11.

[81] *Id.*

[82] *Id.* at 439 n.12. The removal of the Seventh Amendment's application to punitive damages may have opened the door to applications for additur. If the jury's punitive verdict is not sacrosanct and a judge is free to reduce it as unconstitutionally excessive without offering the parties the option of a new trial. It then naturally follows that the judge should be equally free to increase it as inadequate without offering a new trial, because the only bar to doing so, the Seventh Amendment, has been removed from the equation. For a further discussion of this possibility, see Robert S. Peck, *Winning Increased Punitive Awards After* Cooper, TRIAL, Oct. 2001, at 51.

[83] *See* Anthony J. Sebok, *What Did Punitive Damages Do? Why Misunderstanding the History of Punitive Damages Matters Today*, 78 CHI.-KENT L. REV. 163 (2003).

[84] *See, e.g.*, Stephen Daniels & Joanne Martin, *Myth and Reality in Punitive Damages*, 75 MINN. L. REV. 1, 14 (1990) (describing press kits and other public relations tools playing

confronted with empirical evidence of the infrequency and limited nature of punitive damage awards, it conceded that "the most recent studies tend to undercut much of [the criticism]."[85] Instead, a survey of the literature "reveals that discretion to award punitive damages has not mass-produced runaway awards."[86] In fact, studies revealed both modest ratios between compensatory and punitive damages, as well as no marked increase in the number of cases in which punitive damages were part of the verdict.[87] Instead, and the Court concluded that the data revealed "an overall restraint" on the part of juries.[88] The toothpaste, however, was already out of the tube.

B. Transforming a Liberalizing Expert Evidence Decision into Restrictions on Experts

Similar efforts were made to adopt a more restrictive approach to expert evidence and thereby cut off litigation through evidentiary limitations. The Federal Rules of Evidence permit opinion evidence from qualified experts when the witness's "scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue."[89] The testimony must be based on sufficient facts or data and properly use reliable methodologies.[90]

Raising concerns that the courts were flooded with "junk science" and that this contributed to a "litigation explosion," corporate campaigners attacked the admissibility of expert evidence in the courts,

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off horror stories and anecdotes about jury verdicts involving punitive damages and misuse of aggregate data on the frequency and size of awards to change attitudes).

85 Exxon Shipping Co. v. Baker, 554 U.S. 471, 497 (2008).

86 *Id.*

87 *Id.* at 497–98.

88 *Id.* at 499. Exxon, the defendant in the case, attempted to rebut the overall scholarly consensus with a number of studies, but the Court declined to rely on the studies "[b]ecause this research was funded in part by Exxon." *Id.* at 501 n.17. Because its prior rationale of skyrocketing punitive damage awards and runaway juries evaporated after the scholarly literature was examined, the Court justified its diminution of the jury's role because of the "stark unpredictability of punitive awards" and the need for consistency to be fair. *Id.* at 499. The literature rebuts that claim as well. *See* Theodore Eisenberg et al., *Juries, Judges, and Punitive Damages: An Empirical Study*, 87 CORNELL L. REV. 743, 773 (2002) (indicating compensatory awards are most powerful indicators of punitive awards). Still, a certain amount of unpredictability is desirable to prevent. That inability to forecast punitive damages increases the deterrent effect and prevents corporations from engaging in the type of cost-benefit analyses that was used to justify an exploding gas tank in the Ford Pinto. *See* Grimshaw v. Ford Motor Co., 174 Cal. Rptr. 348, 384 (Ct. App. 1981).

89 FED. R. EVID. 702(a).

90 *Id.* at 702(b)–(d).

in the legislatures, and in the public mind.[91] Perhaps no publication had more influence on the debate than a series of publications by a then-senior fellow at the Manhattan Institute's Center for Legal Policy, a think-tank supported by industry and insurance groups. In *Galileo's Revenge: Junk Science in the Courtroom*[92] and related publications,[93] Peter Huber successfully focused policymakers and others on the supposed prevalence of false experts, peddling party-friendly distortions of science.[94] His success was evidenced by Vice President Dan Quayle's invocation to argue for reform of the law governing experts[95] and the ubiquitous appearance of the words "junk science" in judicial opinions[96] and academic literature.[97] Despite a thorough refutation of Huber's premise and examples,[98] the concept of junk science persisted in the courts and has influenced judicial attitudes toward expert evidence.

The campaign to constrain the use of expert evidence sparked interest in the Supreme Court of the United States. In *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,[99] the Court reinterpreted Federal

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91 Peter W. Huber, *Junk Science in the Courtroom*, 26 VAL. U. L. REV. 723 (1992).

92 PETER W. HUBER, GALILEO'S REVENGE: JUNK SCIENCE IN THE COURTROOM (1991).

93 *See, e.g.*, Huber, *supra* note 91; Peter W. Huber, *Medical Experts and the Ghost of Galileo*, 54 L. & CONTEMP. PROBS. 119 (1991); Peter W. Huber, *Fact Versus Quack*, FORBES, July 4, 1994, at 132.

94 Huber also decried the supposed explosion of lawsuit filings. See HUBER, *supra* note 92, at 181–82, for Huber's description of the litigation explosion. *See also* WALTER K. OLSON, THE LITIGATION EXPLOSION: WHAT HAPPENED WHEN AMERICA UNLEASHED THE LAWSUIT (1992). The claim of a litigation explosion remains true in the public mind, even though it has been thoroughly debunked. *See, e.g.*, THOMAS H. KOENIG & MICHAEL L. RUSTAD, IN DEFENSE OF TORT LAW (2002) (reviewing empirical evidence countering claims of a great increase in lawsuits and of the prevalence of runaway juries); Randy M. Mastro, *The Myth of the Litigation Explosion*, 60 FORDHAM L. REV. 199 (1991) (book review).

95 Dan Quayle, *Civil Justice Reform*, 41 AM. U. L. REV. 559, 565 (1992).

96 *See, e.g.*, Tuf Racing Prods., Inc. v. Am. Suzuki Motor Corp., 223 F.3d 585, 591 (7th Cir. 2000) (stating that expert evidence "must be real science, not junk science"); Stuart v. United States, 23 F.3d 1483, 1486 (9th Cir. 1994) (rejecting the argument that the trial judge had been unduly influenced by Huber's book on junk science).

97 *See, e.g.*, David E. Bernstein, *Keeping Junk Science Out of Asbestos Litigation*, 31 PEPP. L. REV. 11 (2003).

98 Kenneth J. Chesebro, *Galileo's Retort: Peter Huber's Junk Scholarship*, 42 AM. U. L. REV. 1637, 1677 (1993); *see also* Edmond & Mercer, *supra* note 62, at 3; Jeff L. Lewin, *Calabresi's Revenge? Junk Science in the Work of Peter Huber*, 21 HOFSTRA L. REV. 183 (1992) (book review).

99 Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579 (1993).

Rule of Evidence 702[100] to permit the admission at trial of novel scientific expert testimony as long as the theory or technique offered "will assist the trier of fact" and is capable of being tested.[101] The approach marked a liberalization of the expert admissibility rules from the prevailing *Frye* general acceptance test.[102] Under that test, courts excluded cutting-edge scientific evidence because it had not yet gained acceptance within the community of experts. When scientific consensus changed, the evidence—and the results in cases—changed as well. Under *Daubert*, the Court backed away from too heavy a reliance on general acceptance because that would be "at odds" with the "liberal thrust" of the Federal Rules and its "general approach of relaxing the traditional barriers to 'opinion testimony.'"[103] The decision appeared to usher in a new era of focus on the use of acceptable scientific methodology, rather whether the expert conclusions matched up with those of other experts.[104] The *Daubert* approach was soon extended to nonscientific expert evidence.[105]

Yet, the junk-science campaigners ignored the conclusion that the federal rules liberalized admissibility of scientific evidence, focusing entirely on the decision's discussion of reliability.[106] The decision avoided dictating a "definitive checklist" for any reliability inquiry, but still made "some general observations"[107] that became the *Daubert* test: (1) can the theory or technique be tested?; (2) has it been subjected to peer review and publication?; (3) what is the known or potential error

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100 FED. R. EVID. 702 ("If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.") (emphasis removed); *Daubert*, 509 U.S. at 589.

101 *Daubert*, 509 U.S. at 593.

102 In a decision that predated the Federal Rules of Evidence, the District of Columbia Circuit developed a test that relied on the general acceptance of experts in the field as the threshold for scientific evidence. Frye v. United States, 293 F. 1013, 1014 (D.C. Cir. 1923).

103 *Daubert*, 509 U.S. at 588 (citing Beech Aircraft Corp. v. Rainey, 488 U.S. 153, 169 (1988)).

104 *See id.* at 595 ("The focus, of course, must be solely on principles and methodology, not on the conclusions that they generate.").

105 Kumho Tire Co. v. Carmichael, 526 U.S. 137 (1999).

106 Some found the Court's discussion of reliability gratuitous. *See, e.g.*, James W. McElhaney, *Fixing the Expert Mess*, 20 LITIG. 53, 53–54 (Fall 1993) (observing that Rule 702 does not address "how reliable scientific evidence has to be," but by abandoning *Frye*, the Court felt compelled to say something, putting it "in the awkward position of making something up").

107 *Daubert*, 509 U.S. at 593.

rate it generates?; and (4), harking back to *Frye*, is it generally accepted?[108]

The Court intended the inquiry to be a "flexible one" balanced against the traditional reliance upon "[v]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof.[109] Although the Court expressed clear guidance that "these conventional devices, rather than wholesale exclusion under an uncompromising 'general acceptance' test are the appropriate safeguards where the basis of scientific testimony meets the standards of Rule 702,"[110] the decision spawned pretrial practice attacking expert evidence through "*Daubert* hearings" to a far greater extent than *Frye* ever did, resulting in the exclusion of expert evidence previously regarded as generally acceptable.

C. The Myth of the Frivolous Lawsuit

On March 10, 2017, the U.S. House of Representatives passed H.R. 720, the so-called Lawsuit Abuse Reduction Act (LARA),[111] a perennial offering in recent Congresses. The Act would amend Rule 11 of the Federal Rules of Civil Procedure to require sanctions to compensate the injured party against any attorney, law firm, or party that has violated, or is responsible for the violation of, the rule with regard to representations to the court. An existing safe harbor that permits a challenged filing to be withdrawn or corrected would be removed from the rule. The bill would reinstitute changes the federal judiciary adopted in 1983 and abandoned a decade later because it became a source of satellite litigation and was itself abused.[112]

The legislation reflects the unwarranted concern that there are too many tort lawsuits and that a large number of them are unjustified. It declares its purpose as "help[ing] prevent frivolous lawsuits and help[ing] dispel the legal culture of fear that has come to permeate American society."[113] The idea that rampant litigation plagues the

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108 *Id.* at 593–94.

109 *Id.* at 594, 596.

110 *Id.* at 596.

111 H.R. 720, 115th Cong. (2017). The 2017 legislation is identical to bills with the same title that have been introduced in every Congress at least since 2011. *See* Lonny Hoffman, *The Case Against the Lawsuit Abuse Reduction Act of 2011*, 48 HOUS. L. REV. 545, 546 (2011).

112 *See* Hoffman, *supra* note 111, at 547–48.

113 H. REP. NO. 115–16, at 1 (2017).

country ignores the steady decline the country has seen in tort filings and the startling drop in the number of jury trials in civil cases throughout the country. The National Center for State Courts reports that incoming cases generally declined 9.4% from 2008 to 2012 in the nation's state courts and that civil cases in those same courts declined 7.7% during that same period.[114] Meanwhile, the number of jury trials continues to drop precipitously, despite its existence as a central feature of our civil justice system.[115]

The drop in filings demonstrates that Americans are not nearly as litigious as commentators make us out to be. Still, the overwhelming number of cases are filed in state, rather than federal court. The proposed legislation would only affect civil cases filed in federal court. In 2014, 295,310 civil cases were filed in federal court.[116] Of that amount, 32,537 were removed from state courts.[117] Some 60,675 were prison petitions, 178,961 were actions authorized by federal law, and only 79,990 were tort actions that were brought by and against private parties.[118] Civil rights cases authorized by federal law numbered 35,274, although the federal government was involved in 1257 of those.[119] Thus, the bill actually addresses only a relatively small number of civil cases.

Yet, despite its salutary-sounding name supposedly aimed at "lawsuit abuse reduction," LARA would expose Americans to harmful actions and products by diminishing the opportunity to hold those

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114 NAT'L CTR. FOR STATE COURTS, COURT STATISTICS PROJECT, EXAMINING THE WORK OF STATE COURTS: AN OVERVIEW OF 2012 STATE TRIAL COURT CASELOADS 3, 7–8 (2014), http://www.courtstatistics.org/~/media/microsites/files/csp/ncsc_ewsc_web_nov_25_14.ashx.

115 *See* Joseph F. Anderson, Jr., *Where Have You Gone, Spot Mozingo? A Trial Judge's Lament over the Demise of the Civil Jury Trial*, 2010 FED. CTS. L. REV. 99, 101 (2010) (discussing "the vanishing jury trial"); William G. Young, *Vanishing Trials, Vanishing Juries, Vanishing Constitution*, 40 SUFFOLK U. L. REV. 67, 73 (2006) (The "civil jury trial has all but disappeared.").

116 *U.S. District Courts—Civil Cases Commenced, Terminated, and Pending During the 12-Month Periods Ending September 30, 2013 and 2014 (Table C)*, ADMIN. OFFICE OF THE U.S. COURTS, http://www.uscourts.gov/sites/default/files/statistics_import_dir/C00Sep14.pdf (last visited Jan. 29, 2018).

117 *U.S. District Courts—Civil Cases Filed, by Origin, During the 12-Month Periods Ending September 30, 2010 Through 2014 (Table C-8)*, ADMIN. OFFICE OF THE U.S. COURTS, http://www.uscourts.gov/sites/default/files/statistics_import_dir/C08Sep14.pdf (last visited Jan. 29, 2018).

118 *U.S. District Courts—Civil Cases Commenced, by Basis of Jurisdiction and Nature of Suit, During the 12-Month Periods Ending September 30, 2013 and 2014 (Table C-2)*, ADMIN. OFFICE OF THE U.S. COURTS, http://www.uscourts.gov/sites/default/files/statistics_import_dir/C02Sep14.pdf (last visited Jan. 29, 2018).

119 *Id.*

responsible accountable. If enacted, it would add to the cost of litigation from both parties' perspective, as well as drain resources from the judicial branch. And it will accomplish these problematic feats by invading authority that rightfully resides in the judicial branch. It is remarkable that a measure as short and simple as LARA could wreak such havoc, but the lessons of experience and strong, consistent empirical literature supports that assessment.

The judiciary experimented with Rule 11 in 1983 by adopting the essential provisions that LARA would readopt. During its nearly decade-long existence, that version of the rule generated more than 7000 reported sanctions.[120] In a number of notable cases, sanctions were issued where the sanctioned party ultimately prevailed,[121] meaning that these cases were not frivolous.

Whenever a new or modified rule is put into place, it is in the competitive nature of the adversarial system for lawyers to test its applicability and tactical usefulness.[122] When faced with information that a lawsuit was in the offing, lawyers used the threat of Rule 11 sanctions under the 1983 version to discourage opposing counsel from filing cases in the first place, causing many to drop the claim or to settle for nominal damages. These cases went away, not because the case was frivolous, but because of the difficulty of the underlying factual issues. Civil rights plaintiffs could not prove necessary elements of their cases without the aid of compulsory discovery. Often, the smoking gun proving discrimination was hidden within the defendant's sole possession. When civil rights plaintiffs were unable to demonstrate that factual basis for their complaints at the outset of the case, the threat of Rule 11 sanctions became all too real. Today's plausibility standard for

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120 Georgene Vairo, *Rule 11 and the Profession*, 67 FORDHAM L. REV. 589, 625–26 (1998). Reported sanctions remain only a portion of the universe of all sanctions. It is fair to assume that the 7000 number represents the tip of the iceberg, with a great mass submerged and out of view. A task force formed by the U.S. Court of Appeals for the Third Circuit investigated this question, finding that reported decisions represented only two-fifths of Rule 11 sanctions issued. *See also* STEPHEN B. BURBANK, RULE 11 IN TRANSITION: THE REPORT OF THE THIRD CIRCUIT TASK FORCE ON FEDERAL RULE OF CIVIL PROCEDURE 11 (Am. Judicature Soc'y 1989).

121 *See* Mark S. Stein, *Rule 11 in the Real World: How the Dynamics of Litigation Defeat the Purpose of Imposing Attorney Fee Sanctions for the Assertion of Frivolous Legal Arguments*, 132 F.R.D. 309, 317–26 (1990).

122 *See* William W. Schwarzer, *Rule 11 Revisited*, 101 HARV. L. REV. 1013, 1018 (1988) (acknowledging the "readiness of lawyers to resort to any device available to exert pressure on their opponents").

pleadings[123] makes it even more likely that these cases would find a mandatory Rule 11 sanction requirement to constitute a nearly insuperable obstacle to lawsuits vindicating civil rights laws.

In fact, Rule 11 created satellite litigation with a vengeance. The Director of the Administrative Office of the U.S. Courts, Ralph Meacham, in a letter to Representative Sensenbrenner as chair of the Judiciary Committee on behalf of the Judicial Conference declared that the 1983 version of Rule 11 spawned a "cottage industry . . . that churned tremendously wasteful satellite sanctions litigation that had everything to do with strategic gamesmanship and little to do with underlying claims."[124] Director Meacham added, "Rule 11 motions came to be met with counter motions that sought Rule 11 sanctions for making the original Rule 11 motion."[125]

Sanctions motions became routine as a knee-jerk reaction to a lawsuit because defendants rarely believe they have done anything wrong. The 1983 version of Rule 11 provided defendants with another way to render the litigation more expensive for the plaintiff to pursue so that a smaller settlement amount would become more attractive. Defense lawyers, because they are paid on an hourly basis, have a perverse incentive to drag litigation out; plaintiffs' lawyers, usually paid on a contingency-fee basis, have incentives to reach a resolution as soon as possible and to only bring meritorious cases.[126] Dilatory tactics favor defense counsel and only make litigation more expensive to their clients and to a plaintiff. That type of delay and expense was a notable strategy of the tobacco industry in the days they still denied that smoking and cancer were linked because a plaintiff's lawyer could not sustain a lawsuit as long as a wealthy defendant could.[127]

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123 *See* Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007).

124 Letter from Leonidas Ralph Mecham, Sec'y, Judicial Conference of the U.S. to Representative James Sensenbrenner, Jr., Chairman, Comm. on the Judiciary (May 17, 2005), *in* 151 Cong. Rec. H9287 (Oct. 27, 2005).

125 *Id.*

126 *See generally* ALEXANDER TABARROK & ERIC HELLAND, TWO CHEERS FOR CONTINGENT FEES (2005); Herbert M. Kritzer, *Advocacy and Rhetoric vs. Scholarship and Evidence in the Debate over Contingency Fees: A Reply to Professor Brickman*, 82 WASH. U. L.Q. 477 (2004).

127 A federal court quoted a memorandum from an R.J. Reynolds' general counsel advising their litigation counsel that the "aggressive posture we have taken regarding depositions and discovery in general continues to make these cases extremely burdensome and expensive for plaintiffs' lawyers, particularly sole practitioners. To paraphrase General Patton, the way we won these cases was not by spending all of [RJR]'s money, but by making that other son of a bitch spend all of his." Haines v. Liggett Grp., Inc., 814 F. Supp. 414, 421 (D.N.J. 1993).

LARA's push for more than a plausible claim but a probable one only forces plaintiffs to speculate about connections that only discovery can elucidate, making it necessary to develop new factual and legal theories when pleading is complete and the substance of the action is considered. It multiplies expert costs. The routine nature of Rule 11 motions was further demonstrated by a survey that showed during a one-year period, 54.5% of respondents had been threatened with Rule 11 motions, while nearly one-third were forced to face Rule 11 proceedings.[128]

This misuse of Rule 11 convinced Judge William Schwarzer, a great proponent of the 1983 change, that the amendment he championed had been a mistake. He decried the way Rule 11 "added substantially to the volume of motions," led to "waste and delay[,]" and carried "the potential for increased tension among the parties and with the court."[129] He added, "when lawyers go to war under rule 11, litigation tends to become less manageable."[130] One leading scholar, Professor Stephen Burbank, described the fiasco of the 1983 version of the rule as an "irresponsible experiment with court access."[131] In fact, Professor Georgene Vairo, who has probably delved into Rule 11 more deeply than anyone else, wrote that the 1983 version of Rule 11 was "met with more controversy than perhaps any other Federal Rule of Civil Procedure."[132]

Civil rights cases in particular suffered under the 1983 version of Rule 11. Sanctions were assessed against civil rights plaintiffs more frequently than others, with the Federal Judicial Center finding that twenty-five percent of civil rights plaintiffs were sanctioned.[133] In fact, motions to sanction were granted against civil rights plaintiffs seventy percent of the time.[134] Most who studied this disparity recognized that the sanctions in civil rights cases were largely the product of disparate resources between low-income civil rights plaintiffs and their better-

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128 *See* Lawrence C. Marshall, Herbert M. Kritzer & Frances Kahn Zemans, *The Use and Impact of Rule 11*, 86 NW. U. L. REV. 943, 952 tbl.1 (1992).

129 Schwarzer, *supra* note 122.

130 *Id.*

131 Stephen B. Burbank, *Ignorance and Procedural Law Reform: A Call for a Moratorium*, 59 BROOK. L. REV. 841, 844 (1993).

132 Vairo, *supra* note 120, at 591.

133 THOMAS E. WILLGING, FEDERAL JUDICIAL CENTER, THE RULE 11 SANCTIONING PROCESS 74 tbl.8 (1988).

134 GEORGENE M. VAIRO, RULE 11 SANCTIONS: CASE LAW, PERSPECTIVES AND PREVENTATIVE MEASURES 50 n.68 (3d ed. 2004).

resourced defendants, as well as civil rights plaintiffs' inability to develop necessary facts before filing a complaint and obtaining necessary internal documents from the defendant that proved their allegations.[135]

If the 1983 version of Rule 11 had been applicable, the litigation that uncovered the General Motors ignition switch defect linked to sixty-five deaths would have been the subject of Rule 11 motions. The lawsuit that unlocked the puzzle was initially filed on the theory that the young woman's crash that resulted in her death was due to a defect in the power steering. Only after significant discovery was the ignition switch problem, which GM knew about all along, discovered as the cause of the crash.[136]

While that is a notable, recent case, one can just as easily look to some of the most watched cases of our time that started out with little hope of success. The most important case of the past century, *Brown v. Board of Education*,[137] was filed as a class action suit in 1951 and was, on its face, not regarded as the ideal vehicle to argue that separate was not equal and that the well-entrenched precedent of *Plessy v. Ferguson*,[138] should be overturned. As the evidence developed in the federal district court showed, "the physical facilities, the curricula, courses of study, qualification of and quality of teachers, as well as other educational facilities in the two sets of schools [were] comparable" between the all-white and all African American schools.[139] In a mandatory sanctions Rule 11 world, defense lawyers would likely have argued that there was no factual basis to argue that separate was not in fact equal.

It is not fanciful to suggest that *Brown* would have faced Rule 11 sanctions. Judge Robert Carter, who had been part of Thurgood Marshall's legal team in *Brown*, expressed "no doubt" that 1983's version of Rule 11 would have precluded the initiation of the lawsuit.[140] Even at the outset of *National Federation of Independent Business v. Sebelius*,[141] the constitutional challenge to the Patient

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135 *See, e.g.*, Carl Tobias, *Rule 11 and Civil Rights Litigation*, 37 BUFF. L. REV. 485, 493–96 (1988).

136 Lance A. Cooper & Patrick A. Dawson, *Switched Off*, TRIAL, Nov. 2014, at 14.

137 Brown v. Bd. of Educ., 347 U.S. 483 (1954).

138 Plessy v. Ferguson, 163 U.S. 537 (1896), *overruled by Brown*, 347 U.S. at 483.

139 Brown v. Bd. of Educ., 98 F. Supp. 797, 798 (D. Kan. 1951), *rev'd*, 347 U.S. 483 (1954).

140 Robert L. Carter, *The Federal Rules of Civil Procedure as a Vindicator of Civil Rights*, 137 U. PA. L. REV. 2179, 2192–93 (1989).

141 Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519 (2012).

Protection and Affordable Care Act's individual mandate,[142] upheld by a bare majority, drew descriptions from a number of scholars as a frivolous lawsuit. Professor Timothy Jost of Washington and Lee University Law School urged Rule 11 sanctions against the challengers. He also urged reimbursement of the federal government for the cost of defending the Act when the challenges were first filed because they represented "shockingly shoddy lawyering," involved a "pleading whose key claims are without support in the law and the facts," and made arguments that are "simple nonsense."[143] Former Reagan Administration Solicitor General Charles Fried, who had also been a Harvard law professor and Massachusetts judge, echoed Jost's assessment, calling the basis for the challenge "complete nonsense."[144] Though the Supreme Court upheld the Act against these attacks, the lawsuit was not frivolous. It garnered four dissenting votes that would have ruled in favor of the supposedly frivolous lawsuit.

Much too often, what constitutes a frivolous lawsuit is in the eyes of the beholder, and judicial discretion, as in the current rule, is plainly warranted. Under the 1983 version of the rule, the sanctions were frequently considered after judgment had been rendered. The result of a case, however, is not determinative of whether it was frivolous or not, particularly as there are a wide variety of factors that could produce an adverse result even when the claim or defense is fundamentally meritorious. If results determined frivolousness, then every case would result in sanctions because every case has a winner and a loser. As the lead researcher for the Federal Judicial Center observed, "there may be a tendency to merge the sanctions issue with the merits," as a result of a hindsight effect.[145] Yet, Rule 11 is about whether the pleading, *ex ante*, was without sufficient factual or legal support to have made the claim.

The 1983 version of Rule 11 also contributed vastly to a lowering of civility and professionalism among lawyers. The mandatory sanctions regime of 1983 produced suspicion and over-the-top accusations that were inconsistent with a properly functioning civil justice system. One

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142 26 U.S.C. § 5000A (2012).

143 Timothy Stoltzfus Jost, *Sanction the 18 State AGs*, NAT'L L.J. (Apr. 12, 2010, 12:00 AM), https://www.law.com/nationallawjournal/almID/1202447759851.

144 Alexander Bolton, *GOP Views Supreme Court as Last Line of Defense on Healthcare Reform*, HILL (Mar. 29, 2010, 10:00 AM), http://thehill.com/homenews/senate /89547-republicans-view-supreme-court-as-last-line-of-defense-on-healthcare-reform.

145 WILLGING, *supra* note 133, at 87–88.

court observed that it created incentives to "engage in professional discourtesy, preventing prompt resolution of disputes."[146] Commentators described the 1983 experiment as ushering in a new era of incivility and unprofessionalism within the legal profession.[147]

In light of that experience, the Advisory Committee on Civil Rules held extensive hearings, asked the Federal Judicial Center to study the issues, and received a vast number of comments from judges and lawyers. They concluded that it was necessary to amend Rule 11, amendments that yielded its current version. This version should not be mistaken for a paper tiger.

Currently, utilizing the same criteria to determine if a filing is baseless, judges have the discretion to impose sanctions, in addition to the fact that judges always have inherent authority to manage the litigation process before them and sanction improper claims, defenses, and tactics. Judges are not reluctant to do so where warranted, but also recognize that alternate theories that depend on how the facts play out are not frivolous when only one of several prevail. They understand that raising questions rather than sanctions about merely colorable claims can narrow the issues and help the parties focus on a very real dispute between them that a court may properly resolve.

Sanctions under the present-day Rule 11 seek deterrence, now and in the future. Malicious prosecution lawsuits and other means remain available to seek compensation when punishment is appropriate. Moreover, the adopted safe harbor provision assures a quick disposition of a questionable filing. Often, a defendant will have information, only obtainable through discovery, that enables a plaintiff to understand that no liability lies and dismissal should occur.

It is of no small moment that LARA seeks to amend Rule 11 directly, in contravention of the Rules Enabling Act of 1934,[148] which pertinently provides: "The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts (including proceedings before magistrate judges thereof) and courts of appeals."[149]

The Rules Enabling Act might best be described as a treaty between the legislative and judicial branches, allocating authority over the rules that govern proceedings in court. Just as Congress would properly resist

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146 Morandi, Inc. v. Texport Corp., 139 F.R.D. 592, 594 (S.D.N.Y. 1991).

147 1 GEOFFREY HAZARD, JR. & W. WILLIAM HODES, THE LAW OF LAWYERING: A HANDBOOK ON THE MODEL RULES OF PROFESSIONAL CONDUCT § 3.1:205 (Supp. 1996).

148 28 U.S.C. § 2072 (2012).

149 *Id.*

judicial interference with the rules by which it conducts business, the judiciary, as a coequal branch of government, should not be subservient to Congress in devising the rules by which it conducts its business, namely, the trial of cases or controversies. While the Constitution is not explicit here, both branches have inherent authority to do what is necessary for them to function. When one branch steps over the line by prescribing internal functioning, it raises profound separation of powers issues.

The Rules Enabling Act establishes a demanding process for amending the Federal Rules. In accordance with it, committees of the Judicial Conference of the United States, the governing body of our federal courts, consider proposals and initiate their own, drafting those changes to the rules they find warranted. Afterwards, the proposals are subject to thorough public comment and reconsideration. The recent amendments to the rules governing discovery received more than 2300 comments and were the subject of three public hearings. The comments generated further refinements to the proposals. After being approved by the Civil Rules Committee, the proposed amendments then went to the Judicial Conference for approval, followed by the Supreme Court, which separately considered and then promulgated them.

Even after that further consideration, under the Act, the Supreme Court transmits them to Congress, which retains the authority to reject, modify, or defer any rule or amendment before it takes effect. That process deserves respect. It is considerate of the underlying separation of powers concerns that motivated approval of the Rules Enabling Act in the first place. The process allows for the views of consumers of the system, not just lawyers and judges, but litigants as well, to be heard. It assures that rules changes do not occur on an ad hoc basis, but only through a process that considers the complex and interconnecting nature of procedural rules.

The vast majority of judges and lawyers support Rule 11 in its current form. A 1995 survey of judges and lawyers found that the current rule was well supported.[150] Sixty percent of judges, sixty-one percent of defense counsel, and eighty-nine percent of plaintiffs' lawyers believed that groundless litigation was a small to nonexistent problem.[151] In light of the 1993 amendment, respondents were asked whether they saw a change in behavior. Rather than report that the

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[150] *See* JOHN SHEPARD ET AL., FEDERAL JUDICIAL CENTER, REPORT OF A SURVEY CONCERNING RULE 11, FEDERAL RULES OF CIVIL PROCEDURE (1995).

[151] *See id.* at 3.

floodgates to baseless litigation had opened, eighty-five percent of judges said there had been no change, meaning that the 1993 version was at least as effective as the 1983 version, or that the situation had actually improved. The judges were joined in that assessment by seventy percent of defense lawyers and seventy-two percent of plaintiff lawyers.[152] As for the safe harbor provision, it garnered the support of seventy percent of the judges, seventy-one percent of defense counsel, and eighty percent of plaintiff counsel. When the Federal Judicial Center returned to the subject in 2005, the survey revealed that support for the 1993 Rule had grown even stronger. More than eighty percent of judges responding agreed that "Rule 11 is needed and it is just right as it now stands."[153] In considering alternatives, eighty-seven percent preferred the current Rule 11, while only five percent preferred the 1983 version that LARA would resurrect.[154] As to whether groundless litigation was a problem, eighty-five percent responded that it was only a small to nonexistent problem, a twenty-five percentage point increase over the survey ten years earlier.[155] Eighty-five percent said the 1993 amendments either were as effective as the 1983 Rule in deterring baseless litigation or improved the situation.[156] Eighty-six percent of judges supported the safe-harbor provision; sixty percent overall and sixty-five percent of judges commissioned since 1992 gave it strong support.[157] Importantly, when sanctions were warranted, eighty-four percent of judges opposed an award of attorney fees to the supposedly injured party.[158]

All of this data was well known to the House Judiciary Committee when LARA came up yet again this year. Still, clinging to beliefs derived from a propaganda campaign and the special interests they favored, the House chose not to defer to this overwhelming judgment. Imposition of this change to Rule 11 cannot help but recall the experiences that caused those who drafted our Constitution to provide for judicial independence. The framers regarded the guarantee of access to the courts, along with separation of powers, as a necessary response to experiences in which legislatures "played fast and loose

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152 *Id.*

153 DAVID RAUMA & THOMAS WILLGING, FEDERAL JUDICIAL CENTER, REPORT OF A SURVEY OF UNITED STATES DISTRICT JUDGES' EXPERIENCES AND VIEWS CONCERNING RULE 11, FEDERAL RULES OF CIVIL PROCEDURE 2 (2005).

154 *Id.*

155 *Id.* at 4.

156 *Id.* at 5.

157 *Id.* at 5–6.

158 *Id.* at 8.

with the very structure of the judiciary; meddled constantly in judicial affairs, nullified court verdicts, vacated judgments, remitted fines, dissolved marriages, and relieved debtors of their obligations almost with impunity."[159] As the Supreme Court itself put it, "[t]his sense of a sharp necessity to separate the legislative from the judicial power, prompted by the crescendo of legislative interference with private judgments of the courts, triumphed among the framers of the new Federal Constitution."[160] There plainly is no need for this bill, and strong constitutional imperatives weigh against it.

The legislation received strong support from the Chamber of Commerce and the National Federation of Independent Businesses. Both groups testified in favor of the legislation, trotting out anecdotes and statistics that could not bear scrutiny. Some of the data was compiled by an insurance industry consulting firm, Towers Watson (previously Tillinghast/Towers Perrin), which puts out reports on "U.S. Tort Cost Trends." Yet, what the firm tallies up are insurance benefits paid from injuries caused by insureds and, costs of handling insurance claims, including legal representation of insureds, as well as insurance company overhead.[161]

Moreover, the report itself recognizes that it makes "[n]o attempt . . . to measure or quantify the benefits of the tort system, or conclude that the costs of the U.S. tort system outweigh the benefits, or vice versa."[162] Also, the report makes plain that some of its estimates are based on guesswork. The result is a report on the expenses of the insurance industry without the reductions that properly should be calculated for industry profits. In the 2011 report, it admits that the increase between 2009 and 2010 is "attributable to the April 2010 Deepwater Horizon drilling rig explosion and resulting oil spill in the Gulf of Mexico."[163] This "estimate" is not a reliable figure about the tort system.

Nor is the U.S. Chamber Institute for Legal Reform's "Tort Liability Costs for Small Businesses," used to promote the Act, reliable. The Chamber's public relations piece starts with the Towers Watson numbers and adds to it the costs of insurance to businesses of different

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159 HENRY STEELE COMMAGER, THE EMPIRE OF REASON: HOW EUROPE IMAGINED AND AMERICA REALIZED THE ENLIGHTENMENT 214 (1977).

160 Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 221 (1995).

161 *See, e.g.*, TOWERS WATSON, 2011 UPDATE ON U.S. TORT COST TRENDS 8 (2012).

162 *Id.* at 2.

163 *Id.* at 3.

sizes and estimates of liability costs not covered by insurance.[164] Thus, the estimates proffered are the costs of the insurance industry to operate, the costs of business to buy insurance industry products, and the payouts that compensate those wrongfully injured. That does not represent the costs of the tort system, double counts premiums that are paid and then allocated to pay liabilities, and ignores the savings, profits, and benefits of insurance, which must properly be accounted for in any scheme. No accounting system properly ignores this other side of the ledger.

Moreover, if I run into your parked car, causing $1000 worth of damage, the tort system is not costing us that money. I am responsible for the damage I caused; the tort system merely enforces that responsibility. My premiums help me pay that responsibility, and my insurer is paying out money it contracted to expend on my behalf in return for those premiums. I save money, and the insurer profits from this system of spreading risk. To count this as a lamentable cost of the tort system is simply wrong.

Yet, LARA's perennial consideration, "[l]ike some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried,"[165] demonstrates the efficacy of a well-financed and carefully crafted public relations campaign to distort the law.

II
OREGON'S JOURNEY FROM SUBSTANTIVE FUNDAMENTAL RIGHTS TO MERE PROCEDURAL GUARANTEES

Developments overturning existing civil litigation rules and precedent at the national level have also impelled similar efforts, perhaps even on a broader scale, among the states. In our view, the Oregon Supreme Court's decision in *Horton* was the product of similar forces determined to turn the civil litigation system to their advantage by undermining longstanding precedent and understandings, while making the effort seem like a natural course correction. The most problematic aspect of what *Horton* accomplished was the transformation of substantial and important constitutional rights into mere procedural guarantees and moved Oregon from a "lonely

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164 U.S. CHAMBER INST. FOR LEGAL REFORM, TORT LIABILITY COSTS FOR SMALL BUSS. 8 (2010).

165 Lamb's Chapel v. Ctr. Moriches Union Free School Dist., 508 U.S. 384, 398 (1993) (Scalia, J., concurring).

eminence" in taking the strongest stand among the states in favor of the rights to a jury trial and to access to the courts to the opposite extreme in which those rights become essentially hortatory, rather than enforceable.

A. The Right to Trial by Jury

Oregon's Constitution provides a double protection of the right to trial by jury. Its Bill of Rights declares the right "inviolate,"[166] a unique superlative of unmatched force that appears nowhere else in the Constitution. Consulting dictionaries that both predated and postdated the 1857 Oregon Constitution, the *Lakin* Court found that "inviolate" meant it was free from violation or impairment.[167] Its unyielding meaning admits of no balancing test and derives its import from the jury's historic role and responsibilities.[168]

By initiative in 1910, apparently insufficiently confident that an "inviolate" guarantee was adequate, voters added a second guarantee, framed in nearly the same words as the federal Constitution's Seventh Amendment and declaring the "right of trial by jury shall be preserved . . . ."[169]

Applying the jury-trial right in *Lakin,* the Oregon Supreme Court unanimously held a cap on noneconomic damages in personal injury cases of $500,000 violated the state constitutional right to a jury trial.[170] Following a common formulation of how to interpret a

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166 OR. CONST. art. I, § 17.

167 Lakin v. Senco Prods. Inc., 329 Or. 62, 69, 987 P.2d 463, 468, *modified*, 329 Or. 369, 987 P.2d 476 (1999), *overruled by* Horton v. Or. Health & Sci. Univ., 359 Or. 168, 250, 376 P.3d 998, 1044 (2016).

168 *Id.* at 69–70, 987 P.2d at 468 (citing Molodyh v. Truck Ins. Exch., 304 Or. 290, 295–98, 744 P.2d 992, 996–97 (1987)) (The Constitution guarantees a jury trial "in those classes of cases in which the right was customary at the time the [Oregon] constitution was adopted or in cases of like nature" and "includes having a jury determine all issues of fact, not just those issues that remain after the legislature has narrowed the claims process."); State v. 1920 Studebaker Touring Car, 120 Or. 254, 259, 251 P. 701, 703 (1926) ("The right of trial by jury, guaranteed by the Constitution of this state, embraces every case where it existed before the adoption of the Constitution, and it is not within the power of the Legislature to enact any law which deprives any litigant of that right."); Tribou v. Strowbridge, 7 Or. 156, 159 (1879) (Article I, section 17, "indicates that the right of trial by jury shall continue to all suitors in courts in all cases in which it was secured to them by the laws and practice of the courts at the time of the adoption of the constitution.").

169 OR. CONST. art. VII, § 3.

170 The plaintiffs brought a product-liability action when the nail gun being used fired three times, rather than just once, with the second and third nails ricocheting off the head of the first nail and implanting itself in the user's face and brain. *Lakin*, 329 Or. at 67–68, 987

constitutional provision, the court considered the text, the relevant precedents, and the history that led to its enactment.[171] Though the court of appeals had focused on the reexamination clause in Oregon's second jury-trial guarantee,[172] the supreme court limited its review to the first mention of the right, the bill of rights guarantee that holds the right to be "inviolate."[173] It found that the text, employing a word that does not allow any abridgement, did not answer the question about whether a damage cap was inconsistent with the jury-trial right.

Looking at past precedent interpreting the jury-trial right,[174] the court concluded, consistent with nearly every other state's high court[175] and with the historical test adopted by the U.S. Supreme Court,[176] that the jury-trial right today comprises the same practices and authority that juries had when the Oregon Constitution was adopted.[177] An examination of the various iterations of the jury-trial right that preceded the Oregon Constitution[178] reinforced that approach

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P.2d at 467. Surgery required removal of part of the user's brain, resulting in mental impairment and the inability to live independently. *Id.*, 987 P.2d at 467–68.

171 *Id.* at 68, 987 P.2d at 467 (citing Priest v. Pearce, 314 Or. 411, 415–16, 840 P.2d 65, 67 (1992)).

172 OR. CONST. art. VII, § 3. Under the federal Seventh Amendment, the Reexamination Clause is generally regarded as a limitation on judicial authority to change the verdict. *See* Hetzel v. Prince William Cty., 523 U.S. 208, 211 (1988).

173 OR. CONST. art. I, § 17.

174 *Lakin*, 329 Or. at 69, 987 P.2d at 468.

175 *See, e.g.*, Lisanti v. Alamo Title Ins. of Texas, 55 P.3d 962, 966 (N.M. 2002) (jury-trial right attaches to "any common law cause of action that predates our Constitution"); New Bedford Hous. Auth. v. Olan, 758 N.E.2d 1039, 1045 (Mass. 2001) (same); Benton v. Ga. Marble Co., 365 S.E.2d 413, 420 (Ga. 1988) (same); State Conservation Dep't v. Brown, 55 N.W.2d 859, 861 (Mich. 1952) (same); People v. One 1941 Chevrolet Coupe, 231 P.2d 832 (Cal. 1951) (same).

176 Markman v. Westview Instruments, Inc., 517 U.S. 370, 376 (1996) (employing a historical test consisting of whether the cause of action "tried at law at the time of the founding or is at least analogous to one that was;" and "whether the particular trial decision must fall to the jury in order to preserve the substance of the common-law right as it existed in 1791").

177 Among the cases cited by the court, in *Lakin*, 329 Or. at 69–70, 987 P.2d at 468, were Tribou v. Strowbridge, 7 Or. 156, 159 (1879) ("Article I, section 17, 'indicates that the right of trial by jury shall continue to all suitors in courts in all cases in which it was secured to them by the laws and practice of the courts at the time of the adoption of the constitution.'") and State v. 1920 Studebaker Touring Car, 120 Or. 254, 259, 251 P. 701, 703 (1926) ("The right of trial by jury, guaranteed by the Constitution of this state, embraces every case where it existed before the adoption of the Constitution, and it is not within the power of the legislature to enact any law which deprives any litigant of that right.").

178 Oregon's Constitution was significantly influenced by that of Indiana. *See* Priest v. Pearce, 314 Or. 411, 418, 840 P.2d 65, 68 (1992); W.C. Palmer, *The Sources of the Oregon Constitution*, 5 OR. L. REV. 200, 201 (1926). In fact, Oregon's jury-trial right contained in article I, section 17 is identically worded as the right found at article I, section 20, of the

because each version of the jury-trial guarantee anchored the right in continuity from its common law understandings.[179]

Reviewing early Oregon cases, the court found that directed verdicts or dismissals were beyond a court's authority as long as any evidence supported the plaintiff, thereby moving the case into the jury's, rather than the court's, purview.[180] Early cases also established that a judge's differing view of appropriate damages had to defer to the jury's assessment of damages.[181] That weight of precedent convinced the court that "common-law actions carry with them fundamental rights to a jury determination of the right to receive, and the amount of, damages" and that legislative interference with "the full effect of a jury's assessment of noneconomic damages, at least as to civil cases in which the right to jury trial was customary in 1857, or in cases of like nature" is unconstitutional.[182]

Responding to the argument adopted in some courts that the jury is permitted to reach a verdict for the full compensatory amount but has no authority to set the legal import of that determination,[183] the *Lakin* court countered that a cap prevents "the jury's award from having its full and intended effect" and "eviscerates 'Trial by Jury' as it was understood in 1857 and, therefore, does not allow the common-law right of jury trial to remain 'inviolate.'"[184] Quoting with approval

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1851 Indiana Constitution. Indiana's Supreme Court, interpreting its provision has also recognized that "it has long been agreed that Article I, section 20 serves to preserve the right to a jury trial only as it existed at common law." Songer v. Civitas Bank, 771 N.E.2d 61, 63 (Ind. 2002).

179 *Lakin*, 329 Or. at 71–72, 987 P.2d at 469–70. For example, the Organic Law that provided for a provisional government for the Oregon Territory guaranteed that its inhabitants "shall always be entitled to the benefits of . . . trial by jury, . . . and of judicial proceedings according to the course of the common law." *Id.* at 72, 987 P.2d at 469 (citing ORGANIC LAW OF THE PROVISIONAL GOVERNMENT OF OREGON OF 1845, art. I, § 2, *reprinted in* THE ORGANIC AND OTHER GENERAL LAWS OF OREGON TOGETHER WITH THE NATIONAL CONSTITUTION AND OTHER PUBLIC ACTS AND STATUTES OF THE UNITED STATES, 1845-1864 59 (M.P. Deady ed., 1866)).

180 *Id.* at 75, 987 P.2d at 471 (first citing Tippin v. Ward, 5 Or. 450, 453 (1875); and then citing Vanbebber v. Plunkett, 26 Or. 562, 564–65, 38 P. 707, 708 (1895)).

181 *Id.* (citing Or. Cascades R.R. Co., v. Or. Steam Nav. Co., 3 Or. 178, 179 (1869)).

182 *Id.* at 77, 78, 987 P.2d at 472, 473.

183 For example, the Virginia Supreme Court held that "[o]nce the jury has ascertained the facts and assessed the damages," the jury has discharged its duties and the "constitutional mandate is satisfied." Etheridge v. Med. Ctr. Hosps., 376 S.E.2d 525, 529 (1989) (citation omitted). The cap, according to that court, merely requires the court to "apply the law to the facts." *Id.*; *see also* Kirkland v. Blaine Cty. Med. Ctr., 4 P.3d 1115, 1120 (2000) (adopting the court's approach in *Etheridge*, 376 S.E.2d 525).

184 *Lakin*, 329 Or. at 79, 987 P.2d at 473.

Washington's Supreme Court, *Lakin* further stated that the cap "ignores the constitutional magnitude of the jury's fact-finding province, including its role to determine damages . . . . [While it] pays lip service to the form of the jury but robs the institution of its function."[185]

B. The Right to a Remedy

The plaintiff in *Smothers v. Gresham Transfer, Inc.*,[186] invoked Oregon's right to a remedy guarantee after having been denied workers' compensation for injuries he claimed from mist and fumes at work and then having his negligence action dismissed because workers' compensation provides the exclusive remedy for work-related injuries. He asserted that this Kafkaesque result pointing him at the unavailable workers' compensation system denied him a remedy. The Oregon Supreme Court unanimously agreed, finding the exclusive remedy provision in the workers' compensation law, which applied even when benefits are denied, unconstitutional.[187]

Recognizing that Oregon had not applied a consistent jurisprudence to its remedy clause,[188] the court undertook an original-intent analysis adopted as the appropriate way to construe original provisions of the state constitution in *Priest v. Pearce*.[189] First, it examined the meaning of the term "remedy" as used in article I, section 10, as it may have been understood in 1857, when the Oregon Constitution was drafted, and 1859, when adopted, through dictionaries of the time. The court concluded that the word "remedy" refers both to a process through which a person may seek redress for injury and to what is required to restore a person who has been injured.[190] For the second key phrase in the constitutional provision, "due course of law," the court said there were no reliable sources for what the constitutional drafters might have meant.[191] Finally, as to the word "injury," the parties provided the court with two options. The defendant asserted that "injury" comprises

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185 *Id.* at 79–80, 987 P.2d at 473 (quoting Sofie v. Fibreboard Corp., 771 P.2d 711, 723 (1989), *amending opinion*, 780 P.2d 260 (1989)).

186 Smothers v. Gresham Transfer, Inc., 332 Or. 83, 23 P.3d 333 (2001), *overruled by* Horton v. Or. Health & Sci. Univ., 359 Or. 168, 188, 376 P.3d 998, 1010 (2016).

187 *Id.* at 86, 23 P.3d at 336.

188 *Id.* at 90, 23 P.3d at 338.

189 Priest v. Pearce, 314 Or. 411, 415–16, 840 P.2d 65, 66–67 (1992). The *Priest* analysis consists of "an examination of the wording of the particular constitutional provision, the historical circumstances that led to its creation, and case law surrounding it." *Smothers*, 332 Or. at 91, 23 P.3d at 338 (citing *Priest*, 314 Or. at 415–16, 840 P.2d at 67).

190 *Smothers*, 332 Or. at 92, 23 P.3d at 339.

191 *Id.*

whatever the legislature chooses it to mean, while conceding that its definition allowed the legislature to abolish a previously recognized right.[192] The plaintiff offered a definition that embraced "any wrong or damage done by or to another," which the court found consistent with legal and standard dictionaries at the time of the Constitution's promulgation.[193]

While the court found the definitional approach helpful, even if not conclusive, it then under took an examination of the historical circumstances that brought into being the remedy guarantee. The guarantee, the court found, grew out of the common law and derived from Magna Carta's final and definitive edition promulgated in 1225[194] and relied upon by Sir Edward Coke in explicating its legal meaning.[195] In his influential *Institutes*, Coke wrote that Chapter 29 meant that:

> every subject of this realme, for injury done to him in [goods, lands, or person], by any other subject, . . . may take his remedy by the course of the law, and have justice, and right for the injury done to him, freely without sale, fully without any deniall, and speedily without delay.[196]

To the court, Coke instructed that legal remedies provided by the common law were an English birthright and a guarantee of "both justice ('justitiam') and the means to attain it ('rectum')."[197]

The court also examined Blackstone's *Commentaries*, which it characterized as a 1765 update of "Coke's accounts of the evolution of

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192 *Id.*, 23 P.3d at 340.

193 *Id.*, 23 P.3d at 339.

194 The provision of Magna Carta that generated the remedy clauses in American constitutions stated: "To no one will we sell, to no one will we refuse or delay right or justice." MAGNA CARTA, ch. 29 (1225). Chapter 29 consisted of the combination of chapters 39 and 40 of the original issue of the great charter. *Smothers*, 332 Or. at 94, 23 P.3d at 340.

195 *Smothers*, 332 Or. at 94 n.5, 23 P.3d at 340 n.5. The framers of the Constitution regarded Coke, along with Blackstone, as one of the great expositors of the English common law. *See* Payton v. New York, 445 U.S. 573, 594 (1980) (Coke was "widely recognized by the American colonists 'as the greatest authority of his time on the laws of England.'").

196 *Smothers*, 332 Or. at 96–97, 23 P.3d at 341 (quoting 1 EDWARD COKE, THE SECOND PART OF THE INSTITUTES OF THE LAWS OF ENGLAND 55 (1797)) (emphasis omitted). No less an authority than Thomas Jefferson wrote that "Coke has given us the first view of the whole body of law worthy now of being studied . . . . Coke's Institutes are a perfect Digest of the law as it stood in his day." Laura K. Donohue, *The Original Fourth Amendment*, 83 U. CHI. L. REV. 1181, 1328 (2016) (quoting Letter from Thomas Jefferson to John Minor (Aug 30, 1814), *in* J. JEFFERSON LOONEY, ed., 7 THE PAPERS OF THOMAS JEFFERSON 625, 627 (2010)).

197 *Smothers*, 332 Or. at 97, 23 P.3d at 341 (citing COKE, *supra* note 196, at 56).

the common law."[198] Blackstone forthrightly declared that the common law's recognition of a right or prohibition against an injury guaranteed a legal remedy.[199]

The seeds of the common law planted by Coke's and Blackstone's descriptions found fertile soil in the American colonies, where they were adopted in the rhetoric of the American Revolution and the first state constitutions.[200] Remedies clauses appeared frequently in the early state constitutions. Still, experience had proven the wisdom of Jefferson's observation that legislatures, not just executives, could threaten liberty.[201] In fact, the mid-nineteenth century spate of constitution-writing was significantly motivated by distrust of legislative arrogation of power.[202] The *Smothers* court looked at the revision of the remedy guarantee in the Indiana Constitution during that period as a significant part of that trend. Indiana rewrote the existing single clause, *Smother*s found, to establish a strengthened right to "open courts" while separately assuring a means to administer the guarantee.[203]

Because no Indiana decision construed the remedy guarantee before Oregon adopted the same approach, the court looked to decisions in other states that had examined its meaning. Decisions from other states established the remedy clause as involving the "sacred right of every person,"[204] as protecting "fundamental, sacred rights,"[205] and as imposing a "duty to assure the availability of a remedy for injury."[206] While *Smothers* recognized that early cases permitted legislatures to alter remedies, early decisions limited that authority when they

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198 *Id.* at 98, 23 P.3d at 342. Blackstone's *Commentaries* were widely accepted as "the most satisfactory exposition of the common law of England . . . . [U]ndoubtedly[,] the framers of the Constitution were familiar with it." Schick v. United States, 195 U.S. 65, 69 (1904).

199 *Smothers*, 332 Or. at 99, 23 P.3d at 343 (citing BLACKSTONE, *supra* note 1, at *123).

200 *Id.* at 100–05, 23 P.3d at 343–46.

201 THE FEDERALIST NO. 48 (James Madison).

202 *Smothers*, 332 Or. at 106, 23 P.3d at 347 (citing Amasa M. Eaton, *Recent State Constitutions*, 6 HARV. L. REV. 109, 109 (1892)); *see also* KERMIT L. HALL, THE MAGIC MIRROR: LAW IN AMERICAN HISTORY 89 (1989) (recounting popular rebellion at government corruption and favoritism to special interests at mid-century that "climaxed in an outburst of constitutional reform that diminished legislative power").

203 *Smothers*, 332 Or. at 107–08, 23 P.3d at 347.

204 *Id.* at 108, 23 P.3d at 348 (citing Fisher v. Patterson, 14 Ohio 418, 426 (1846)).

205 *Id.* (citing Commercial Bank of Natchez v. Chambers, 16 Miss. 9, 57 (1847)).

206 *Id.* at 109, 23 P.3d at 348 (citing Davis v. Ballard, 24 Ky. 563, 568 (1829)).

infringed on absolute or vested rights.[207] A Tennessee decision established that rights enshrined in the state constitution, like the remedy guarantee, became "vested, unexchangeable, and unalienable."[208] Thus, remedies clauses provided an "important limitation" on legislative authority.[209]

After reviewing application of the remedy provision in other states and examining the term's use in preconstitutional caselaw, *Smothers* concluded

> when the Oregon Constitutional Convention convened in 1857, courts and commentators . . . [had] revealed that the purpose of remedy clauses was to protect "absolute" common-law rights. . . . Remedy clauses mandated the continued availability of remedy for injury to absolute rights. The requirement that remedy be by due course or due process of law was intended as a limitation on the legislature's authority when it substituted statutory remedies for common-law remedies.[210]

The court next reviewed guidance that could be gleaned from the Oregon Constitutional Convention on the remedy provision. While Indiana's Constitution provided the basis for most Bill of Rights provisions, the Oregon framers edited it with respect to the remedy provision, accomplishing what Indiana originally provided in a single sentence with two clauses.[211] No debates were recorded on the remedy provision, and the evidence available about intent was decidedly "sketchy."[212] The court nonetheless took the absence of indicia to suggest that the drafters embraced the "historical purpose of remedy clauses, which was to mandate the availability of a remedy by due course of law for injury to absolute rights respecting person, property, and reputation."[213] The separation of a clause aimed at administration, and

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[207] *Id.* Earlier in the decision, the court adopted Blackstone's approach to absolute rights, as those liberties that are immutable, exist regardless of the structure of civil society, and protect an individual's personal security, liberty, and private property. *Id.* at 98–99, 23 P.3d at 342 (citing BLACKSTONE, *supra* note 1, at *123–24, *129).

[208] *Id.* at 110, 23 P.3d at 349 (citing Townsend v. Townsend, 7 Tenn. 1, 12 (1821)).

[209] *Id.* at 109–10, 23 P.3d at 348 (quoting THEODORE SEDGWICK, A TREATISE ON THE RULES WHICH GOVERN THE INTERPRETATION AND APPLICATION OF STATUTORY AND CONSTITUTIONAL LAW 534, 534 (1857)).

[210] *Id.* at 112, 23 P.3d at 350.

[211] *Id.* at 114, 23 P.3d at 351.

[212] *Id.*

[213] *Id.*

> a separate, independent clause [with] the requirement of remedy by due course of law for injury to person, property, or reputation, indicates that the drafters regarded the remedy clause as providing substantive protection to . . . absolute rights respecting person, property, and reputation as those rights were understood in 1857,

it decided.[214]

The Court also took some comfort for this view in the judicial explanation later expressed by Judge Matthew Deady, president of the Oregon Constitutional Convention in 1857, who wrote:

> [T]he remedy guarantied by [article I, section 10,] is not intended for the redress of any novel, indefinite, or remote injury that was not then regarded as within the pale of legal redress. But whatever injury the law, as it then stood, took cognizance of and furnished a remedy for, every man shall continue to have a remedy for by due course of law . . . . If [a] then known and accustomed remedy can be taken away in the face of this constitutional provision, what other may not? Can the legislature, in some spasm of novel opinion, take away every man's remedy for slander, assault and battery, or the recovery of a debt?[215]

The Court read this explanation to mean "if there was a common-law cause of action for injury to person, property, or reputation in 1857, then the remedy clause mandates the continued availability of remedy for that injury,"[216] a view first adopted by the court in 1915.[217]

Oregon's post-Constitution caselaw, the Court found, consistently confirmed this understanding. Cases from a century ago refer to the remedy right as "'one of the most sacred and essential of all the constitutional guaranties,' intended 'to make the common-law maxim that there is no wrong without a remedy 'a fixed and permanent rule of law in this state.'"[218]

In invalidating a guest statute in 1928, the Oregon Supreme Court adhered to earlier holdings that the "purpose of the remedy clause 'is to save from legislative abolishment those jural rights which had become well established prior to the enactment of our Constitution.'"[219] However, after the U.S. Supreme Court upheld the validity of a Connecticut guest statute against an equal protection

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214 *Id.* at 114–15, 23 P.3d at 351.

215 *Id.* at 122, 23 P.3d at 355 (quoting Eastman v. Clackamas, 32 F. 24, 32 (D. Or. 1887).

216 *Id.*

217 *See* Theiler v. Tillamook Cty., 75 Or. 214, 217, 146 P. 828 (1915).

218 *Smothers*, 332 Or. at 115, 23 P.3d at 351–52 (first quoting Gearin v. Marion Cty., 110 Or. 390, 396, 223 P. 929, 931 (1924) and then quoting Platt v. Newberg, 104 Or. 148, 153, 205 P. 296, 298 (1922)).

219 *Id.* at 116, 23 P.3d at 352 (quoting Stewart v. Houk, 127 Or. 589, 591, 272 P. 999, (1928)).

challenge in *Silver v. Silver*,[220] the Oregon Supreme Court fell in line and upheld a subsequent law in *Perozzi v. Ganiere*.[221] The new decision "cited Silver for the proposition that the remedy clause in Article I, section 10, of the Oregon Constitution, does not prohibit the legislature from creating new rights or abolishing old rights recognized at common law."[222]

To the *Smothers* court, the new decision marked a wrong turn in Oregon's remedies jurisprudence, mistakenly "relying on the United States Supreme Court's analysis of the Equal Protection Clause in *Silver* for its interpretation of the rights protected by the Oregon remedy clause," even though they are "distinctly different constitutional concerns."[223] Oregon's courts, however, then began to rely upon *Silver* and equal protection to evaluate remedies challenges. Because *Smothers* found this too erroneous, it expressly "disavow[ed] this court's holdings, beginning with *Perozzi*, that the legislature can abolish or alter absolute rights respecting person, property, or reputation that existed when the Oregon Constitution was drafted without violating the remedy clause in Article I, section 10."[224]

Still, the court took pains to point out that it was not holding that the "remedy clause freezes in place common-law remedies," but that the legislature "cannot deny a remedy entirely for injury to constitutionally protected common-law rights," or "substitute an 'emasculated remedy' that is incapable of restoring the right that has been injured."[225] It thus held that a "remedy must be available for the same wrongs or harms for which the common-law cause of action existed in 1857," and, when

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220 Silver v. Silver, 280 U.S. 117 (1929). *Silver* marked the beginning of the Supreme Court's refusal "to entertain due process objections to tort statutes." John C.P. Goldberg, *The Constitutional Status of Tort Law: Due Process and the Right to a Law for the Redress of Wrongs*, 115 YALE L.J. 524, 578 (2005). Still, a number of state supreme courts refused to go along with that approach. *Id.* at 579 n.275 (citing Emberson v. Buffington, 306 S.W.2d 326, 331 (Ark. 1957) (invalidating guest statute)); Neely v. Saint Francis Hosp. & Sch. of Nursing, Inc., 391 P.2d 155, 160 (Kan. 1964) (invalidating charitable immunity); Heck v. Schupp, 68 N.E.2d 464, 466 (Ill. 1946) (invalidating anti-heartbalm statute), *superseded by statute as recognized in* Martin v. Kiendl Constr. Co., 438 N.E.2d 1187, 1190 (Ill. App. 1982).

221 *Smothers*, 332 Or. at 117, 23 P.3d at 352 (citing Perozzi v. Ganiere, 149 Or. 330, 345, 40 P.2d 1009, 1014 (1935)).

222 *Id.* (citing *Perozzi*, 149 Or. at 333, 40 P.2d at 1010 (footnote omitted)).

223 *Id.* at 117, 23 P.3d at 353. *Horton* denied this reading of *Perozzi*. Horton v. Or. Health & Sci. Univ., 359 Or. 168, 195, 376 P.3d 998, 1015 (2016).

224 *Smothers*, 332 Or. at 119, 23 P.3d at 353.

225 *Id.* at 119–20, 23 P.3d at 354 (citing West v. Jaloff, 113 Or. 184, 195, 232 P. 642, 645 (1925) (footnote omitted)).

the legislature substitutes a new remedy for cause of action, it must be a "constitutionally adequate substitute remedy for the common-law cause of action for that injury."[226]

C. The Campaign Against the Oregon Supreme Court's Holdings

Lakin drew immediate fire from the Oregon legislature. Within eight days of the decision, it approved a constitutional amendment that would have empowered legislators to set damage limitations in civil cases, if approved by the voters.[227] Though it began with wide public support, the public turned against the amendment and defeated it by a seventy-five to twenty-five margin.[228] The negative popular opinion on the initiative probably foreclosed other attempts to roll *Lakin* back.

Smothers, too, came under swift criticism, some of which came from a lawyer who had written previously about state constitutional rights to a remedy.[229] Jonathan Hoffman, an Oregon lawyer who defends products liability cases, wrote two law review articles that critiqued *Smothers*. The critiques notably agreed with a number of premises *Smothers* set forth. For example, he agreed with *Smothers* that the phrase "due course of law" was more than a due process clause.[230] He also agreed that the remedy clause "derive[d] from Magna Carta chapter 40, as reinterpreted in Sir Edward Coke's, *The Second Part of the Institute of the Laws of England*," but argued that we do not know enough about why the concept of remedies for wrongs was embraced in America and what it was thought to address here to be assured of its proper application today, as there is "no consensus about the historical meaning of the Clause."[231]

The gist of Hoffman's thesis is that what he calls the "Maxim"—that every wrong has a remedy—has no connection to the constitutional guarantee in article I, section 10, that "every man shall have remedy by due course of law for injury done him in his person, property, or reputation."[232] By confusing the two as equivalents, he argued, the

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226 *Id.* at 124, 23 P.3d at 356–57.

227 *Deciding Damages*, OR. ST. B. BULL., Feb./Mar. 2000, at 19.

228 *List of Oregon Ballot Measures*, WIKIPEDIA, https://en.wikipedia.org/wiki/List_of_Oregon_ballot_measures (last visited Dec. 10, 2017).

229 *See* Jonathan M. Hoffman, *By the Course of the Law: The Origins of the Open Courts Clause of State Constitutions*, 74 OR. L. REV. 1279 (1995).

230 Jonathan M. Hoffman, *Questions before Answers: The Ongoing Search to Understand the Origins of the Open Courts Clause*, 32 RUTGERS L.J. 1005, 1029 (2001).

231 *Id.* at 1006; *see also* Hoffman, *supra* note 229, at 1281.

232 Hoffman, *supra* note 230, at 1011.

court erred in holding that the provision "preclude[s] the legislature from eliminating a common-law remedy without providing a meaningful substitute."[233] Instead, Hoffman asserts that the remedy clause merely vests the courts with the authority to supply a remedy where the legislature has created a cause of action but left the relief unspecified. The underwhelming nature of his contention seems to refute the hypothesis.

Courts in England and in the United States have always been regarded as common law courts.[234] That postulate has greater gravitational pull when discussing state courts, but applies to federal courts as well.[235] Moreover, both the Magna Carta and the United States Constitution "are products of the common law process," with their statements of rights and limitations "themselves the result of

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233 *Id.* at 1010.

234 *See* Thomas C. Grey, *Origins of the Unwritten Constitution: Fundamental Law in American Revolutionary Thought*, 30 STAN. L. REV. 843, 850 (1978). After all, the "common law is, of course, lawmaking and policymaking by judges." Judith S. Kaye, *State Courts at the Dawn of a New Century: Common Law Courts Reading Statutes and Constitutions*, 70 N.Y.U. L. REV. 1, 5 (1995) (footnote omitted).

235 *See* City of Milwaukee v. Illinois, 451 U.S. 304, 312 (1981) ("Federal courts, unlike state courts, are not general common-law courts and do not possess a general power to develop and apply their own rules of decision."). That broad assertion reflects the notion, forthrightly declared in a seminal case, that "[t]here is no federal general common law." Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938). Yet, that statement is not entirely correct. As one author of this Article defined the term "federal common law," the concept refers "to the development of legally binding federal law by the federal courts in the absence of directly controlling constitutional or statutory provisions." ERWIN CHEMERINSKY, FEDERAL JURISDICTION 331 (2d ed. 1994). Moreover, the federal courts do exercise common law authority, for example, in maritime cases. *See* U.S. CONST. art. III, § 2, cl. 1; Norfolk S. Ry. Co. v. Kirby, 543 U.S. 14, 23 (2004); *see also* Exxon Shipping Co. v. Baker, 554 U.S. 471, 502 (2008) ("examining the verdict in the exercise of federal maritime common law authority"). They also exercise common-law authority in numerous other areas and ways. *See, e.g.*, Jay Tidmarsh & Brian J. Murray, *A Theory of Federal Common Law*, 100 NW. U. L. REV. 585, 585–86 (2006) (adding to admiralty cases, those "affecting the rights and obligations of the United States, disputes between states, cases affecting international relations.") (footnotes omitted). Professor Martha Field also described the federal judicial power to create common law in nondiversity cases. Martha A. Field, *Sources of Law: The Scope of Federal Common Law*, 99 HARV. L. REV. 883, 950–62 (1986). Finally, federal courts engage in a common-law methodology of constitutional and statutory construction. *See, e.g.*, Sekhar v. United States, 133 S. Ct. 2720, 2724 (2013) (quoting Neder v. United States, 527 U.S. 1, 23 (1999) ("It is a settled principle of interpretation that, absent other indication, 'Congress intends to incorporate the well-settled meaning of the common-law terms it uses.'")). Similarly, it has long been understood that the federal and state constitutions employ words familiar to the common law and must be construed consistently with that tableau. *See, e.g.*, 1 THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 130–33 (8th ed. 1927).

judicial development."[236] In fact, as Professor Nichol has written, "the framers, whatever else they may have had in mind, certainly 'saw themselves as building upon the English legal institutions that had taken root' on this side of the Atlantic" and with equity "generally in an impoverished state in the colonies, the founding generation surely contemplated heavy use of the tools of the common law."[237] One of those tools was the judicial authority to create a damage remedy, because under the common law, "courts created damage remedies as a matter of course."[238]

It is possible that, as Mr. Hoffman theorized, the remedy clause comprised a textual confirmation of the power of common-law courts to fashion a remedy when none existed. However, even if so, that assignment does not and could not exhaust the entire reach of the clause. Americans revolted against England by making arguments founded in law.[239] Of enormous influence during the colonial period were the protests against the Stamp Act, which, among other things, was designed to inhibit recourse to the courts for violations of the unwritten English Constitution. The issue came to a head when colonial courts had to decide whether they would "remain open for business without the stamped papers required by the Act."[240] Powerful arguments, like those made by John Adams, invoking the Magna Carta and Coke's writings,[241] and raising rights that Parliament could not interfere with, succeeded in opening the courts and nullifying the Stamp Act's effectiveness.[242] Although the courts' actions demonstrated a fundamental acceptance of judicial review when recourse through Parliament was unavailable, it also demonstrated authority to devise a remedy in conflict with a statutory mandate.

Another critique of *Smothers* emerged from an article by Judge Jack Landau, then a member of the Oregon Court of Appeals and later a member of the Oregon Supreme Court when *Horton* was decided. In

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236 Gene R. Nichol, *Bivens, Chilicky, and Constitutional Damages Claims*, 75 VA. L. REV. 1117, 1136 (1989).

237 *Id.*

238 Walter E. Dellinger, *Of Rights and Remedies: The Constitution as a Sword*, 85 HARV. L. REV. 1532, 1542 (1972).

239 Grey, *supra* note 234, at 890.

240 *Id.* at 879.

241 John Adams, Diary (Dec. 18, 1765), *in* 2 THE WORKS OF JOHN ADAMS at 154, 157 n.1 (Charles Francis Adams ed., 1850); *see also* CATHERINE DRINKER BOWEN, THE LION AND THE THRONE: THE LIFE AND TIMES OF SIR EDWARD COKE (1552–1634), at 315–16 (1957).

242 Grey, *supra* note 234, at 879–81.

the course of opining on the misuse of history in constitutional decision-making, Judge Landau posited that "resorting to history unavoidably involves a number of value judgments that cannot be resolved by reference to history itself."[243] The statement reflects a similar observation expressed by Justice William Brennan, who, responding to calls for originalism in constitutional interpretation,[244] said

> We current Justices read the Constitution in the only way that we can: as twentieth century Americans. We look to the history of the time of the framing and to the intervening history of interpretation. But the ultimate question must be: What do the words of the text mean in our time?[245]

To Brennan, the approach was not problematic because "the evolution of textual meaning is not only possible but desirable."[246] He realized that the problems we face today are different from those of the framers, but involve similar principles. Taking those principles and applying them to modern issues is precisely the task that justices face today, having the benefit of considering the resolutions made by the earliest American constitutionalists, the approach to new matters that arose during intervening years, and consideration of the way the issue manifests itself today. It takes no great leap to realize that the framers never contemplated the Internet, but that free-speech principles must apply with the same vigor to this new form of communication if freedom of speech will continue to represent a "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include

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243 Jack L. Landau, *A Judge's Perspective on the Use and Misuse of History in State Constitutional Interpretation*, 38 VAL. U. L. REV. 451, 453 (2004) [hereinafter *A Judge's Perspective*]. Some of these themes were explored earlier by Judge Landau in a critique of the Oregon Supreme Court's "revolutionary" focus on its state constitution as distinct from federal constitutional rights. *See* Jack L. Landau, *The Unfinished Revolution*, OR. ST. B. BULL., Nov. 2001 [hereinafter *Unfinished Revolution*] (describing *Smothers* as the end product of that revolution).

244 Brennan was not opposed to the use of history in constitutional interpretation. For example, his opinion for the Court in N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270–77 (1964), drew heavily on early American history to examine the First Amendment issues before the Court.

245 William J. Brennan, Jr., Speech to the Text and Teaching Symposium, *cited in* ORIGINALISM: A QUARTER CENTURY OF DEBATE 55 (Steven G. Calabresi ed., 2007).

246 J. HARVIE WILKINSON III, COSMIC CONSTITUTIONAL THEORY: WHY AMERICANS ARE LOSING THEIR INALIENABLE RIGHT TO SELF-GOVERNANCE 12 (2012).

vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials."[247]

To Landau, history fails to supply an answer or essential guidance because determining what the framers intended does not answer what the constitution means.[248] As an example of this disconnect, Landau points to *Lakin,* which translated an examination of framers' intent from 1857 into a meaning that applied to a question the framers may not have contemplated.[249] He acknowledged that judges regularly engage in "an essentially archeological exercise of exhuming the framers' intentions," but finds little in that historical exercise to enable judges to divine its legal significance.[250] Landau questions as well a court's ability to examine history when the history portrayed to it is the product of advocates shaping their renditions to the position they hope the court will take.[251]

Relying on Hoffman's research, Landau uses, as an example, the decision in *Smothers*, which he says rests "on a number of unsubstantiated assumptions and on a questionable selection of sources.[252] He also accused *Smothers* of exemplifying "the 'fallacy of elitism,' that is, 'conceptualizing human groups in terms of their upper strata.'"[253] Recalling that *Smothers* "traced the history of the Oregon remedy clause from the Magna Carta, to Sir Edward Coke's *Second Institute*, to Blackstone's *Commentaries*, to early state constitutions and declarations of rights, and to case law construing those constitutions," Landau questioned whether the "mid-nineteenth century framers of the Oregon Constitution were familiar with all of those sources and concepts."[254]

However, Landau does not explain why it is necessary for all participants to have this knowledge in order to find it probative of a purpose that provides interpretive guidance. Certainly, some members of Congress—and perhaps even a majority—do not know the purposes or the even the entire contents of legislation they consider. Still, they have markers they use to guide their vote: the backing of the leadership of their party, the support or opposition of a member whose views on

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247 *Sullivan*, 376 U.S. at 270.

248 *A Judge's Perspective*, *supra* note 243, at 454–55.

249 *See id.* at 453, 458.

250 *Id.* at 454.

251 *See id.* at 461–63.

252 *Id.* at 470 (citing Hoffman, *supra* note 230).

253 *Id.* at 481.

254 *Id.*

the issue has garnered their respect, the feedback they receive from constituents or interests important to them. What the historical genealogy does provide is a clear indication of the flow of constitutional concepts and the problems they may have been thought to address. To be sure, however, that is not the end of the inquiry, nor was it for the *Smothers* Court.

Landau reiterated his criticism of *Smothers* in a concurrence in *Klutschkowski v. PeaceHealth*.[255] His problems there were twofold. First, he expressed doubt that the Oregon Constitution "today means no more than what it meant in 1857" or that "the framers of the Oregon Constitution intended that their intentions or understandings would be forever controlling."[256] Second, even assuming the historical approach is valid, he expressed disagreement with the Court's historical analysis, which he found "difficult to reconcile with the historical record"[257] and involving conclusions "that would have been foreign to their source,"[258] relying on Blackstone for the conclusion that common-law rights were a defense against royal interference but not against parliamentary undertakings.

Yet, the criticism seems misplaced. Blackstone's distinctions between limitations upon the king and parliamentary superiority[259] have little application in the American system of separation of powers, where either governmental branch can be the source of unconstitutional interference with remedies guaranteed as an individual right. Montesquieu, the "oracle" Madison said is "always consulted and cited on this subject,"[260] wrote approvingly of separating powers between "that of enacting laws, that of executing the public resolutions, and of trying the causes of individuals,"[261] as though that was the English

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255 Klutschkowski v. PeaceHealth, 354 Or. 150, 178–96, 311 P.3d 461, 476–86 (2013) (Landau, J., concurring).

256 *Id.* at 178, 311 P.3d at 476.

257 *Id.* at 180, 311 P.3d at 477.

258 *Id.* at 183, 311 P.3d at 479.

259 *See, e.g.*, *id.* at 184, 311 P.3d at 480 (citing BRADLEY J. NICHOLSON, A SENSE OF THE OREGON CONSTITUTION 208 (2015) ("[C]onsistent with the scope of the 18th-century doctrine of parliamentary supremacy, . . . Blackstone apparently believed that parliament was more trustworthy than the judiciary.")); Phillips, *supra* note 28, at 1323 ("Blackstone clearly saw the remedies guarantee only as a check on royal and other 'private' abuses of power, not parliamentary excess.").

260 THE FEDERALIST NO. 47 (James Madison).

261 M.J.C. VILE, CONSTITUTIONALISM AND THE SEPARATION OF POWERS 95 (2d ed. 1998) (quoting MONTESQUIEU, THE SPIRIT OF THE LAWS bk. XI, ch. 6, at 152 (Thomas Nugent trans., Hafner Pub. 1949) (1748) (internal quotation marks omitted)).

system.[262] Instead, "the unwritten English constitution—the most obvious focal point shared by the founders and the model Montesquieu himself identified for the separation of powers doctrine—separated and blended powers quite differently from the manner in which the U.S. Constitution did."[263] As Professor John Manning wrote, the "upper house of Parliament—the House of Lords—sat as the supreme judicial tribunal for the nation, . . . judges still assisted Parliament and the Crown in drafting legislation," and the "Crown had an absolute veto."[264] That the framing generation and subsequent generations who were part of the explosion of state constitution writing in the mid-nineteenth century would have seen rights as limitations on both legislative and executive power and that they invoked Blackstone to that effect should not surprise anyone. The

> early state constitutions, particularly those adopted in the immediate aftermath of independence, reflected a common theme of placing primary faith in the people to control the excesses of government—an approach that tended to yield dominant legislatures, weak governors, dependent judiciaries, and thus largely formal separations of legislative, executive, and judicial powers.[265]

Despite having explicit declarations that the powers of government were separate in their newly written constitutions, though not necessarily the full separation we now expect,[266] the separation concept was "widely dishonored in other provisions of the constitutions themselves and, even more, in the practices of powerful state legislatures."[267] Early state constitutions, reflecting the determination to avoid experiences under an all-powerful executive like a king, actually "provided for legislative supremacy quite as complete as that

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[262] Montesquieu imagined an idealized English system of separated powers never actually realized in England. For example, essential to his vision was an independent judiciary. MONTESQUIEU, *supra* note 261, at 151–52. The highest court in England operated as but a committee of the House of Lords, a situation that did not change until 2009. *See The Supreme Court*, JUD. COMM. OF THE PRIVY COUNCIL WEBSITE, https://www.supremecourt.uk/about/the-supreme-court.html (last visited Nov. 10, 2017).

[263] John F. Manning, *Separation of Powers as Ordinary Interpretation*, 124 HARV. L. REV. 1939, 1996 (2011) (footnote omitted).

[264] *Id.* (footnotes omitted).

[265] *Id.* at 1998 (footnote omitted).

[266] *See, e.g.*, VA. CONST. of 1776, art. I, § 5 ("That the legislative and executive powers of the State should be separate and distinct from the judiciary."). On the other hand, Massachusetts voters were so mindful that true separation of powers was necessary that they rejected a 1778 draft Constitution, in part, because it failed to make the executive, legislative, and judicial powers sufficiently separate and distinct. GERHARD CASPER, SEPARATING POWER: ESSAYS ON THE FOUNDING PERIOD 14 (1997).

[267] COMMAGER, *supra* note 159, at 214.

of Parliament."[268] The flaw in this approach became immediately apparent. James Madison, arguing for true separation of powers in the federal Constitution, identified the constitutions of New Jersey, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, South Carolina, and Georgia as countenancing legislative omnipotence, despite explicit state constitutional guarantees to the contrary.[269] He warned that "[t]he legislative department is everywhere extending the sphere of its activity, and drawing all power into its impetuous vortex."[270] Similar caution about legislative authority were expressed by Thomas Jefferson: concentrating the powers of government "in the same hands is precisely the definition of despotic government. It will be no alleviation that these powers will be exercised by a plurality of hands, and not by a single one. [One hundred and seventy-three] despots would surely be as oppressive as one."[271]

State experience bore out the foresight in these warnings. Early state legislatures "played fast and loose with the very structure of the judiciary; meddled constantly in judicial affairs, nullified court verdicts, vacated judgments, remitted fines, dissolved marriages, and relieved debtors of their obligations almost with impunity."[272] Legislatures actually adjudicated disputes.[273] Madison contrasted the proposed federal Constitution with the problems states experienced when "cases belonging to the judiciary department [were] frequently drawn within legislative cognizance and determination."[274] Of that period, the U.S. Supreme Court also noted "the crescendo of legislative interference with private judgments of the courts" in the states that the federal Constitution was designed to avoid.[275]

Continued dissatisfaction with legislative adventurism, along with the advent of Jacksonian democracy, brought forth an upsurge of

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268 FORREST MCDONALD & ELLEN SHAPIRO MCDONALD, REQUIEM: VARIATIONS ON EIGHTEENTH CENTURY THEMES 150 (1988).

269 *See* THE FEDERALIST NO. 47 (James Madison).

270 THE FEDERALIST NO. 48 (James Madison).

271 THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA 120 (William Peden ed., 1954) (1781).

272 COMMAGER, *supra* note 159, at 214.

273 For a description of that experience, see Christine A. Desan, *Remaking Constitutional Tradition at the Margin of the Empire: The Creation of Legislative Adjudication in Colonial New York*, 16 LAW & HIST. REV. 257 (1998); Christine A. Desan, *The Constitutional Commitment to Legislative Adjudication in the Early American Tradition*, 111 HARV. L. REV. 1381 (1998).

274 THE FEDERALIST NO. 48 (James Madison).

275 Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 221 (1995).

constitution-writing in the mid-nineteenth century that included Oregon. Looking back at that period soon after it was over, a commentator noted that "[o]ne of the most marked features of all recent State constitutions is the distrust shown of the Legislature."[276] Both existing constitutional provisions and new language aimed to secure greater judicial independence and end the ability of powerful interests to turn the law into economic advantage or to enjoy "legal privileges that [they] could turn to [their] own account in an otherwise competitive economy."[277] Among the motivating factors was a widespread dissatisfaction with "state legislative forays into economic boosterism and favoritism,"[278] as well as a "response to the rise of large corporations and their economic and political power."[279] The arrogation of legislative power to these harmful ends constituted a problem in search of a constitutional solution. Though Blackstone was certain that remedies would only be harmed by royal fiat, the American experience was different, and the remedy right seemed like a suitable response to that ill-use of accumulated legislative power. By the time Oregon's Constitution was written, legislative, rather than royal, excess was a primary motivation for the right's enunciation in a constitution.

Landau acknowledges "mid-nineteenth-century framers of state constitutions mistrusted legislative power" and that the "'outburst of constitutional reform'" in the 1850s "'diminished legislative power.'"[280] However, he faults the *Smothers* Court for failing to connect that mistrust to the "enactment of laws that encroached on common-law tort remedies."[281] He submits that it could not have, as negligence law was in "its infancy" and generally "favored railroads and industry."[282] Yet, a requirement of that level of specificity misconceives the interpretative enterprise and misunderstands the unity of contract and negligence law in the preconstitutional common-law era.[283] If Oregonians wanted greater access to the courts and a

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276 Eaton, *supra* note 202, at 109.

277 RUSH WELTER, THE MIND OF AMERICA: 1820-1860, at 78 (1975).

278 G. ALAN TARR, UNDERSTANDING STATE CONSTITUTIONS 113 (1998).

279 *Id.* at 115.

280 Klutschkowski v. PeaceHealth, 354 Or. 150, 185, 311 P.3d 461, 480 (Landau, J., concurring) (quoting HALL, *supra* note 202, at 89, 103–05).

281 *Id.* at 186, 311 P.3d at 481.

282 *Id.*

283 Although, in terms of modern doctrinal development, this is essentially true, negligence is derived from trespass on the case and has an ancient lineage. *See* Robert J. Kaczorowski, *The Common-Law Background of Nineteenth-Century Tort Law*, 51 OHIO ST. L.J. 1127, 1131 (1990) ("the contract action of assumpsit and the tort action of negligence

constitutional guarantee of a remedy by explicitly including it in the Bill of Rights, they were expressing a cognizance that favoritism of powerful interests and skewing the law and the courts in favor of those interests were evils that required a constitutional response. The principle established cannot be limited to contract or property law, but must apply across the entire spectrum of legal disputes if, as Chief Justice John Marshall wrote, we are expounding "a constitution, intended to endure for ages to come, and consequently, to be adapted to the various *crises* of human affairs."[284]

In the end, both Hoffman's and Landau's analyses cannot overcome the fact that both *Lakin* and *Smothers* presented the court with a real, justiciable issue that required the courts' resolution. Hoffman suggested that the courts are answering questions before the relevant historical record is complete, and Landau expressed valid criticisms of too heavy a reliance on that record. Moreover, the caselaw was and is replete with inconsistencies among courts in contemplating what the right to a remedy means, as the *Smothers* court acknowledged.[285] Still, that does not mean courts should not assay an attempt to provide a vindication of rights thought to be at issue in a controversy that cries out for resolution now.

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evolved from the same ancestral writ, trespass on the case."). Tort and contract were treated interchangeably well "into the eighteenth century because the basis of the plaintiff's action and the defendant's liability in many cases of tort and contract was the latter's misfeasance, or failure to perform his undertaking with requisite care or skill." *Id.* Though we regard cases going back to 1374 as instances of medical malpractice, the actions were brought in assumpsit based on failure to meet the standard of care, the approach now regarded as a medical negligence action, was predicated on his failure to act with the care or skill the community expected of him. *Id.* (citing Stratton v. Swanlone, Y.B. 48 Edw. III, fo. 6, pl. 11 (K.B. 1374)).

284 M'Culloch v. Maryland, 17 U.S. 316, 415 (1819).

285 *See* Smothers v. Gresham Transfer, Inc., 332 Or. 83, 90, 23 P.3d 333, 338, *overruled by* Horton v. Or. Health & Sci. Univ., 359 Or. 168, 188, 376 P.3d 998, 1010 (2016) (citing Hale v. Port of Portland, 308 Or. 508, 529, 783 P.2d 506, 518 (1989) ("This court has written many individually tenable but inconsistent opinions about the remedy clause.") (Linde, J., concurring)); Schuman, *supra* note 28, at 1203 (courts have adopted a "daunting variety of remedy guarantee interpretations"); Hoffman, *supra* note 229, at 1282 (courts are in "total disarray" over how to interpret remedy clauses).

D. The Oregon Supreme Court Transforms Fundamental Rights into Mere Procedural Guarantees

1. Horton *Limits the Right to a Remedy*

It was against this background that *Horton* arrived at the Oregon Supreme Court. *Horton* overruled *Smothers* and *Lakin*. It held that *Smothers* found

> no support in the text and history of Article I, section 10; . . . is at odds with the context found in Article XVIII, section 7;[286] . . . is squarely inconsistent with a series of this court's cases holding that Article I, section 10, did not freeze rights and remedies as they existed in 1857[; and] is of relatively recent vintage

so that "it has not given rise to the sort of reliance interests" that would advise continued adherence.[287]

The court reached this conclusion despite conceding that neither text nor history provide a "clear answer regarding the clause's meaning" and yet "reaffirm[ed the] remedy clause decisions that preceded *Smothers,* including the cases that *Smothers* disavowed."[288] That breathtaking pirouette, essentially expressing disagreement unanchored to new understandings or deeper inquiry provides extraordinarily weak grounds for overruling a recent and maturely decided case.

Horton raised the question of "whether a statute limiting a state employee's tort liability violates either the remedy clause of article I, section 10, of the Oregon Constitution or the jury trial clauses of article I, section 17, and article VII (amended), section 3, of the Oregon Constitution."[289] The underlying case was a medical-malpractice action on behalf of a six-month-old whose blood vessels to the liver were transected and causing the child to need a "liver transplant, removal of his spleen, additional surgeries, and lifetime monitoring due to the risks resulting from the doctors' act."[290] Because Oregon Health & Science University (OHSU), a state institution, was a defendant, the

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286 OR. CONST. art. XVIII, § 7 provides: "All laws in force in the Territory of Oregon when this Constitution takes effect, and consistent therewith, shall continue in force until altered, or repealed." Contrary to the *Horton* Court's suggestion, the language does not render all common law adopted subject to alteration or repeal by ordinary legislation because some of it was incorporated into the Constitution.

287 *Horton*, 359 Or. at 187, 376 P.3d at 1010.

288 *Id.* at 218, 376 P.3d at 1027.

289 *Id.* at 171, 376 P.3d at 1001.

290 *Id.*

action against it was brought under the state tort claims act, which waived sovereign immunity to the extent of a $3 million overall damage cap.[291] The trial court, however, held that the cap did not apply to the doctor, finding that doing so would be inconsistent with Oregon's right to a remedy and the right to a jury trial.[292]

Before the supreme court, the initial question was whether *Smothers* was correctly decided. It found that it was not. By tying modern law to the law of 1857, when the Oregon Constitution was promulgated, the court determined *Smothers* gives constitutional effect to common-law anomalies and could result in "trying two claims to a jury—one under the current law and the other under the law as it existed in 1857."[293]

Turning to the text of the remedy clause, the court stated it "prescribe[s] how the functions of government shall be conducted,"[294] rather than serves as "a protection against the exercise of governmental power."[295] The distinction drawn by the court is a curious one, which insists on an either/or stance, when individual rights provisions generally serve both prescriptive and protective purposes. While the federal Constitution is a charter of enumerated powers in which Congress may only exercise the authority granted in Article I,[296] state legislatures enjoy plenary authority, limited only by federal or state constitutional restrictions.[297] A bill of rights, which by its very nomenclature guarantees rights, is such a restriction on legislative authority *and* an affirmative guarantee of enforceable rights.

Consider the Oregon Constitution's free-speech provision: "No law shall be passed restraining the free expression of opinion, or restricting the right to speak, write, or print freely on any subject whatever; but every person shall be responsible for the abuse of this right."[298]

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291 *Id.* at 171, 376 P.3d at 1002. A jury returned a verdict for $12 million. *Id.* The Tort Claims Act limits the tort liability of the state and its employees to $3 million. OR. REV. STAT. §§ 30.265(1), 30.271(3)(a).

292 *Horton*, 359 Or. at 172, 376 P.3d at 1002.

293 *Id.* at 178, 376 P.3d at 1005.

294 *Id.* at 179, 376 P.3d at 1006.

295 *Id.* at 179, 376 P.3d at 1005 (citations omitted).

296 Marbury v. Madison, 5 U.S. 137, 176 (1803) ("The powers of the legislature are defined and limited; and that those limits may not be mistaken, or forgotten, the constitution is written."); *see also* United States v. Morrison, 529 U.S. 598, 607 (2000) ("Every law enacted by Congress must be based on one or more of its powers enumerated in the Constitution.").

297 *See, e.g.*, Brusco Towboat Co. v. State, 284 Or. 627, 633–34, 589 P.2d 712, 717 (1978).

298 OR. CONST. art. I, § 8.

The Oregon Supreme Court reads this language in two parts. It held the "first half of the provision is directed at the legislature and other lawmaking bodies ('No law shall be passed . . .')."[299] Under the *Horton* court's formulation, the first part of the free-speech provision would constitute a prescription on the functions of the legislature in the form of a prohibition on the reach of legislation. Yet, when the court turned to the second half of the provision, it read the language as "an exception or modification to the broad guarantee (*i.e.,* 'this right') set out in the first half."[300] In other words, the second half limits a person's free-expression rights when perpetrated in an abusive manner. Yet, to limit a right, the right must be declared somewhere, presumably in the first half of the free-speech provision. To reconcile the separate readings of the two halves of this section is to understand that the first half prescribes certain legislative functions *and* guarantees an enforceable individual right. Though written as a limitation on legislative power, we also understand the provision to guarantee individuals' freedom of expression, no matter which branch of government engages in censorious conduct.

Like the free-speech provision, article I, section 10 is divided into two parts. The first part prohibits secret courts and mandates justice that is open, without purchase, complete, and without delay.[301] Complete justice, then, is part of the formulation, regardless of whether section 10 is regarded as an administrative mandate or an enforceable individual right and suggests that partial justice is inadequate, as *Smothers* recognized. However, section 10 also has another clause that states: "every man shall have remedy by due course of law for injury done him in his person, property, or reputation."[302] Its language, neither relying on the limitations placed on a court in the first clause nor referencing any institutional limits, plainly establishes a right to a remedy that should be capable of enforcement by individuals. Yet, the *Horton* court denied that when it said the provision "is not a protection against the exercise of governmental power."[303] For that proposition, the court cited Justice Linde's concurrence in *State ex rel. Oregonian*

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299 State v. Ciancanelli, 339 Or. 282, 292, 121 P.3d 613, 618 (2005); *see also* State v. Spencer, 289 Or. 225, 228, 611 P.2d 1147, 1148 (1980) (Article I, section 8, "is a prohibition on the legislative branch.").

300 *Ciancanelli*, 339 Or. at 293, 121 P.3d at 618.

301 OR. CONST. art. I, § 10.

302 *Id.*

303 Horton v. Or. Health & Sci. Univ., 359 Or. 168, 179, 376 P.3d 998, 1005 (2016) (citing State *ex rel.* Oregonian Pub. Co. v. Deiz, 289 Or. 277, 288, 613 P.2d 23, 29 (1980) (Linde, J., concurring)).

Publishing Co. v. Deiz.[304] However, in doing so, the court failed to recognize that Justice Linde was only discussing the "open courts" guarantee, and not the remaining language of the provision. He explained, coming shortly after the free speech, and just before the criminal justice, protections, by design, open courts guarantees press (and others') access to judicial proceedings because "a guarantee against censorship does not itself serve as a public meeting or public records act."[305] He concluded his discussion by saying the "guarantee of open courts does not guarantee any one person a 'right' to be present."[306] Plainly, rather than making a global statement about the scope of the right to remedy, Justice Linde focused exclusively on the open courts provision, and *Horton's* treatment of the right as purely procedural had no legitimate basis.

The *Horton* court also questioned *Smothers*' reliance on historical analysis and its treatment of the sacrosanct nature of the preconstitutional common law. It found no text that required relation back to 1857, and it noted that changing conditions and industrial growth forced legal changes that a static common law would not accommodate.[307] The court relied on changes in the common law to demonstrate the limited nature of the right to a remedy. For example, it cited the demise of interspousal and parental immunity, as well as abolition of the common-law torts of criminal conversation and alienation of affections, as exemplifying changes that the framers would have anticipated because they "understood that the common law was not tied to a particular point in time but instead continued to evolve to meet changing needs."[308]

The changes cited by the court, though, largely reflect new constitutional understandings, rather than independent modifications of the common law. Under the common law, "'a woman had no legal existence separate from her husband, who was regarded as her head and representative in the social state,'" and that a woman, "'as the center of

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304 *Deiz*, 289 Or. at 288, 613 P.2d at 29 (Linde, J., concurring).

305 *Id.* at 288, 613 P.2d at 28–29.

306 *Id.* at 290, 613 P.2d at 30. *Horton* also invokes Linde's speculation in an important law review article that this clause "could be nothing 'more than a procedural guarantee that the 'due course of law' will be open to 'every man' who is entitled to a remedy under the substantive law, whatever that might be at any time." *Horton*, 359 Or. at 180, 376 P.3d at 1006 (citing Hans A. Linde, *Without "Due Process": Unconstitutional Law in Oregon*, 49 OR. L. REV. 125, 136 (1970)).

307 *Horton*, 359 Or. at 182, 376 P.3d at 1007.

308 *Id.* at 182–83, 376 P.3d at 1007.

home and family life,'" did not have "full and independent legal status under the Constitution."[309] As the U.S. Supreme Court pointed out, "[t]hese views, of course, are no longer consistent with our understanding of the family, the individual, *or the Constitution*."[310]

The court's treatment of the common law as a unitary whole conflates the nature of the general common law with the use of certain principles within it as a constitutional reference point. Certainly, the common law has an organic nature, growing and changing with both the wisdom that experience brings and the changing conditions of our times.[311] That does not mean, however, that the common law provides no tableau upon which constitutional principles are understood. Indeed, while the common law is generally amenable to statutory revision, that part of the common law incorporated into a constitution is not defeasible by statute.[312]

To examine what the common law means for constitutional principles, one can consult the revolutionary fervor that the colonists expressed about their entitlement to common-law rights.[313] That claim of prerogative did not embrace the entire body of the English common law and all its judicial pronouncements. Instead, the Antifederalists asserted,[314]

> [the] term common law [meant] the great rights associated with due process—trial by jury of the vicinage, the unreviewability of jury

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309 Planned Parenthood of S.E. Pa. v. Casey, 505 U.S. 833, 897 (1992) (first citing Bradwell v. Illinois, 83 U.S. 130, 141 (1872); and then citing Hoyt v. Florida, 368 U.S. 57, 62 (1961)).

310 *Id.* (emphasis added); *cf.* Norwest v. Presbyterian Intercommunity Hosp., 293 Or. 543, 563, 652 P.2d 318, 329 (1982).

311 *See generally* MELVIN ARON EISENBERG, THE NATURE OF THE COMMON LAW (1988). The common law "presupposes a measure of evolution." Rogers v. Tennessee, 532 U.S. 451, 461 (2001).

312 *See* Alden v. Maine, 527 U.S. 706, 733 (1999). *Alden* recognizes that many rights, "such as the right to trial by jury and the prohibition on unreasonable searches and seizures, derive from the common law." *Id.* at 733.

313 *See, e.g.*, FIRST CONTINENTAL CONGRESS DECLARATION AND RESOLVES (1774), *in* DOCUMENTS ILLUSTRATIVE OF THE FORMATION OF THE UNION OF THE AMERICAN STATES, H.R. DOC. NO. 398, 69th Cong., 1st Sess., 1, 3 (C. Tansill ed., 1927) ("That the respective colonies are entitled to the common law of England"). Of course, examining colonial complaints does not entirely answer the question of how the common law relates to constitutional principles. Another means of reviewing the question, discussed *infra*, goes to the fundamental nature of the right at issue.

314 The great accomplishment of the Antifederalists was to force adoption of the Bill of Rights, though, for many the call for a bill of rights was little more than a talking point to prevent ratification of the Constitution. *See generally* John P. Kaminski, *Restoring the Grand Security: The Debate Over A Federal Bill of Rights, 1787-1792*, 33 SANTA CLARA L. REV. 887 (1993).

> fact-finding, protection against excessive bail, prohibition of unreasonable fines and cruel and unusual punishments, freedom from warrantless searches, the necessity of grand jury indictment, the conduct of trial by established procedures (such as the right to counsel and cross-examination), and so on.[315]

Yet, *Horton* adopts a reading of Coke and Blackstone consistent with the idea that the common law and access to the courts was solely a protection against royal interference, but subservient to parliamentary mandates.[316] As explained earlier,[317] that wooden and literal approach to translating Coke and Blackstone to the U.S. experience fails to account for the distinctly American approach to incorporating their ideas into restrictions on government action. The court then compounds its error by considering Coke's decision in *Dr. Bonham's Case*,[318] in which he famously wrote that an act of Parliament was void as against the common law when it is "against common right and reason, or repugnant, or impossible to be performed."[319] Coke's cryptic passage has engendered much scholarly debate,[320] as *Horton* acknowledges, allowing it to assert that the better reasoning applied to that phrase reads it as permitting an interpretation of the statute akin to the doctrine of constitutional avoidance,[321] by construing the statute as consonant with the common law. To the *Horton* court, Coke's stance "makes it more difficult to say that this court's decisions finding in the remedy clause a substantive limit on legislative authority" is valid.[322] Yet, whether one reads Coke to hold an act of Parliament contrary to the common law invalid or that laws in derogation of the common law must be strictly construed does not shed light on whether the remedy right

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315 Stewart Jay, *Origins of Federal Common Law: Part Two*, 133 U. PA. L. REV. 1231, 1256–57 (1985). Similarly, the Supreme Court recognized that the liberties protected by the Fourteenth Amendment include, *inter alia,* the right "generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men." Meyer v. Nebraska, 262 U.S. 390, 399 (1923).

316 Horton v. Or. Health & Sci. Univ., 359 Or. 168, 376 P.3d 998 (2016).

317 *See supra* notes 257–65, 268–79 and accompany text.

318 Bonham's Case, 77 Eng. Rep. 646 (C.P. 1610) (cited in *Horton*, 359 Or. at 205, 376 P.3d 1020).

319 *Id.* at 652.

320 *See* John V. Orth, *Did Sir Edward Coke Mean What He Said?*, 16 CONST. COMMENT. 33 (1999).

321 The doctrine of constitutional avoidance is an approach to statutory interpretation that instructs courts to "interpret statutes 'in such a manner as to avoid any serious constitutional problems.'" Bernstein Bros., Inc. v. Dep't of Revenue, 294 Or. 614, 621, 661 P.2d 537, 541 (1983) (quoting Easton v. Hurita, 290 Or. 689, 694, 625 P.2d 1290, 1292 (1981)).

322 *Horton*, 359 Or. at 205, 376 P.3d at 1020.

constricts legislative limitations on the remedies available in common law actions. In other words, *Dr. Bonham's Case* provides no guidance on the scope of the constitutional provision.

As the *Horton* opinion progressed to a review of early American caselaw, it recognized that "most early and mid-nineteenth century cases started from the proposition that state remedy clauses limit legislative as well as executive acts."[323] Yet, it also found that legislative acts were invalidated only to the extent that they applied retroactively, impairing vested rights.[324] That examination of the access provision reads the cases to fit a preconceived scheme and in isolation from other civil-trial guarantees and in doing so, errs in failing to consider the jury's role, as explained *infra*.

2. Horton *Robs the Right to a Jury Trial of Substantial Meaning*

The right to a jury trial was also reduced by the *Horton* court to a mere procedural guarantee. The court reviewed a number of post-*Lakin* decisions, found it difficult to reconcile them with the reasoning in *Lakin,* and dubiously concluded that the conflicting approaches made *Lakin* neither "settled" or "well-established" precedent.[325] While *Horton* agreed with *Lakin* that the jury-trial right contained in article I, section 17, preserved the right that existed in 1857,[326] contrasting the court's approach with its treatment of the right to a remedy, it struggled to define the right. It reviewed Blackstone's teachings on the jury, finding that although he considered the jury "an essential attribute of the liberty that English citizens enjoyed,"[327] "he did not state that the jury trial right checked the lawmaking authority of either the common-law courts or parliament."[328] In that respect, the *Horton* court fell into the same trap it occupied in describing the constitutional right to a remedy. It examined Blackstone in literal terms. In doing so, the court failed to understand the animating principle derived by the framers in adapting Blackstone to American constitutionalism. More than its English forebears, American colonists believed that the institution of the jury was an essential feature of governance for it helped them resist the excesses of English Rule. They thus celebrated juries who applied their own sense of right or wrong to the unwillingness of Parliament to

323 *Id.* at 212–13, 376 P.3d at 1024.
324 *Id.* at 213, 376 P.3d at 1024.
325 *Id.* at 234, 376 P.3d at 1035.
326 *Id.*, 376 P.3d at 1036.
327 *Id.* at 236, 376 P.3d at 1036.
328 *Id.* at 236–38, 376 P.3d at 1036–37.

seat a duly elected member availability of punitive damages to punish improper acts of the government,[329] or override the law of seditious libel to establish truth as a defense.[330] Plainly, the jury had prerogatives that Parliament could not override.

Even when the *Horton* court discovered a passage from Blackstone that may not have fit its thesis, the court engaged in a form of carpentry that downsized the troublesome text. Thus, when Blackstone wrote, "once the fact is ascertained, the law must of course redress it," the court said the statement "did not reflect an understanding that the jury's fact-finding ability imposed a substantive limitation on parliament or common-law courts' authority to announce legal principles that guide and limit the jury's fact-finding function." [331] This flaw in finding the jury's fact-finding authority to be subject to legislative revision swallows the jury-trial right whole. *Horton*'s formulation becomes particularly incongruent when one realizes that jury instructions are supposed to inform the panel of the applicable law. When, as in damage-cap statutes, the jury is in the dark about the cap but well instructed on all other aspects of the law, there is no proper guide to the jury's fact-finding function.[332]

The court also credited the arguments Alexander Hamilton chose to respond to, unsuccessfully, in explaining why the U.S. Constitution originally did not and should not include a civil-jury right, claiming that none of the arguments "suggest that the right was viewed as a substantive limit on Congress's lawmaking power."[333] Yet, Hamilton

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329 Wilkes v. Wood, 98 Eng. Rep. 489 (C.B. 1763). John Wilkes was a member of Parliament, arrested, expelled, and exiled because he published an attack on a peace treaty with France. He nonetheless returned and won back his old parliamentary seat, which Parliament refused to permit and instead had him imprisoned. *See* Powell v. McCormack, 395 U.S. 486, 527–28 (1969). His cause was celebrated in America, particularly after he prevailed politically and then won a civil action in which the jury awarded punitive damages against the government. The Supreme Court recognized that "Wilkes' struggle and his ultimate victory had a significant impact in the American colonies." *Id.* at 530.

330 *See, e.g.,* Peck, *supra* note 20, at 344 (citing James Alexander, A BRIEF NARRATIVE OF THE CASE AND TRIAL OF JOHN PETER ZENGER, PRINTER OF THE NEW YORK WEEKLY JOURNAL (Stanley Katz, ed., Belknap Press of Harvard U. Press 1972)).

331 *Horton*, 359 Or. at 238, 376 P.3d at 1038 (quoting BLACKSTONE, *supra* note 1, at *380).

332 This is not to suggest that the jury-trial violation that a damage cap necessarily commits can be remedied by a well-written instruction. The interference with the jury's constitutional guaranteed prerogatives and the party's right to jury-assessed damages still exists if the jury is instructed that it must limit compensation. The fact that the cap is hidden from the jury, however, demonstrates that *Horton's* explanation does not make sense.

333 *Id.* at 241, 376 P.3d at 1039.

was on the losing end of that constitutional debate. In fact, nothing in the court's limited review of the historic background of the Seventh Amendment,[334] suggested that the right was viewed as a substantive limit on legislation that interfered with the fact-finding authority of the jury.[335] The absence of that determination, in the court's estimation, meant that section 10's jury-trial right was nothing more than a "procedural right; that is, it guarantees the right to a trial by a jury (as opposed to a trial by a judge) in civil actions for which the common law provided a jury trial when the Oregon Constitution was adopted in 1857 and in cases of like nature."[336] Remarkably, examining that same history, the U.S. Supreme Court concluded otherwise—and the availability of that analysis by the authoritative body in construing the Seventh Amendment apparently did not influence the Oregon Supreme Court,[337] though it should have. While the value of the U.S. Supreme Court's determinations of cognate provisions in the federal Constitution has only persuasive value in most instances, Oregon's adoption of the Seventh Amendment's language in its second jury-trial guarantee should render the value even stronger.

Yet, the court began its analysis of Oregon's second jury-trial guarantee by accepting the parties' contention that its statement that the "right of trial by jury shall be preserved" is merely redundant of article I, section 17, guarantee of an inviolate right to trial by jury.[338] That approach violates a cardinal principle of statutory construction that courts must give effect, if possible, to every clause and word of a statute, rather than to emasculate an entire section.[339] As a result, it skipped straight to the second clause of section 3 and interpreted it as a limitation solely on the courts, just as the federal courts do.[340]

The difference in federal and Oregon jurisprudence with respect to the preservation clause is that *Horton* held that "a damages cap does not reflect a legislative attempt to determine a fact in an individual case

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334 U.S. CONST. amend. VII.

335 *See Horton*, 359 Or. at 241–43, 376 P.3d at 1039–40.

336 *Id.* at 243, 376 P.3d at 1040.

337 *See* notes 349–58, 361–65 and accompanying text *infra.*

338 *See Horton*, 359 Or. at 251, 376 P.3d at 1044–45.

339 United States v. Menasche, 348 U.S. 528, 538–39 (1955) (quoting Inhabitants of Montclair Tp. v. Ramsdell, 107 U.S. 147, 152 (1883)); *see also* Colautti v. Franklin, 439 U.S. 379, 392 (1979) (rendering one part "redundant or largely superfluous [would violate] the elementary canon of construction that a statute should be interpreted so as not to render one part inoperative").

340 *Cf. Horton*, 359 Or. at 251, 376 P.3d at 1045.

or to reweigh the jury's factual findings."[341] Instead, it held the cap was a legal limit on the damages available.[342] The redefinition of damages in this fashion seems little more than an exercise of *ipse dixit*. The court admitted that "the amount of damages that a party sustains is ordinarily a factual issue for the trier of fact," but insisted that a trier of fact does not have "free rein to determine the amount of a party's damages, unconstrained by legal limits."[343] Yet, any limits on the jury's discretion or determinations are contained in instructions.[344] Juries are not informed of the cap on damages, but are instructed to award damages to compensate the injured party completely. Thus, the amount of damages the jury assesses must be viewed as a fact determination a legislative body cannot alter.

Federal treatment of the Seventh Amendment's Preservation Clause ought to be instructive on the meaning of Oregon's identical clause. The demotion of the jury trial right to a mere procedural right, rather than a substantive liberty, as the *Horton* court held, is jarring, considering that the right is of foundational importance to American constitutional government and was, in part, responsible for our country's birth. The Declaration of Independence charged England with "depriving us in many cases, of the benefit of trial by jury."[345] Whenever "the jury right was threatened in the colonial era, the citizen reaction was generally swift and hostile."[346]

The right to trial by jury was of such paramount importance to the nation's founders that it was the only right universally secured by all thirteen original American state constitutions.[347] As Professor Charles Wolfram wrote, the "nascent American nation demonstrated at virtually every important step in its development that trial by jury was

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341 *Id*. at 244, 376 P.3d at 1041.

342 *Id.*

343 *Id.* at 244–45, 376 P.3d at 1041.

344 *See* Sherrard v. Werline, 162 Or. 135, 157, 91 P.2d 344, 353 (1939) ("The purpose of instructions is to state to the jury the principles of law governing the facts revealed to the jury by the evidence.").

345 DECLARATION OF INDEPENDENCE Para. 20 (U.S. 1776).

346 Stephen Landsman, *The Civil Jury in America: Scenes from an Unappreciated History*, 44 HASTINGS L.J. 579, 594 (1993).

347 Parklane Hosiery Co. v. Shore, 439 U.S. 322, 341 (1979) (Rehnquist, J., dissenting) (citations omitted).

the form of trial in civil cases to which people and their politicians were strongly attached."[348]

Without its guarantee, the U.S. Constitution would never have been ratified: "One of the strongest objections originally taken against the constitution of the United States, was the want of an express provision securing the right of trial by jury in civil cases."[349] The Bill of Rights was added to secure the U.S. Constitution's ratification included the Seventh Amendment's civil jury-trial right to assure, *inter alia,* that legislators did not interfere with a jury's prerogatives.[350] The jury-trial right is thus one of the "great ordinances of the Constitution."[351] This history establishes that the "[m]aintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care."[352]

History is important when considering the jury-trial right. The Supreme Court relies on a historical analysis because of the Seventh Amendment's "textual mandate that the jury right be preserved."[353] The inquiry consists of two questions: (1) "whether we are dealing with a cause of action that either was tried at law at the time of the founding or is at least analogous to one that was;" and, (2) whether the particular trial decision must fall to the jury in order to preserve the substance of the common-law right as it existed in 1791."[354]

Both questions can be answered affirmatively with respect to the tort actions at issue in *Horton*. Medical malpractice cases, like the underlying case here, were recognized at common law long before the nation was founded and unquestionably were tried before juries.[355] No decision has ever suggested otherwise.

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348 Charles W. Wolfram, *The Constitutional History of the Seventh Amendment*, 57 MINN. L. REV 639, 656 (1973).

349 Parsons v. Bedford, 28 U.S. 433, 446 (1830) (Story, J.).

350 Wolfram, *supra* note 348, at 664–65.

351 Springer v. Philippine Islands, 277 U.S. 189, 209 (1928) (Holmes, J., dissenting).

352 Dimick v. Schiedt, 293 U.S. 474, 486 (1935).

353 City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687, 708 (1999).

354 Markman v. Westview Instruments, Inc., 517 U.S. 370, 376 (1996) (citations omitted).

355 *See, e.g.*, Weidrick v. Arnold, 835 S.W.2d 843, 846 (Ark. 1992) (noting that medical malpractice "had its origins at common law" with the first recorded case in 1374) (citing WILLIAM L. PROSSER, LAW OF TORTS § 32, 161 n. 32 (4th ed. 1971)); Wright v. Central DuPage Hosp. Ass'n, 347 N.E.2d 736, 742 (Ill. 1976); *see also* Allan H. McCoid, *The Care Required of Medical Practitioners*, 12 VAND. L. REV. 549, 550 (1959).

The second question is equally well settled by the historic record. One of the jury's indisputable responsibilities, as judges of the facts, is the assessment of damages. Longstanding precedent establishes that the determination of compensatory damages "involves only a question of fact."[356] A jury's incontrovertible authority to set—and not merely suggest—damages was settled at least as far back as the time of Coke.[357] Coke defined tort "damages" as "the recompense that is given by the jury to the plaintife . . . for the wrong the defendant hath done unto him."[358] If any English scholar rivaled Coke on American understanding of the common law, it was Sir William Blackstone who stressed it is solely the jury's province to "assess the damages . . . sustained by the plaintiff, in consequence of the injury."[359] Thus, if "damages are to be recovered, a jury must . . . assess them."[360]

Summarizing this history, the U.S. Supreme Court recognized juries have always served as the "judges of damages."[361] Because jurors have the preeminent role in assessing damages, their determination cannot be overridden without impinging on the jury-trial guarantee. These precedents explain why in *Feltner,* the U.S. Supreme Court emphatically rejected the defendant's argument—similar to the one about legal significance adopted in *Horton*—that the jury's job was complete when it reached its verdict and that the constitutional jury-trial guarantee "does not provide a right to a jury determination of the amount of the award."[362] Instead, the *Feltner* Court held that any other approach to finalizing the award of damages would fail "'to preserve the substance of the common-law right of trial by jury,'" as required by the Constitution.[363] As *Feltner* concluded, "if a party so demands, a

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356 St. Louis, Iron Mountain & S. Ry. Co. v. Craft, 237 U.S. 648, 661 (1915); *see also* Kennon v. Gilmer, 131 U.S. 22, 29–30 (1889) (a "court has no authority . . . in a case in which damages for a tort have been assessed by a jury at an entire sum, . . . to enter an absolute judgment for any other sum than that assessed by the jury [unless] . . . the plaintiff elected to remit the rest of the damages").

357 Austin Wakeman Scott, *Trial by Jury and the Reform of Civil Procedure*, 31 HARV. L. REV. 669, 675 (1918).

358 2 EDWARD COKE, THE FIRST PART OF THE INSTITUTES OF THE LAWS OF ENGLAND § 257a (19th ed., 1832).

359 BLACKSTONE, *supra* note 1, at *376.

360 *Id.*

361 Feltner v. Columbia Pictures Television, Inc., 523 U.S. 340, 353 (1998), *quoting with approval*, Townsend v. Hughes, 86 Eng. Rep. 994, 994−95 (C.P. 1677).

362 *Feltner*, 523 U.S. at 354.

363 *Id.* (citation omitted).

jury must determine the actual amount of . . . damages."[364] As if that was not crystalline enough, the Court straightforwardly held that the right established by the Seventh Amendment "includes the right to have a jury determine the amount of . . . damages."[365] A legislative damage cap in a cause of action the legislature did not create improperly takes that constitutionally consecrated authority away, substituting a legislative one-size-fits-all determination divorced from the record established in the case from the jury's binding determination.

The right to jury-assessed damages is well established in federal jurisprudence.[366] In fact, the Supreme Court said, "the measure of actual damages suffered . . . presents a question of historical or predictive fact," which constitutes "a 'fact' 'tried' by the jury."[367] For that reason, a plaintiff is "entitled . . . to have a jury properly determine the question of liability and the . . . assessment of damages. Both are questions of fact."[368]

The Supreme Court's examination of the issue established that "there is overwhelming evidence that the consistent practice at common law was for juries to award damages."[369] For that reason, the Court held that "if a party so demands, a jury must determine the actual amount of . . . damages."[370]

To adopt the *Horton* approach is to render the jury's damage determination merely advisory or a factual determination that can be changed by the application of "law." That is the approach adopted by a pre-*Feltner* decision of the Fourth Circuit that every other federal circuit case has followed. In *Boyd v. Bulala*,[371] the Fourth Circuit adopted the reasoning of the Virginia Supreme Court that a statute that capped all damages, economic and noneconomic, in medical malpractice cases did not run afoul of the jury-trial right because "it is not the role of the jury to determine the legal consequences of its factual findings."[372]

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364 *Id.* at 355.

365 *Id.* at 353.

366 *See, e.g.*, Barry v. Edmunds, 116 U.S. 550, 565 (1886).

367 Cooper Indus., Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424, 437 (2001) (internal citations omitted).

368 Dimick v. Schiedt, 293 U.S. 474, 486 (1935).

369 *Feltner*, 523 U.S. at 353.

370 *Id.* at 355.

371 Boyd v. Bulala, 877 F.2d 1191 (4th Cir. 1989).

372 *Id.* at 1196 (citing Etheridge v. Med. Ctr. Hosps., 376 S.E.2d 525, 529 (Va. 1989)).

Etheridge reached its erroneous conclusion under a state constitution that merely indicates that the jury-trial right is "preferable" to other forms of adjudication.[373] Other courts have recognized the limited scope of the Virginia jury-trial right and criticized *Etheridge* for its approach to the jury-trial right. The Washington Supreme Court, for example, refused to follow *Etheridge* because it found Virginia's language too different from its own "inviolate" jury-trial guarantee as an enforceable right, while also calling the decision "poorly reasoned."[374] The result in Virginia, the Washington court stated, "bypassed [the constitutional protection] by allowing it to exist in form but letting it have no effect in function."[375] The Georgia Supreme Court similarly described Virginia's guarantee to be a "less comprehensive constitutional jury trial provision[]."[376] In response to these critiques, the Virginia Supreme Court, revisiting the issue, acknowledged that its constitutional language provides a weaker protection than other states.[377] Thus, *Boyd* and its progeny were built on a shaky foundation that should not guide constitutional decision-making when the jury-trial right must be preserved and held "inviolate."

In holding that the jury may assess a fact to be one sum but the legislature is authorized to require that a judge construe that same fact as another sum,[378] jury verdicts are rendered little more than advisory opinions. Courts of the era in which *Boyd* was decided took its reasoning from a misreading of the U.S. Supreme Court's holding in *Tull v. United States*.[379] *Tull* upheld, against a Seventh Amendment

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373 VA. CONST. art. I, § 11 ("trial by jury is preferable to any other").

374 Sofie v. Fibreboard Corp., 771 P.2d 711, 724 (Wash. 1989).

375 *Id. Lakin* was also critical of *Etheridge,* quoting *Sofie* when the court stated that such an argument "ignores the constitutional magnitude of the jury's fact-finding province," and "pays lip service to the form of the jury but robs the institution of its function." Lakin v. Senco Prods., Inc., 329 Or. 62, 80, 987 P.2d 463, 473, *modified*, 329 Or. 364, 987 P.2d 476 (1999), *overruled by* Horton v. Or. Health & Sci. Univ., 359 Or. 168, 187, 376 P.3d 998, 1010 (2016).

376 Atlanta Oculoplastic Surgery, P.C. v. Nestlehutt, 691 S.E.2d 218, 224 n.8 (Ga. 2010); *see also* Watts v. Lester E. Cox Med. Ctrs., 376 S.W.3d 633, 644 (Mo. 2012) (same).

377 *See* Pulliam v. Coastal Emergency Servs. of Richmond, Inc., 509 S.E.2d 307, 314 (Va. 1999).

378 If the legislature has the authority to redefine the meaning of facts in this manner, there is no reason why another legislature could not increase the liability in common-law causes of action, essentially mandating that every $1000 in jury-assessed compensatory damages be multiplied by five before being reduced to judgment. Where the jury's determination of facts is enforceable under the Constitution, however, the defendant's jury-trial right would be abridged by such an arrangement.

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

challenge, the Clean Water Act, a federal statute that created a cause of action that was neither recognized at common law nor analogous to a common law cause of action. That statute allowed a judge to set the civil penalty after the jury determined liability; for just that reason, the *Tull* Court took pains to emphasize that its ruling was limited to statutory, rather than common-law, causes of action.[380]

Unfortunately, that critical distinction was lost upon many courts. However, *Feltner* recognized the need to maintain the essential distinction between statutory and common law causes of action. It not only reiterated the difference but explicitly declared that *Tull* was "inapposite" when the claim at issue was one recognized under the jury-trial right's historic test.[381] *Feltner* further held that any other approach to finalizing the award of damages would fail "'to preserve the substance of the common-law right of trial by jury.'"[382]

That is why the second rationale in *Boyd*—that the jury right cannot be abridged by a damage cap because the power to abolish the cause of action altogether includes the "lesser" power to limit damages[383]—also does not hold up to scrutiny.[384] The obligation of a court under the Seventh Amendment is to preserve the "substance of the common-law right of trial by jury."[385] While the common law itself is subject to statutory changes, the Seventh Amendment immunizes the jury's common-law authority, established as of 1791, from legislative abridgement.[386]

The bottom line, as the Florida Supreme Court observed, is that a plaintiff whose "jury verdict is being arbitrarily capped" is not "receiving the constitutional benefit of a jury trial as we have heretofore understood that right."[387]

Though since the advent of the modern incorporation doctrine, through which certain provisions of the Bill of Rights have been made binding on the States,[388] the U.S. Supreme Court has not had occasion

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380 *Id.* at 414–16.

381 Feltner v. Columbia Pictures Television, Inc., 523 U.S. 340, 355 (1998).

382 *Id.* (citation omitted).

383 Boyd v. Bulala, 877 F.2d 1191, 1196 (4th Cir. 1989); *see also* Etheridge v. Med. Ctr. Hosps., 376 S.E.2d 525, 529 (Va. 1989).

384 *Horton* adopted a similar rationale. *See* Horton v. Or. Health & Sci. Univ., 359 Or. 168, 376 P.3d 998 (2016).

385 *Tull*, 481 U.S. at 426 (citing Colgrove v. Battin, 413 U.S. 149, 157 (1973)).

386 *Cf.* Atlanta Oculoplastic Surgery, P.C. v. Nestlehutt, 691 S.E.2d 218 (Ga. 2010).

387 Smith v. Dep't of Ins., 507 So.2d 1080, 1088–89 (Fla. 1987).

388 *See* Louis Henkin, *"Selective Incorporation" in the Fourteenth Amendment*, 73 YALE L.J. 74 (1963).

to determine the Seventh Amendment's eligibility for incorporation. Nonetheless, the exercise of considering its eligibility further establishes why dismissal as a mere procedural right is inconsistent with the jury trial's place in the hierarchy of constitutional rights.

In *McDonald v. City of Chicago*,[389] the Supreme Court held the Second Amendment qualified for incorporation through the Fourteenth Amendment for application to the States. Until that decision, the lower courts uniformly followed *United States v. Cruikshank*,[390] to reject that proposition. Similarly, with respect to the Seventh Amendment, six federal circuits relied on nineteenth century precedent,[391] to deny application of the Seventh Amendment to the States.[392]

Even before incorporating the right to bear arms, yet anticipating that its ruling would encourage similar challenges to statutes and ordinances throughout the states, the Court stated,

> [w]ith respect to *Cruikshank*'s continuing validity on incorporation, a question not presented by this case, we note that *Cruikshank* also said that the First Amendment did not apply against the States and *did not engage in the sort of Fourteenth Amendment inquiry required by our later cases*.[393]

By making that statement, the Court placed lower federal courts on notice that mere acceptance of *Cruikshank*'s holding constituted an abdication of the courts' responsibility for applying modern incorporation analysis. As such, in cases where litigants sought to apply *Heller*'s holding to state statutes and ordinances, federal district courts were able to "best perform their role in our hierarchical judicial system by treating the Supreme Court's modern incorporation jurisprudence as law."[394] As a result, "[t]here is no legal requirement that lower courts

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389 McDonald v. City of Chicago, 561 U.S. 742, 791 (2010).

390 United States v. Cruikshank, 92 U.S. 542, 553 (1875); *see, e.g.*, Love v. Pepersack, 47 F.3d 120, 123 (4th Cir. 1995).

391 Walker v. Sauvinet, 92 U.S. 90, 92–93 (1875).

392 Coleman v. Sellars, 614 Fed. App'x 687, 689 (5th Cir. 2015); González-Oyarzun v. Carribean City Builders, Inc., 798 F.3d 26, 29 (1st Cir. 2015); R.J. Reynolds Tobacco Co. v. Shewry, 423 F.3d 906, 924 (9th Cir. 2005); GTFM, LLC v. TKN Sales, Inc., 257 F.3d 235, 240 (2d Cir. 2001); Elliott v. City of Wheat Ridge, 49 F.3d 1458, 1459 (10th Cir. 1995); Letendre v. Fugate, 701 F.2d 1093, 1094 (4th Cir. 1983); Woods v. Holy Cross Hosp., 591 F.2d 1164, 1171 (5th Cir. 1979).

393 Dist. of Columbia v. Heller, 554 U.S. 570, 620 n.23 (2008) (emphasis added).

394 Nelson Lund, *Anticipating Second Amendment Incorporation: The Role of the Inferior Courts*, 59 SYRACUSE L. REV. 185, 187 (2008).

'wait' for the Supreme Court to apply the *Duncan*[395] due process test to the right to keep and bear arms."[396]

Despite this direction and the Court's explicit recognition that "[o]ur governing decisions regarding . . . the Seventh Amendment's civil jury requirement long predate the era of selective incorporation,"[397] courts have adhered to the result dictated by nineteenth century precedent, awaiting a definitive ruling from the Supreme Court that the non-incorporation precedents are overruled.[398]

As recalled by the *McDonald* Court, for the first fifty-seven years after the Fourteenth Amendment was adopted, from 1868 to 1925, the Supreme Court repeatedly rejected arguments that any particular provision of the Bill of Rights applied to the states through the Fourteenth Amendment's Due Process Clause. It was during this period that the Court ruled that the Seventh Amendment right to trial by jury was not incorporated.

Since 1925, however, the Supreme Court steadily expanded the list of Bill of Rights protections that apply against the states.[399] Following *McDonald*, the only protections in the Bill of Rights that have not been fully applied to the states are the Third Amendment's protection against quartering of soldiers, the Fifth Amendment's grand jury indictment requirement, the Sixth Amendment's requirement of a unanimous jury verdict, the Seventh Amendment's right to a jury trial in civil cases, and the Eighth Amendment's prohibition on excessive fines.[400]

The standard for incorporation articulated in *McDonald* makes plain that the protections of the Seventh Amendment ought to apply against the states. In the modern era of "selective incorporation," the governing standard is not whether any "civilized system [can] be imagined that would not accord the particular protection."[401] Instead, the Court "inquire[s] whether a particular Bill of Rights guarantee is fundamental

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395 Duncan v. Louisiana, 391 U.S. 145 (1968).

396 Lund, *supra* note 394, at 196.

397 McDonald v. City of Chicago, 561 U.S. 742, 765 n.13 (2010).

398 *See, e.g.*, González-Oyarzun v. Caribbean City Builders, Inc., 798 F.3d 26, 29 (1st Cir. 2015). The First Circuit eschewed the *McDonald* dicta in favor of the instructions found in Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477, 484 (1989) ("If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls.").

399 *McDonald*, 561 U.S at 764 n.12 (listing decisions incorporating particular rights).

400 *Id.* at 765 n.13.

401 *Id.* at 743.

to *our* scheme of ordered liberty and system of justice,"[402] or "whether this right is 'deeply rooted in this Nation's history and tradition.'"[403]

Under either criterion, the Seventh Amendment qualifies for incorporation. The Seventh Amendment guarantee is "fundamental."[404] It is also essential to a fair trial.[405] Moreover, each of the values that the Second Amendment satisfied that supported its incorporation provide an even more sturdy basis for the Seventh Amendment's incorporation.

It is likewise "of ancient origin,"[406] and was one of the rights enshrined in Magna Carta. The civil jury was a hallmark of British common law; Blackstone proclaimed the right to trial by jury as the "principal bulwark of our liberties," "the glory of the English law," and "the most transcendent privilege which any subject can enjoy."[407]

The American colonists brought the civil jury with them to the New World. As Justice Story recognized: "The trial by jury in all cases, civil and criminal, was as firmly and as universally established in the colonies as in the mother country."[408] Indeed, efforts by the British to restrict the role of the jury in the colonies (in order to exercise greater control over the colonists) played an important role in the decision to seek independence.[409] Only after the Bill of Rights, including the Seventh Amendment, was added was the Constitution ratified.

Respect for the civil jury trial right remained strong throughout the decades between the ratification of the Constitution and the adoption of the Fourteenth Amendment. Indeed, at the time the Fourteenth Amendment was ratified, the Constitutions of "[t]hirty-six out of thirty-seven states . . . guaranteed the right to jury trials in all civil or common

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402 *Id.* at 764 (quoting Duncan v. Louisiana, 391 U.S. 145, 149 n.14 (1968)).

403 *Id.* at 767 (quoting Washington v. Glucksberg, 521 U.S. 702, 721 (1997)).

404 *See, e.g.*, Hodges v. Easton, 106 U.S. 408, 412 (1882); Jacob v. New York City, 315 U.S. 752, 752–53 (1942); *see also* Parklane Hosiery Co. v. Shore, 439 U.S. 322, 338 (1979) (Rehnquist, J., dissenting) ("fundamental to our history and jurisprudence").

405 *See, e.g.*, Simler v. Conner, 372 U.S. 221, 222 (1963); Byrd v. Blue Ridge Rural Elec. Coop., Inc., 356 U.S. 525, 537–39 (1958).

406 Dimick v. Schiedt, 293 U.S. 474, 485 (1935).

407 BLACKSTONE, *supra* note 1, at *350, *379.

408 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES, § 165 at 117 (Melville M. Bigelow ed., Little, Brown, and Co. 5th ed. 1905) (1833).

409 *See Parklane Hosiery*, 439 U.S. at 340 (Rehnquist, J., dissenting) ("[T]he right of trial by jury was held in such esteem by the colonists that its deprivation at the hands of the English was one of the important grievances leading to the break with England.").

law cases."[410] By comparison, as the Supreme Court noted in *McDonald*, only "22 of the 37 States in the Union had state constitutional provisions explicitly protecting the right to keep and bear arms."[411] Yet even this smaller majority of states was sufficient for the Court to declare the right to keep and bear arms one of the "foundational rights necessary to our system of Government" and "among those fundamental rights necessary to our system of ordered liberty."[412]

Thus, under the modern doctrine of selective incorporation, as most recently elucidated by the Supreme Court in *McDonald*, there can be no question that the Seventh Amendment guarantee meets the requirements for incorporation against the states through the Due Process Clause of the Fourteenth Amendment. It is both "fundamental to our scheme of ordered liberty and system of justice" and "deeply rooted in this Nation's history and tradition." The right to a jury trial is no mere procedural nicety and deserves application as a substantive protection against interference with a civil trial. If states do not provide a substantive jury-trial right, as *Horton* now has done, incorporation through the federal Constitution should.

CONCLUSION

The civil justice system occupies a properly essential position in the hierarchy of constitutional values that, too often, gets short shrift. Only through it can powerful actors, whether the president of the United States,[413] or a multinational corporation, be held accountable for the private damages they cause. Because those who have unequal influence in government ought not be able to skew the system in their favor, our constitutional system fully recognizes the importance of system of justice for private wrongs and protects it against efforts to tilt the playing field in favor of the powerful. Although due process and equal protection provide some basis for resisting efforts to game the system in favor of some, the framers of state constitutions, including those of Oregon, recognized the unparalleled importance of an inviolate right to a jury trial and a right to a remedy in securing a fair system impervious

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410 Steven G. Calabresi & Sarah E. Agudo, *Individual Rights Under State Constitutions when the Fourteenth Amendment was Ratified in 1868: What Rights Are Deeply Rooted in American History and Tradition?*, 87 TEX. L. REV. 7, 77 (2008).

411 McDonald v. City of Chicago, 561 U.S. 742, 777 (2010) (citing Calabresi & Agudo, *supra* note 410, at 50).

412 *Id.* at 778.

413 Clinton v. Jones, 520 U.S. 681, 684 (1997).

to the political machinations that could render it impotent. The decisions in *Lakin* and *Smothers* recognized the role that these fundamental individual rights must play. Unfortunately, *Horton* robbed the constitutional provisions of their power and one of their crucial purposes.

It is too early now to understand fully the consequences of the decision and the deprivations likely unleashed by turning fundamental rights essential to the functioning of a fair civil justice system into procedural niceties that a legislature can easily sweep aside. James Madison once warned that a legislature has the tendency to "draw[] all power into its impetuous vortex" and that rarely will mere "parchment barriers" withstand the "encroaching spirit of power."[414] To strengthen that barrier against political interference with constitutional guarantees, we rely on an independent judiciary, not to defer to legislative choices constitutions deny that body, but to stem unwarranted legislative interference with the proper operation of a fair and proper civil justice system. While the Oregon Supreme Court may have abandoned that role here, we are confident that the decision will prove problematic, forcing a future court to revisit it and restore the jury and remedy rights to their proper places in the constitutional pantheon of enforceable protections.

414 THE FEDERALIST NO. 48 (James Madison).