

RESTRICTION OF TORT REMEDIES AND THE CONSTRAINTS OF DUE PROCESS: THE RIGHT TO AN ADEQUATE REMEDY

Tracy A. Thomas*

In the recent proliferation of tort reform statutes, the dangerous clause of remedial jurisdiction stripping has sneaked into the law. Reminiscent of federal statutes in other areas of the law,¹ these jurisdictional provisions strip courts of all power to award punitive or non-pecuniary damages in excess of legislative limits.² Many states have acted to restrict frivolous claims and excessive recoveries by cabining “McTorts” and “runaway juries.”³ Regardless of the merits of these policy questions, the use of the simple expedient of remedial jurisdiction to accomplish these purposes raises significant concerns. By arbitrarily restricting an individual’s right to a meaningful remedy, the tort reform remedy restrictions threaten to dilute common-law rights. The systemic problems of restricting remedies through arbitrary state action have concerned me in the past,⁴ and they are brought to the

* Professor of Law, University of Akron. A special thanks to the participants in the 2005 Remedies Forum for their insightful comments and reactions to this paper, and to Sarah Cravens and Stewart Moritz for their valuable input on the article.

1. See *infra* notes 21-25 and accompanying text.

2. See OHIO REV. CODE § 2305.01 (2005) (“The court of common pleas shall not have jurisdiction, in any tort action to which the amounts set forth apply, to award punitive or exemplary damages that exceed [two times compensatories to a maximum of \$350,000].”); *id.* §§ 2305.01 & 2315.18(E)(1) (limiting jurisdiction in tort action to award compensatory damages for non-economic loss in excess of \$250,000 or three times economic loss up to \$500,000). Ohio adopted the same jurisdiction stripping provision in its 1999 tort reform laws that were struck down in the *Sheward* case. Ohio Acad. of Trial Lawyers v. Sheward, 715 N.E.2d 1062 (Ohio 1999).

3. The poster children of tort reform have been the media images of unrestrained “runaway” juries and frivolous lawsuits against McDonald’s for hot coffee and high-fat foods. See, e.g., Alex Berenson, *Vioxx Jury Adds More in Damages*, N.Y. TIMES, April 12, 2006, at C1; Editorial, *It’s Lawyers’ Own Fault*, SAN ANT. EXPRESS-NEWS, Dec. 23, 2005, at 6B (“[I]f lawyers’ greed and liberal juries had not resulted in such ridiculously extravagant awards (i.e. the McDonald’s hot coffee spill multimillion-dollar award), tort reform would not have been necessary.”); Howard Wasserman, *Fast Food Justice: Infamous Cases Involving French Fries, Obesity, Too-Hot Coffee, and Fingertips* (Oct. 6, 2005), available at <http://www.findlaw.com/commentary>.

4. See Tracy A. Thomas, *Ubi Jus, Ibi Remedium: The Fundamental Right to a Remedy*

forefront again with the advent of the latest generation of tort reform.

The legislative action of tort reform remedy stripping exhibits a misuse of jurisdictional defining power. Using remedial jurisdiction to control rights is arguably a convenient, politically acceptable way to legislate disfavored rights.⁵ Such jurisdiction stripping at the federal level has been used to attack remedies for desegregation, prisoners' civil rights, and habeas corpus.⁶ Its use as a legal maneuver is often accompanied by little political fallout: for it seems politically expedient to stop excessive payouts to prisoners (but not eliminate civil rights),⁷ and protect health insurance (but not immunize doctors).⁸ After all, everyone knows coffee is hot, prisoners don't live in hotels, and doctors help people. However, avoiding direct legislation upon these substantive issues by sneaking in through the back door of remedies is formalistically dishonest and insulates representatives from the political accountability that should follow as a consequence of legislative action in a democracy.

The pretextual use of jurisdiction to restrict remedies has serious implications both within and outside of the tort reform context. The maneuver exceeds the purpose and intent of the legislative power to define and organize the judiciary. Such a violation of the spirit of jurisdictional authority converts the legislature's power to define the jurisdiction of the courts into a plenary power to regulate, or eviscerate, all remedies and legal rights. This unrestrained legislative power has been challenged in the past as a violation of separation of powers.⁹ In

Under Due Process, 41 SAN DIEGO L. REV. 1633 (2004) (arguing that judicial denial of an adequate remedy violates due process) [hereinafter Thomas, *Ubi Jus*]; Tracy A. Thomas, *Congress' Section 5 Power and Remedial Rights*, 34 U.C. DAVIS L. REV. 673 (2001) (arguing that Congress' restriction of remedies under Section 5 of the Fourteenth Amendment provides inadequate redress which dilutes the individual's constitutional right) [hereinafter Thomas, *Remedial Rights*].

5. David Rudovsky, *Running in Place: The Paradox of Expanding Rights and Restricted Remedies*, 2005 U. ILL. L. REV. 1199, 1242 (2005) ("Targeting groups without political power or support, Congress imposed wide-ranging limitations" on civil rights remedies. "There is a sad irony in the fact that Congress (and the courts . . .) have selectively limited rights for these 'discrete and insular minorities.'").

6. See *infra* notes 21-25 and accompanying text; see Lloyd Anderson, *Congressional Control Over the Jurisdiction of the Federal Courts: The New Threat to James Madison's Compromise*, 39 BRANDEIS L.J. 417 (2000) (discussing the many historical and modern attempts by Congress to restrict federal court jurisdiction).

7. John Boston, *The Prison Litigation Reform Act: The New Face of Court Stripping*, 67 BROOK. L. REV. 429, 437 n.23 (2001) (noting that the sparse legislative history of the PLRA consisted mainly of rhetorical assertions about the need for criminals to do "hard time," prisoners "churning out lawsuits with no regard to cost or merit," and frivolous prisoner lawsuits over melted ice cream and the wrong brand of sneakers).

8. OHIO REV. CODE ANN. § 2323.43 (2005) (Statement of Findings and Intent).

9. Ohio Acad. of Trial Lawyers v. Sheward, 715 N.E.2d 1062, 1094-95 (Ohio 1999); Theodore J. Weiman, Comment, *Jurisdiction Stripping, Constitutional Supremacy and the*

response, legislatures have tried to circumvent these structural barriers by using their jurisdictional power to shackle the judiciary's ability to act.

This article identifies another counterbalancing power that checks the legislative ability to restrict tort remedies through tort reform: the due process clauses of both state and federal constitutions. Pursuing this uncharted line of inquiry, this article argues that due process guarantees provide a restraint on the tort remedy stripping provisions that deny plaintiffs their fundamental right to a meaningful remedy. Building upon prior work asserting the fundamentality of the right to a remedy,¹⁰ this article develops the correlative due process protection mandating heightened review of legislation that burdens or denies the remedial right. This constitutional scrutiny is necessary to hold the legislature accountable to constitutional commands and to provide the necessary transparency and respect for the rule of law.

Pulling together the disparate strands of legal rules in existing case law, the article develops a cohesive theory of due process protection for the right to an adequate remedy. State court decisions invalidating tort reform remedy restrictions appear analytically scattered and based upon seemingly narrow doctrinal rules of “quid pro quo,” “due course of law,” or access to the courts.¹¹ However, upon closer consideration, these cases reveal a common theoretical foundation emanating from due process.¹² When these decisions are compared to U.S. Supreme Court decisions spanning the twentieth century, the right to an adequate and meaningful judicial remedy emerges even more clearly.¹³ Locating this due process requirement of an adequate remedy significantly alters the way in which courts currently assess the legality of tort reform legislation. Such a heightened standard does not necessarily sound the death knell for tort reform, but it does demand a more substantial basis for restricting remedies, and it averts the political obfuscation of the significant remedial issues dominating tort reform today.

I. JURISDICTION BY ANY OTHER NAME, IS STILL JURISDICTION?

It should come as no surprise that state legislatures are using

Implications of Ex Parte Young, 153 U. PA. L. REV. 1677 (2005); Robert S. Peck, *Tort Reform's Threat to an Independent Judiciary*, 33 RUTGERS L.J. 835 (2002); Matthew W. Light, Note, *Who's the Boss? Statutory Damage Caps, Courts, and State Constitutional Law*, 58 WASH. & LEE. L. REV. 315, 316 (2001).

10. See Thomas, *Ubi Jus*, *supra* note 4; see also *infra* notes 58-65 and accompanying text.

11. See Light, *supra* note 9.

12. See *infra* notes 84-94 and accompanying text.

13. See *infra* notes 96-118 and accompanying text.

jurisdiction-stripping measures to curtail the power of the courts to award tort remedies. The interbranch tension over tort reform remedies is nothing new. As Professor Janutis discusses in her article, political powers have been fighting since the early nineteenth century over legislative restriction of judicial remedies.¹⁴ In recent time, the judiciary and legislature in Ohio have gone round and round for the last two decades as the courts have repeatedly struck down tort reform statutes and judicial careers have been made and lost on the issue.¹⁵ Tired of polite requests to the judiciary to “reconsider its holding,” the lawmakers have resorted to the legislative death penalty of jurisdiction stripping to deprive the courts of any possible ability to ignore the legislative mandates.¹⁶

The use of a jurisdiction stripping provision rather than a remedial restriction clearly signals the legislative intent for an absolute prohibition on certain damages. The use of the structural tool prohibits any reasoned exception or deviation from the caps, such as those sometimes seen in civil rights cases.¹⁷ The jurisdictional provision encourages collateral attacks for any damages award in excess of the cap, thereby weakening the interstate viability of state judgments. In short, the jurisdictional weapon silences the legislative/judicial dialogue over tort remedies by shutting down one side of the discussion.

This structural attempt to silence the judiciary’s influence over law where legislative and judicial policies differ is also seen at the federal level.¹⁸ Conventional wisdom has held that Congress rarely, if ever,

14. Rachel M. Janutis, *The Struggle Over Tort Reform and the Overlooked Legacy of the Progressives and Populists*, 39 AKRON L. REV. (2007); see also John Nockleby & Shannon Currier, *100 Years of Conflict: The Past and Future of Tort Retrenchment*, 38 LOY. L.A. L. REV. 1021 (2005).

15. Michael Scherer, *State Judges for Sale*, THE NATION, Sept. 2, 2002 (discussing how Ohio Justice Alice Robie Resnick was targeted in the 2000 election because of her majority opinion in the 4-3 *Sheward* decision invalidating tort reform a second time); see also Jim Copland, *Turning Out Trial Lawyers, etc.*, NAT’L REV. ONLINE (Nov. 2004), available at <http://www.nationalreview.com> (“Tort reformers also scored big wins Tuesday in state judicial races. Judicial elections are a key component of litigation reform: Not only do judges make decisions on litigation, but ‘creative’ judges in many states have struck down tort-reform laws passed by state legislatures.”).

16. See OHIO REV. CODE ANN. § 2323.43 (2005) (Statement of Legislative Intent) (“The Ohio General Assembly respectfully requests that the Ohio Supreme Court . . . reconsider its holding on damage caps in *State v. Sheward* (1999).”); Stephen J. Werber, *Ohio: A Microcosm of Tort Reform Versus State Constitutional Mandates*, 32 RUTGERS L.J. 1045, 1065 (2001) (“The [tort reform] picture was completed by an amendment declaring that the Ohio Court of Common Pleas had no jurisdiction to award compensation for non-economic loss. . . . Talk about *chutzpah!*”).

17. See Caprice L. Roberts, *Ratios, (Ir)rationality, and Civil Rights Punitive Damages*, 39 AKRON L. REV. (2006).

18. See, e.g., Caprice L. Roberts, *Jurisdiction Stripping in Three Acts: “Three String Serenade”*, 51 VILL. L. REV. ____ (forthcoming 2006), available at <http://www.ssrn.com>; Anderson, *supra* note 6, at 419, 434 (“It should be emphasized that the issue of congressional control over

restricts federal court jurisdiction, though it often threatens and postures such action.¹⁹ However, a recent empirical study challenges this accepted notion, and establishes, to the contrary, that Congress regularly, and with increasing frequency, strips jurisdiction from the federal courts.²⁰ Indeed, the structural weapon of jurisdiction stripping has been used to attack unpopular injunctive remedies involving unions, abortion, desegregation, immigration, and prisons.²¹ During the height of the school desegregation cases, President Nixon made several proposals to Congress to enact bans on court busing orders.²² Congress has restricted the courts' jurisdiction to order the habeas corpus remedy,²³ and most recently acted to strip the federal courts of jurisdiction to hear constitutional challenges related to the Guantanamo Bay detentions.²⁴ In prison conditions cases, Congress proposed in the Prison Litigation Reform Act of 1995 to strip the federal courts of all power to award structural injunctions; however, it ultimately enacted more narrow qualifications for such injunctions in response to expressed

jurisdiction only arises in any significant way when Congress disagrees with judicial decisions. When Congress is content with such decisions, it has no reason to launch serious attacks on the power of the courts.”); Neil A. Lewis, *Dismissal of Guantanamo Suits Sought*, INT’L HERALD TRIB., Jan. 5, 2006, at 2 (noting that Congress acted to strip courts of jurisdiction to award habeas corpus remedy for Guantanamo Bay detentions to counter the June 2004 decision of the U.S. Supreme Court authorizing such relief). *But see* Dawn M. Chutkow, *Jurisdiction Stripping: Ideology, Institutional Concerns, and Congressional Control of the Court* (Oct. 19, 2005), available at <http://www.ssrn.com> (suggesting that Congress acts to remove jurisdiction for administrative concerns such as reducing federal court caseloads).

19. Anderson, *supra* note 6, at 418; Chutkow, *supra* note 18, at 4.

20. Chutkow, *supra* note 18, at 4 & n.6.

21. *See, e.g.*, *Lauf v. E.G. Shinner & Co.*, 303 U.S. 323, 329-30 (1938) (upholding the Norris-LaGuardia Act and Congress' power to limit the jurisdiction of the federal court by constraining the court's power to issue injunctions in labor cases); *see* Anderson, *supra* note 6, at 418 nn.6-7 (citing examples of jurisdiction-stripping power used to prohibit certain injunctive remedies); Stephan O. Kline, *Judicial Independence: Rebuffing Attacks on the Third Branch*, 87 KY. L. J. 679, 730-40 (1999) (detailing remedial-stripping enactments of the early 1990s).

22. *See* Ronald D. Rotunda, *Congressional Power to Restrict the Jurisdiction of the Lower Federal Courts and the Problem of School Busing*, 64 GEO. L.J. 839 (1976). *See also* H.R. 3332, 97th Cong. (1981) (forbidding any federal court from requiring student attendance at school based on race); H.R. 5200, 97th Cong. (1981) (limiting the authority of federal courts to order student transportation or to alter local tax rates in school desegregation cases).

23. *See* *Felker v. Turpin*, 518 U.S. 651 (1996) (upholding provision eliminating appellate jurisdiction of the Supreme Court for all “second or successive” habeas petitions); David Cole, *Jurisdiction and Liberty: Habeas Corpus and Due Process as Limits on Congress' Control of Federal Jurisdiction*, 86 GEO. L.J. 2481 (1998).

24. S. 1042, 108th Cong. (Nov. 10, 2005) (stripping federal courts of jurisdiction to issue habeas corpus remedy for constitutional challenges related to the Guantanamo detention); Neil A. Lewis, *U.S. to Seek Dismissal of Guantanamo Suits*, N.Y. TIMES, at A11 (Jan. 4, 2006) (reporting that remedy stripping provision regarding Guantanamo detentions became law as part of the 2006 defense appropriations bill).

constitutional concerns.²⁵ Given this context, it is not surprising that legislatures considering tort reform resort to the use of this powerful, and increasingly common, jurisdictional weapon.

However, simply because legislators have crafted the remedy stripping provisions of tort reform laws in terms of “jurisdiction” does not necessarily make them jurisdictional. Morphing legal restrictions on remedies into the shape of jurisdiction raises both formalistic and structural concerns.²⁶ At the formalistic level, calling law jurisdictional when it is not confuses and perhaps masks the operation of the law.²⁷ At the structural level, the misuse of jurisdictional power threatens to expand the limited legislative power to organize the courts into an all-encompassing power to do whatever the legislature pleases.

Legislatures generally designate court jurisdiction.²⁸ State courts, like inferior federal courts, are limited to the jurisdiction that the legislature may choose to bestow.²⁹ As the Ohio Supreme Court held almost one-hundred years ago, with respect to jurisdiction, “[t]he legislative judgment in this behalf will not be nullified except when it clearly appears that there has been a gross abuse of such discretion in undoubted violation of some state or federal constitutional provision.”³⁰

Jurisdiction is the designation of the court’s initial authority to hear a case in the first instance.³¹ As the U.S. Supreme Court stated in *Davis*

25. 18 U.S.C. § 3626(a)(1)(A); 142 CONG. REC. S2285-02 at S2297 (daily ed. Mar. 19, 1996) (statement of Associate Attorney General John Schmidt before the Senate Judiciary Committee testifying that the proposed legislative restrictions on remedies “would raise serious constitutional problems” under due process and separation of powers). See Theodore K. Cheng, *Invading an Article III Court’s Inherent Equitable Powers: Separation of Powers and the Immediate Termination Provision of the Prison Litigation Reform Act*, 56 WASH. & LEE L. REV. 969, 981 (1999).

26. See Howard M. Wasserman, *Jurisdiction and Merits*, 80 WASH. L. REV. 643 (2005) (arguing that confusing jurisdiction with merits determinations in statutory analysis raises procedural and formalistic concerns).

27. Cf. *id.* at 656 (making similar argument where factual issues going to the merits are characterized as threshold questions of “jurisdiction”).

28. See, e.g., OHIO CONST. art. IV, § 4(B); VA. CONST. art. VI, § 1. See *Humphreys v. Putnam*, 178 N.E.2d 506, 509 (Ohio 1961); *Finley v. Pfeiffer*, 126 N.E.2d 57, 61 (Ohio 1955).

29. *Ohio Acad. of Trial Lawyers v. Sheward*, 715 N.E.2d 1062 (Ohio 1999); MARTIN H. REDISH, *FEDERAL JURISDICTION: TENSIONS IN THE ALLOCATION OF JUDICIAL POWER* 83 (2d ed. 1990); Lawrence Gene Sager, *Foreword, Constitutional Limitations on Congress’ Authority to Regulate the Jurisdiction of the Federal Courts*, 95 HARV. L. REV. 17, 25 (1980) (“Courts and commentators agree that Congress’ discretion in granting jurisdiction to the lower federal courts implies that those courts take jurisdiction from Congress and not from article III.”).

30. *Williams v. Scudder*, 131 N.E. 481 (Ohio 1921); *accord Sheward*, 715 N.E.2d at 456 (“It is well established that legislation cannot contravene the Constitution.”); *Dayton v. State*, 813 N.E. 2d 707, 728 (Ohio App. 2004) (citing *Scancarello v. Erie Ins. Co.*, 1996 WL 421858, 3 (1996)) (commenting that under Ohio’s “system of checks and balances, the judiciary retains the power to nullify legislative decisions if they violate a state or federal constitutional provision.”).

31. Wasserman, *supra* note 26, at 650.

v. *Passman*, “jurisdiction” is whether a federal court has the constitutional or statutory power to hear a case.³² Professor Howard Wasserman has explained in some detail how jurisdiction operates as a threshold question a court must resolve before it may proceed to hear the case.³³ The question of remedy is a separate one determining, at the end of the case, whether there is a basis to award the litigant some specified relief for the established violation of a legal right.³⁴ “[T]he Court has largely maintained a clear analytic distinction between jurisdiction, on the one hand, and two other necessary components of a federal-court lawsuit: a cognizable cause of action and the availability of an appropriate judicial remedy.”³⁵

Two recent Supreme Court cases support the precise analytical use of the terminology and power of “jurisdiction.”³⁶ In *Eberhart v. United States*³⁷ and *Kontrick v. Ryan*,³⁸ the Court held that statutory time limits for requesting a new trial are not “jurisdictional,” but rather “claim-processing rules” that are mandatory procedure rules, which do not implicate a court’s power to hear a case. The Court cautioned that the imprecise use of the word “jurisdiction” has obscured the central understandings of the operative rules.³⁹ Despite some lack of clarity in the past, the Court has now signaled its intent to use the term “jurisdiction” carefully to mean only those “prescriptions delineating the classes of cases (subject-matter jurisdiction) and the persons (personal jurisdiction) falling within a court’s adjudicatory authority.”⁴⁰

“Jurisdiction” by definition then is not a decision on the merits of a case.⁴¹ Jurisdiction is a predicate to judicial action; it does not operate at the end of the case as a result or decision of the court.⁴² Thus,

32. 442 U.S. 228 (1979); *see also* *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004).

33. Wasserman, *supra* note 26, at 651.

34. Donald H. Zeigler, *Rights, Rights of Action, and Remedies: An Integrated Approach*, 76 WASH. L. REV. 67 (2001).

35. Laura S. Fitzgerald, *Is Jurisdiction Jurisdiction?*, 95 NW. U. L. REV. 1207, 1214 (2001); *see also* Zeigler, *supra* note 34.

36. Credit goes to Michael Allen for this point.

37. 126 S. Ct. 403 (2005) (holding that Federal Rule of Criminal Procedure 33(a) setting forth time limits for a defendant’s motion for a new trial is not “jurisdictional”).

38. 540 U.S. 443 (2004) (holding that defenses made available by time limitations in the Federal Rules of Bankruptcy Procedure are not “jurisdictional”).

39. *Eberhart*, 126 S.Ct. at 406.

40. *Id.* at 405; *Kontrick*, 540 U.S. at 455.

41. Wasserman, *supra* note 26, at 650.

42. *United States v. Klein*, 80 U.S. (13 Wall) 128, 146-48 (1872). In *Klein*, the Court invalidated a congressional jurisdictional statute that directed a rule of decision on the merits of post-Civil War forfeitures. *Id.* The Court found that the statute did not operate to organize claims in the normal jurisdictional fashion, but instead required the Court to reach a particular decision. “But the court is forbidden to give the effect to evidence which, in its own judgment, such evidence

formalistically, what the tort reform statutes are doing by restricting a factual decision about damages at the end of a case is simply not “jurisdiction.” “The power of the court to hear and decide a case could hardly be made to depend upon the jury’s verdict.”⁴³ Misusing “jurisdiction” raises concerns of positive law by mixing distinct legal questions, thus adding to the confusion of the legitimacy of such action.⁴⁴

Fundamentally, jurisdiction is a rule of organization, not decisionmaking. It exists for the purpose of organizing the courts by subject matter in order to streamline cases and develop the expertise of the courts. Thus, state legislatures commonly designate domestic relations courts, juvenile courts, and small claims courts to direct the stream of cases and develop expertise in the judges.⁴⁵ Jurisdiction thus serves a channeling function to direct the flow of cases to the proper decisionmaking body.

The channeling function of jurisdiction is further illustrated by the bases for federal jurisdiction. Claims can be brought in federal court when a federal question is raised or when there is a diversity of citizenship between the parties and the amount in controversy exceeds a designated sum.⁴⁶ The normal result of these jurisdictional statutes is that some claims will be channeled into federal court, while the remaining claims will be adjudicated in state courts.⁴⁷ As long as there is access to some court for an important constitutional claim, “much of our concern about legislation denying access to federal courts must inevitably seem overblown.”⁴⁸ Jurisdiction thus directs the litigation traffic to the most appropriate court.

It is questionable whether the tort reform jurisdictional statutes are

should have, and is directed to give it an effect precisely contrary.” *Id.* at 147. See Gordon G. Young, *A Critical Reassessment of the Case Law Bearing on Congress’s Power to Restrict the Jurisdiction of the Lower Federal Courts*, 54 MD. L. REV. 132, 157 (1995) (stating that *Klein* involved “puppeteering” rather than “court-stripping” as the Court was given, not denied, jurisdiction to act, and that jurisdiction was shaped to control the decision on the merits).

43. Paul J. Mishkin, *The Federal “Question” in the District Courts*, 53 COLUM. L. REV. 157, 166 (1953).

44. Wasserman, *supra* note 26, at 669-78.

45. *E.g.*, ALA. CODE § 6-5-273.

46. 28 U.S.C. § 1332(a)(1).

47. Richard H. Fallon, Jr., *The Ideologies of Federal Courts Law*, 74 VA. L. REV. 1141, 1215 (1988).

48. Louise Weinberg, *The Article III Box: The Power of Congress to Attack the Jurisdiction of Federal Courts*, 78 TEX. L. REV. 1405, 1410 (2000); Martin Redish, *Constitutional Limitations on Congressional Power to Control Jurisdiction: A Reaction to Professor Sager*, 77 NW. U. L. REV. 143, 156 (1982) (arguing that restricting federal court jurisdiction to issue remedies is not problematic as long as the state courts remain open and provide at least a technically adequate forum).

merely channeling certain cases of high value into federal court. Diversity jurisdiction would give the federal court authority to resolve tort claims of a high value, precisely the large dollar cases that are barred by the jurisdictional limits on non-pecuniary damages. This result parallels other federal statutes, like the federal class action statute, that seemingly woo state tort plaintiffs into federal court.⁴⁹ There is certainly a question as to whether the federalization of tort law is a desired result, and others have suggested that the move to federal court threatens certain democratic values.⁵⁰ Regardless of the normative conclusion as to whether tort claims should be litigated in federal court, practically speaking, there will be few cases that satisfy this option. Only a small group of tort cases would satisfy the requirement of the diversity of parties. For routine tort cases, like medical malpractice or automobile accidents, it is more likely that diversity of citizenship will not be shown, thus confining the case to state court.

Even if some tort cases are brought in federal court, there is a question as to whether state or federal law would apply to the choice of remedial law.⁵¹ The Supreme Court has been schizophrenic in its holdings on this matter.⁵² In some cases, it has held that the state remedial law applies as a substantive rule.⁵³ In others, it has held that the federal remedial law applies as a rule of procedure.⁵⁴ However, in looking at the holdings of cases that are most aligned with tort limits on non-pecuniary damages, the conclusion is likely that the state law of damages would apply to the state tort claim.⁵⁵ If the state law of damages is applied to the diversity case in federal court, then the choice of a federal forum has no impact on the limitation of damages. The state law capping the damages would still apply, prohibiting an award in excess of the set amount.

49. See, e.g., Class Action Fairness Act of 2005, 28 U.S.C. § 1453(b); Securities Litigation Uniform Standards Act of 1997, 15 U.S.C. §§ 77p & 78bb.

50. JoEllen Lind, *Complex Litigation Reform, State Tort Law, and Democratic Values*, 37 AKRON L. REV. 717 (2004); Georgene M. Vairo, *Is Forum Shopping Unethical?*, LOY. LAWYER 4 (2005) (removal of cases to federal court to prevent state courts from providing relief for state law claims “raises serious federalism problems”); see also, Robert M. Ackerman, *Tort Law and Federalism: Whatever Happened to Devotion?*, 14 YALE J. ON REG. 429 (1996).

51. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938).

52. Thomas, *Remedial Rights*, *supra* note 4, at 685-86.

53. *Gasperini v. Ctr for Humanities*, 518 U.S. 415, 426 (1996); *Chambers v. NASCO*, 501 U.S. 32, 52 (1991); *Monessen S.W. Ry. v. Morgan*, 486 U.S. 330, 335-36 (1988); *Guaranty Trust Co. v. York*, 326 U.S. 99, 112 (1945).

54. *Grupo Mexicano Desarrollo v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 319 n.3 (1999); *Burlington N. R.R. Co. v. Woods*, 480 U.S. 1, 3 (1987).

55. *Gasperini*, 518 U.S. at 416 (excessive compensatory damages); *Monessen*, 486 U.S. at 335 (prejudgment interest).

The conclusion of the *Erie* problem thus illustrates that the tort reform statutes are not operating to channel the tort cases into federal court. As such, they are not, in fact, jurisdictional statutes. Rather, they are substantive changes in the law operating to prohibit certain factual decisions on the merits of the damages award. It is an abuse of the legislative prerogative to use jurisdiction and remedies as simple expedients to deny the existence of a right.⁵⁶ Such arbitrary legislative action is held in check by due process guarantees of the federal and state constitutions.

II. DUE PROCESS IMPLICATIONS IN THE RESTRICTION OF REMEDIES

The due process theory advanced in this article argues that restricting the courts' power to award an appropriate measure of damages arbitrarily denies prevailing plaintiffs their fundamental right to a meaningful remedy. Grounded in notions of liberty rights to redress of wrongs and property rights, the due process analysis provides a check upon potentially improper legislative action that restricts remedies. The judicial application of due process to tort reform laws is a routine counterbalancing of two branches of government that ensures legislative accountability to constitutional principles and ultimately the people. This traditional judicial function of constitutional oversight takes on even more importance in an age where scholars have challenged the assumption of the democratic, majoritarian legislature.⁵⁷

The due process theory of evaluating tort reform is built upon the recognition of the right to an adequate remedy as fundamental.⁵⁸ There is a foundational principle in law that assumes a right to a remedy, embodied in the maxim *ubi jus, ibi remedium* (where there is a right, there must be a remedy).⁵⁹ Whether this right is "fundamental" turns

56. "The General Assembly may not gain the authority to take away a constitutional right by the simple expedient of limiting the jurisdiction of the courts to the parameters of its own unconstitutional Act." *Ohio Acad. of Trial Lawyers v. Sheward*, 715 N.E.2d 1062, 1094 (Ohio 1999).

57. Terri Peretti, *An Empirical Analysis of Alexander Bickel's The Least Dangerous Branch*, in *THE JUDICIARY AND AMERICAN DEMOCRACY: ALEXANDER BICKEL, THE COUNTERMAJORITARIAN DIFFICULTY, AND CONTEMPORARY CONSTITUTIONAL THEORY* 123, 125-30 (Kenneth D. Ward & Cecilia R. Castillo, eds. 2005) (arguing that the dominance of interest politics and the influence of corporate interests challenges the notion that legislature effectuates the popular will and that the judiciary, rather than the legislature, may ultimately work to ratify public preferences); see also Barry Friedman, *The History of The Countermajoritarian Difficulty, Part One: The Road to Judicial Supremacy*, 73 N.Y.U. L. REV. 333, 337-38 (1998); Richard H. Pildes & Elizabeth S. Anderson, *Slings Arrows at Democracy: Social Choice Theory, Value Pluralism, and Democratic Politics*, 90 COLUM. L. REV. 2121, 2128-43 (1990).

58. Thomas, *Ubi Jus*, *supra* note 4, at 1636-40.

59. 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 23 (1978).

upon whether the right has been historically recognized or is central to the concept of ordered liberty.⁶⁰ The historical recognition of the right to a remedy is evident in English common law which expressed the necessity of a remedy to vindicate a legal right.⁶¹ This recognition was incorporated into *Marbury v. Madison*, where the Supreme Court emphasized the need for “proper redress” for every injury.⁶² From this early time, state constitutions have adopted express guarantees of the right to a remedy, and three-fourths of the states now provide: “All courts shall be open, and every person, for an injury done to him in his person, property or reputation, shall have remedy by due course of law, which shall be administered without denial or unnecessary delay.”⁶³ Moreover, remedies are central to the concept of ordered liberty because they define abstract rights by giving them meaning and effect in the real world.⁶⁴ Without remedies, a legal right is “nothing more than advice or recommendation” and has no tangible impact upon real parties.⁶⁵ A remedy is thus the integral part of every right that is necessary to the implementation of the rule of law.

Recognizing the existence of a fundamental right to an adequate remedy alters the calculus by which courts should assess the legitimacy of state action restricting remedies. It is no longer simply a question of the superficial reasonableness of the economic legislation. Instead, a new significant interest is added to the constitutional calculus that requires a meaningful assessment of the state regulation. The operation of a fundamental right demands a close tailoring between the legislation, a compelling state interest, and the resulting regulatory ends.⁶⁶ Using a

60. *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997).

61. *Ashby v. White*, (1703) 92 Eng. Rep. 126 (K.B.); BLACKSTONE, *supra* note 59, at 23.

62. 5 U.S. (1 Cranch) 137, 163-66 (1803) (“It is a general and indisputable rule, that where there is a legal right, there is also a legal remedy by suit or action at law, whenever that right is invaded . . . [F]or it is a settled and invariable principle in the laws of England, that every right, when withheld, must have a remedy, and every injury its proper redress.”).

63. See, e.g., UTAH CONST. art. I, § 11; OHIO CONST. art. I, § 16; TEX. CONST. art. I, § 13; David Schuman, *The Right to a Remedy*, 65 TEMP. L. REV. 1197, 1201 (1992) (stating that thirty-nine states have right to remedy clauses); Shannon M. Roesler, Comment, *The Kansas Remedy by Due Course of Law Provision: Defining a Right to a Remedy*, 47 U. KAN. L. REV. 655, 656-59 (1999).

64. Thomas, *Ubi Jus*, *supra* note 4, at 1638-39; Paul Gewirtz, *Remedies and Resistance*, 92 YALE L.J. 585, 587 (1983) (stating that remedies generally “give meaning to ideas” in order that they be “effective in the real world”).

65. THE FEDERALIST NO. 15, at 159 (Alexander Hamilton) (Benjamin Fletcher Wright ed., 1961); Donald H. Zeigler, *Rights Require Remedies: A New Approach to the Enforcement of Rights in the Federal Courts*, 38 HASTINGS L.J. 665, 678 n.73 (1987).

66. *Reno v. Flores*, 507 U.S. 292, 302 (1993) (noting that substantive due process “forbids the government to infringe certain ‘fundamental’ liberty interests, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest”).

due process rubric of strict scrutiny provides the depth of judicial scrutiny necessary to assess whether the legislative substitute remedy is in fact meaningful and adequate.

Due process provides a preferred analytical alternative for evaluating tort reform legislation.⁶⁷ In the past, most structural arguments for or against restriction of judicial remedies in tort reform have been framed as issues of separation of powers in which the legislative branch potentially usurps the power of the judiciary to redress harms.⁶⁸ The due process rubric offers a more definitive command prohibiting arbitrary state action as compared to the shifting nuances of balancing the separation of powers. Due process is an express actionable claim that creates a line relatively more clear than usurpation of governmental power. Moreover, due process establishes an overarching framework for testing the legitimacy of remedy restrictions from both the legislative and judicial branches.⁶⁹ Using a consistent theory for evaluating the adequacy of all judicial remedies against attempted abridgement streamlines the legal questions and provides a mechanism for considering all of the relevant individual and societal interests.⁷⁰

Scholars and courts have assumed that the complete denial of the right to a remedy through the use of jurisdictional restrictions would violate due process.⁷¹ “No one would contend that a law of a State, forbidding all redress by actions at law for injuries to property, would be upheld in the courts of the United States, for that would be to deprive one of his property without due process of law.”⁷² In cases over which

67. Professor John Goldberg offers a conceptually similar, yet analytically distinct argument. See 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. 525 (2005). He argues for a procedural due process protection for the common law right of tort defined as a law of redress and grounded in the U.S. Constitution. *Id.* at 613 n.426. Applying his framework to non-pecuniary damages caps, Goldberg suggests that the caps might be valid because on their face they seem to “leave open a meaningful avenue of redress.” *Id.* at 622.

68. Cf. *Miller v. French*, 530 U.S. 327, 352 n.3 (Souter, J., concurring in part and dissenting in part) (noting that potential due process problems could be raised by congressional restriction of remedy, but since “the constitutional question inherent in these possible circumstances does not seem to be squarely addressed by any of our cases,” assessing the constitutional issue as one of separation of powers).

69. See Thomas, *Ubi Jus*, *supra* note 4, at 1640-45 (arguing that judicial denial of adequate relief should be subject to strict scrutiny under due process).

70. See *Condemarin v. Univ. Hosp.*, 775 P.2d 348, 358 (Utah 1989).

71. Weiman, *supra* note 9, at 28; Young, *supra* note 42, at 134-35; see, e.g., *Webster v. Doe*, 486 U.S. 592, 603 (1988) (interpreting statute so as not to exclude review of all constitutional claims, as the denial of any judicial relief would “raise serious constitutional questions.”); see also *supra* notes 70-72.

72. *Poindexter v. Greenhow*, 114 U.S. 270, 303 (1884).

the state courts have no judicial power, such as suits against federal officials or habeas petitions for prisoners in federal custody, due process concerns likely prevent curtailment of federal court jurisdiction because no court would remain to hear the claim.⁷³ Professor Henry Hart argued a century ago in his seminal article that Congress cannot eliminate all judicial authority to afford any remedy for constitutional rights.⁷⁴ To afford Congress the power to deny any remedy would “turn a mere power to regulate jurisdiction into a power to affect rights having nothing to do with jurisdiction,” and the power to regulate jurisdiction cannot be exercised in a way that would violate other provisions of the Constitution.⁷⁵

The tort reform statutes, however, present a different question since they selectively restrict, rather than eliminate, remedies for common-law claims. When analyzing selective restrictions on remedies at the federal level, Hart and others asserted that such a jurisdictional limitation on remedies raises no constitutional issue, as long as some remedy remains.⁷⁶ Hart distinguished between constitutional rights, which had some ultimate protection against abrogation, and statutory rights, which fell fully into the legislative prerogative.⁷⁷ “In Hart’s view, this power to select among alternative remedies is true to the Madisonian Compromise between the need to protect the supremacy of the Constitution and its guaranteed rights and the need to subject the power of the judiciary to meaningful political control.”⁷⁸

Hart’s dialectic has been followed in the context of tort reform. For example, in *Etheridge v. Medical Center Hospitals*, the Virginia Supreme Court held that the statutory cap on recoverable damages in a medical malpractice action did not violate substantive due process because of the availability of alternate remedies.⁷⁹

A party has no fundamental right to a particular remedy or a full recovery in tort. A statutory limitation on recovery is simply an

73. Weinberg, *supra* note 48, at 1423; *see* 142 CONG. REC. S2285-02, at S2297 (daily ed. Mar. 19, 1996) (statement of Associate Attorney General John Schmidt on the Prison Litigation Reform Act testifying that absolute prohibition on structural injunctions in prisoner conditions cases raises due process problems where such prohibitions would apply in both federal and state court).

74. Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of the Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362 (1953).

75. *Id.* at 1372.

76. *Id.*

77. *Id.* at 1372; *see also* Thomas, *Remedial Rights*, *supra* note 4 (distinguishing Congress’ power to restrict remedies for statutory rights from its power to restrict remedies for constitutional rights).

78. Anderson, *supra* note 6, at 423-24.

79. 376 S.E.2d 525 (Va. 1989).

economic regulation, which is entitled to wide judicial deference. . . . More to the point, the legislature has the power to provide, modify, or repeal a remedy. Virginia alone can prescribe the jurisdiction of her own courts. She can mould her remedies as she pleases. . . . She may be bound to provide some remedy for wrong, but she is the exclusive and sovereign judge of the form of the remedy.⁸⁰

Thus, the mere existence of some alternative remedy remaining after the state regulation has been deemed by some courts as sufficient to satisfy due process.

The mere designation of an alternative remedy, however, does not guarantee tangible redress for a legal wrong.

Commentators consistently promote a system of “substitutability” of remedies and the Court regularly invokes the alternative remedy rationale when it refuses requested remedial measures. Over the years, however, as the full scope of remedial limitations has unfolded, the notion of alternatives or substitutes that can effectively serve the purpose of the principal remedy that has been foreclosed, has the appearance of a “shell game.” Alternatives are promised, but they are often denied, unavailable in practice, or riddled with exceptions that seriously undermine their effectiveness. . . . Remedies have been restricted on the theory that other remedies would be available, but in too many cases the Court has failed to adjust the remedial scheme to ensure the viability of this substitution process.⁸¹

In the absence of judicial inquiry into the merits of the remaining relief, the plaintiff is not assured the minimum protection of the laws.

III. ADEQUACY AS A REQUIREMENT OF JUDICIAL RELIEF

An examination of legal history and judicial precedent in the state and federal supreme courts supports the theory recognizing a fundamental right to an *adequate* remedy protected by due process. Tracing cases from 1845 to the present uncovers a solid foundation for the right to an adequate remedy protected against legislative abridgement. The cases define “adequacy” as an individualized inquiry requiring meaningful benefit to the particular plaintiff.⁸² In addition,

80. *Id.* at 531.

81. Rudovsky, *supra* note 5, at 1212-13, 1254.

82. *See, e.g.*, Lucas v. United States, 757 S.W.2d 687, 690-91 (Tex. 1988) (stating that required quid pro quo for tort reform restriction cannot be established by benefits to society generally, but rather requires benefit to individual plaintiff); Kan. Malpractice Victims Coal. v. Bell, 757 P.2d 251, 264 (Kan. 1988) (holding that legislative caps on damages were inadequate because they treated every injury identically and denied all remedy for plaintiff’s real losses exceeding the cap), *overruled by* Blair v. Peck, 811 P.2d 1176 (Kan. 1991).

“adequacy” is a comparative term defined as that which is equally as effective at redressing harm as the preexisting common law relief.⁸³ Incorporating this requirement of adequacy into the existing framework of remedial substitutability ensures that judicial remedies retain real meaning to plaintiffs, while legislatures tinker with alternative solutions to legal problems.

State court decisions assessing tort reform laws have adopted the requirement of adequacy to qualify the legislature’s assumed prerogative of selecting remedies. Grounding their decisions in state constitutional guarantees of the right to a remedy, these courts have required that the legislature provide an *adequate alternative* remedy.⁸⁴ “The court looks to insure that due process requirements are met, and when a common-law remedy is modified or abolished, an adequate substitute remedy must be provided to replace it.”⁸⁵ For a right to a remedy “cannot be watered down by diluting the definition of remedy.”⁸⁶

Accordingly, tort reform statutes that cap damages have been held to violate constitutional remedial guarantees where they provide no alternative remedy or commensurate benefit to the plaintiff.⁸⁷ For example, in *Kansas Malpractice Victims v. Bell*, the Kansas Supreme Court probed into the adequacy of legislative tort remedies, searching for an adequate and viable substitute to satisfy due process.⁸⁸ “[S]tatutory modification of the common law must meet due process

83. See *infra* notes 117-20 and accompanying text. E.g. *Carlson v. Green*, 446 U.S. 14 (1980); *Middleton v. Tex. Power & Light Co.*, 249 U.S. 152, 163 (1919) (upholding legislative remedial substitutes as adequate because they did not dramatically differ from the compensation available at common law); *Judd v. Drezga*, 103 P.3d 135, 139 (Utah 2004) (stating that benefit provided by legislative remedial substitute must be substantially equal in value or benefit to the remedy abrogated).

84. See *Sorrell v. Thevenir*, 633 N.E.2d 504, 513 (Ohio 1994) (interpreting state constitutional guarantee of remedy as encompassing the fundamental right to a “meaningful remedy” that provides satisfaction for injuries sustained); *Bell*, 757 P.2d at 259, 264; *Lucas*, 757 S.W.2d at 691; *Hardy v. VerMeulen*, 512 N.E.2d 626, 631 (Ohio 1987) (Douglas, J., concurring) (explaining that the gist of a right to a remedy violation is the absence of a reasonable alternative remedy); *Smith v. Dep’t of Ins.*, 507 So.2d 1080 (Fla. 1987) (holding damage cap invalid under right of access to the courts because it provided no alternative remedy or commensurate benefit to the plaintiff). Cf. *Judd*, 103 P.3d at 139 (holding that legislature failed to provide an adequate substitute remedy, but sustaining the inadequate remedy against constitutional challenge).

85. *Bell*, 757 P.2d at 260.

86. *Id.*

87. *Id.* (striking down tort reform statute capping damages in medical malpractice actions at \$250,000 for noneconomic damages and 1 million for aggregate damages); *but see Samsel v. Wheeler Transp. Servs. Inc.*, 789 P.2d 541, 557-58 (Kan. 1990) (overturning decision in *Bell* and finding adequate quid pro quo provided by revised tort reform law interpreted to preclude all remittitur below the statutory cap of \$250,000); *Lucas*, 757 S.W.2d. at 691; *Smith*, 507 So.2d 1080; cf. *Judd*, 103 P.3d at 148 (Durham, J., dissenting).

88. *Bell*, 757 P.2d at 259.

requirements . . . Due process requires that the legislative means selected have a real and substantial relation to the objective sought. One way to meet due process requirements is through substitute remedies.”⁸⁹ Kansas focuses its adequate substitute requirement upon the existence of a “quid pro quo” that provides the plaintiff with some benefit in exchange for the retraction of a common-law remedy.⁹⁰ Applying this standard in *Bell*, the Kansas Court held that the substitute remedies provided by the legislative cap on damages was inadequate because it treats every injury identically, denies all remedy for real losses exceeding the cap, and removes “a substantial right of the plaintiff and gives him *nothing* in return.”⁹¹

More recently, the Utah Supreme Court applied a similar standard of an adequate substitute remedy in evaluating its tort reform legislation.⁹² The right to a remedy, the Court held, is satisfied “if the law provides an injured person an effective and reasonable alternative remedy ‘by due course of law’ for vindication of his constitutional interest. The benefit provided by the substitute must be substantially equal in value or other benefit to the remedy abrogated.”⁹³ Utah thus looks for a substitute remedy of equal or additional value to provide the quid pro quo necessitated by the abridgment of the right to a remedy.⁹⁴ Accordingly, in *Judd v. Drezga*, the court held that the mandated adequate remedy was not found in the legislature’s cap on quality of life damages.⁹⁵

The question of whether tort reform caps on damages violate due process by providing an inadequate substitute remedy was presented to the U.S. Supreme Court in *Fein v. Permanente Medical Group*; however, the Court denied certiorari.⁹⁶ In *Fein*, the California Supreme Court upheld a cap on non-economic damages in medical malpractice cases against a due process challenge.⁹⁷ In dissenting from the denial of certiorari, Justice White argued that the question of whether due process required adequate relief in the tort context was of utmost importance.

Whether due process requires a legislatively enacted compensation scheme to be a quid pro quo for the common-law or state-law remedy

89. *Id.* (internal citations omitted).

90. *Id.* at 258.

91. *Id.* at 264.

92. *Judd*, 103 P.3d at 139.

93. *Id.*

94. *Id.* at 139, 148.

95. *Id.* at 138.

96. 474 U.S. 892 (1985).

97. 695 P.2d 665, 680 (Cal. 1985).

it replaces, and if so, how adequate it must be, thus appears to be an issue unresolved by this Court, and one which is dividing the appellate and highest courts of several States. The issue is important, and is deserving of this Court's review. Moreover, given the continued national concern over the "malpractice crisis," it is likely that more States will enact similar types of limitations, and that the issue will recur. I find, therefore, that the federal question presented by this appeal is substantial, and dissent from the Court's conclusion to the contrary.⁹⁸

Previously, the Supreme Court had upheld a congressional restriction on recoverable damages for nuclear accidents in *Duke Power v. Carolina Environmental Study Group Inc.*⁹⁹ While declining to hold expressly that an adequate substitute remedy was required by due process, the Court went to great lengths to explain how the Price-Anderson Act did in fact provide a "reasonably just substitute" for the common-law state remedies that it replaced.¹⁰⁰ The Court highlighted the legislative assurances of certain recovery from a designated fund and the mandatory waiver of defenses leading to no-fault liability as ample quid pro quo for the uncertainty of liability and recovery under common law.¹⁰¹

The requirement of an adequate substitute remedy finds support in earlier U.S. Supreme Court cases beginning in the nineteenth century. In 1845, Justice Story, dissenting in *Cary v. Curtis*, found the use of jurisdiction to deprive a plaintiff of an adequate remedy to be problematic.¹⁰² In *Cary*, the majority upheld a congressional jurisdictional statute barring the common-law remedy of restitution against a customs tax collector.¹⁰³ The majority reasoned that Congress had the power to limit the jurisdiction of the lower federal courts, and emphasized the availability of alternative remedies in Hart-like fashion.¹⁰⁴ Justice Story, however, delved into the merits of the substitute legislative remedy, finding it inadequate: "[W]hat ground is there to suppose that Congress could intend to take away so important and valuable a remedy, and leave our citizens utterly without any adequate protection?"¹⁰⁵ Story found the alternative remedies identified by the majority (appealing to the executive's discretion for repayment or

98. *Fein*, 474 U.S. at 894-95 (White, J., dissenting).

99. 438 U.S. 59 (1978).

100. *Id.*

101. *Id.*

102. 44 U.S. 236, 254 (1845) (Story, J., dissenting).

103. *Id.* at 252.

104. *Id.* at 250; see Anderson, *supra* note 6.

105. 44 U.S. at 255.

refusing to pay the tax) to be circuitous and impractical.¹⁰⁶ The total elimination of one type of restitution remedy by the use of a jurisdictional statute was, for Story, a misuse of judicial power.

Justice Story's approach of inquiring into the adequacy of the remedial substitute was adopted by the Supreme Court in a series of cases in the early twentieth century challenging economic legislation after the enactment of the Fourteenth Amendment.¹⁰⁷ In these cases, the Court assessed the reasonableness of the legislative substitute remedy by determining whether it substantially departed from the common-law approach.¹⁰⁸ For example, in *Missouri Pacific Railway Co. v. Humes*, the defendant challenged a statutory double damages multiplier for harms to livestock caused by railroads.¹⁰⁹ A unanimous Court upheld the double damages provision because it approximated a possible remedy at common law since the jury had discretion to award damages above pecuniary loss.¹¹⁰ A second example is seen in the workers' compensation cases evaluating laws that precluded employees from seeking tort compensation for workplace injuries.¹¹¹ The Court sustained the legislative substitutes against due process challenge finding the regulation adequate because it did not dramatically differ from the compensation available at common law.¹¹² In addition, the Court, like state courts in the quid pro quo cases, found that the legislature provided an additional benefit to plaintiffs in easier liability rules and scheduled damages.¹¹³

The rule of "adequate relief" as a standard for testing the constitutionality of a substitute remedy finds additional support in modern taxpayer cases in the Supreme Court.¹¹⁴ In these cases, the Court found a denial of due process where prevailing plaintiffs were denied *meaningful* and *adequate* remedies for a proven violation.¹¹⁵ While courts have flexibility to choose among appropriate equitable and

106. *Id.* at 256.

107. *See* Goldberg, *supra* note 67, at 568-72.

108. *Id.*

109. 115 U.S. 512 (1885).

110. *Id.* at 523.

111. *Middleton v. Tex. Power & Light Co.*, 249 U.S. 152, 163 (1919); *New York Central R.R. v. White*, 243 U.S. 188, 201 (1917).

112. *Middleton*, 249 U.S. at 163; *White*, 243 U.S. at 202; *see* Goldberg, *supra* note 67, at 573-74.

113. *Middleton*, 249 U.S. at 163; *White*, 243 U.S. at 202; *see* Goldberg, *supra* note 67, at 573-74.

114. *Reich v. Collins*, 513 U.S. 106, 109 (1994); *Harper v. Va. Dep't of Taxation*, 509 U.S. 86, 101-02 (1993); *McKesson Corp. v. Div. of Alcoholic Beverages and Tobacco*, 496 U.S. 18, 39 (1990).

115. Thomas, *Ubi Jus*, *supra* note 4, at 1641.

monetary remedies, they cannot, consistent with due process, select a remedy that fails to provide meaningful relief to the individual plaintiff.¹¹⁶ The mere availability of alternative remedies did not insulate the denial of damages from constitutional infirmity.

The Supreme Court's cases on civil rights remedies continue this pattern of focusing on the adequacy of the legislative substitute remedy.¹¹⁷ In these cases, the Court asks whether the legislative substitute is *equally effective* at protecting the constitutional right as the judicial remedy.¹¹⁸ The civil rights cases, like the historical economic legislation cases, engage in a comparison between the preexisting judicial remedy and the legislative substitute. The nature of this comparison, however, differs significantly based on the existence of a constitutional fundamental right.¹¹⁹ The interplay of a fundamental right mandates an "equally effective" remedy that provides an individualized remedy that achieves the remedial goal at least as well as the judicial remedy. For example, in *Carlson v. Green*, the Court held that a restriction of mental distress damages under the Federal Tort Claims Act failed to provide an equally effective remedy for an individual plaintiff's Eighth Amendment claims as the non-pecuniary damages available as a remedy in federal court.¹²⁰

Requiring an adequate substitute remedy is therefore the threshold question in a constitutional challenge to remedy restrictions under due process. Courts would first inquire as to the existence of an adequate substitute remedy in order to determine whether the legislation

116. *Id.* See *Harper*, 509 U.S. at 102 ("[Virginia] is free to choose which form of relief it will provide, so long as that relief satisfies the minimum federal requirements we have outlined. State law may provide relief beyond the demands of federal due process, but under non circumstances may it confine petitioners to a lesser remedy.").

117. Thomas, *Remedial Rights*, *supra* note 4, at 756-66. *E.g.*, *Dickerson v. United States*, 530 U.S. 428 (2000) (striking congressional remedy for a Miranda violation finding it not "as equally as effective" in protecting the constitutional right as the judicial prophylactic remedy of mandatory advanced warnings); *Carlson v. Green*, 446 U.S. 14 (1980) (invalidating the Federal Tort Claims Act's prohibition of mental distress damages for prisoner civil rights claims because the legislative remedy was not as effective at protecting constitutional rights as the judicial remedy).

118. Thomas, *Remedial Rights*, *supra* note 4, at 756-66.

119. Where remedies for statutory rights are restricted, legislatures are less likely to run into due process problems since legislatures have the power to create or eviscerate the very right itself, and thus can accomplish that same result via a remedy restriction. Thomas, *Remedial Rights*, *supra* note 4, at 742-43. Constitutional rights, and common-law rights, however, differ in their creation independent of the legislature and in their significance for the rule of law. See Walter Dellinger, *Of Rights and Remedies: The Constitution as a Sword*, 85 HARV. L. REV. 1532, 1534 (1972); Goldberg, *supra* note 67, at 529 (finding a constitutional basis for the common-law tort right to redress).

120. 446 U.S. 14 (1980).

significantly burdens the fundamental remedial right.¹²¹ In the tort reform context, the Utah Supreme Court found without question that damages caps constituted an inadequate substitute. “It is self-evident that the cap on the quality of life damages, which does nothing more than reduce [plaintiff]’s recovery, does not provide a substitute remedy substantially equal to that abrogated.”¹²² In the absence of an adequate substitute, the state interference with the right to a remedy would be subjected to rigorous judicial scrutiny.¹²³ However, where courts find an adequate substitute remedy, as in the cases where a new benefit or quid pro quo is available, the legislative remedy is sufficient and no further judicial scrutiny is required.¹²⁴

IV. CHANGING BUSINESS AS USUAL IN ECONOMIC DUE PROCESS CASES

Explicitly recognizing the fundamental right to a remedy significantly alters the existing framework from which courts have reviewed challenges to tort reform statutes. Most state courts analyzing due process challenges to tort reform statutes have scrutinized this social and economic legislation under a rational basis standard.¹²⁵ Finding that the legislation bears some rational connection to plausible social and economic goals, the courts have upheld the statutes against challenge.¹²⁶

121. *Judd*, 103 P.3d at 139 (finding as threshold question that cap on quality of life damages did not provide substitute remedy substantially equal to that provided by the common law).

122. *Id.*

123. An analytical parallel to this framework can be drawn from the U.S. Supreme Court’s jurisprudence on legislative restrictions on the fundamental right to marry. *See Zablocki v. Redhail*, 434 U.S. 374 (1978). The Court first asks whether the legislation burdens the fundamental right by “significantly interfering” with the right to marry. *Id.* at 381. Only where significant interference is found will the Court subject the regulation to strict scrutiny; otherwise, laws are reviewed under rational basis. *Id.* at 386; *see Moe v. Dinkins*, 533 F. Supp. 623 (S.D.N.Y. 1981), *aff’d*, 669 F.2d 67 (2d Cir.), *cert. denied*, 459 U.S. 827 (1982); *see also Home Bldg. & Loan Ass’n v. Blaisdell*, 290 U.S. 398, 442-43 (1934) (delaying mortgage holder’s right to repossession during Depression did not deny right to a remedy).

124. *See, e.g., Johnson v. Saint Vincent Hosp.*, 404 N.E.2d 585, 601 (Ind. 1980); *Sibley v. Bd. of Supervisors*, 477 So.2d 1094 (1988); *Butler v. Flint Goodridge Hosp.*, 607 So.2d 517, 521 (La. 1992) (finding quid pro quo benefit provided in tort reform statute capping non-pecuniary damages where statute assured continuation of viable medical malpractice insurance industry). *But see Bell*, 757 P.2d at 259, 264 (holding that continuing medical malpractice insurance was not a new benefit to the plaintiff achieved by the tort reform statute itself).

125. *See e.g., Franklin v. Mazda Motor Corp.*, 704 F. Supp. 1325, 1337 (D. Md. 1989); *Judd*, 103 P.3d at 143; *Peters v. Saft*, 597 A.2d 50, 53 (Me. 1991); *Fein v. Permanente Group*, 695 P.2d 665, 680 (Cal. 1985); *Lucas*, 757 S.W.2d at 691. *See Light, supra* note 9, at 319 (“[D]ue process . . . analyses all rest upon rational basis review.”); Carly Kelly & Michelle Mello, *Are Medical Malpractice Caps Constitutional? An Overview of State Litigation*, 33 J. MED. L. & ETHICS 515, 516 (2005) (“We conclude that damages caps passed as a response to documented strains in the liability insurance market are generally upheld against constitutional challenges. . .”).

126. *Judd*, 103 P.3d at 139-42; *Pulliam v. Coastal Emergency Servs. of Richmond, Inc.*, 509

Similarly, the U.S. Supreme Court has adopted a minimal scrutiny standard for reviewing economic legislation challenged under due process grounds. In cases decided soon after the enactment of the Fourteenth Amendment, the Court reviewed economic legislation in due process cases under a deferential standard, upholding state laws that provided reasonably adequate remedies. Then for over forty years during the *Lochner* era, the Court struck down over 200 economic regulations on due process grounds under a higher standard of scrutiny on grounds that they interfered with a liberty of contract.¹²⁷ Strong rejection of *Lochner* beginning with the New Deal era led the Court to abandon even the nineteenth-century minimal inquiry of adequacy and in its place adopt a “strategy of extreme deference to the legislature in economic due process cases.”¹²⁸

The Court proclaimed in one opinion, “So far as the requirement of due process is concerned, . . . a state is free to adopt whatever economic policy may reasonably be deemed to promote public welfare Under this approach, . . . state laws were granted a presumption of constitutionality that could be overcome only by showing them to be clearly irrational or unreasonable. In other words, minimal judicial scrutiny became the Court’s modus operandi in cases involving economic legislation challenged as violative of the Due Process Clause.

Minimal scrutiny, however, is something of a misnomer. In fact, minimal scrutiny is so deferential as to be virtually nonexistent. In economic due process cases, then, where minimal scrutiny is operative, the Court functions as a rubber stamp for statutory enactments, abandoning all oversight of the legislature. As a result, in cases involving economic legislation the Due Process Clause has no efficacy.¹²⁹

After 1937, “Lochnerism” became shorthand for judicial activism and improper judicial review of state regulation.¹³⁰ However, the

S.E.2d 307, 318 (Va. 1999). *But see* Lucas, 757 S.W.2d 687 (striking down damages cap under rational basis review of due process challenge); Ferdon *ex rel.* Petrucelli v. Wis. Patients Compensation Fund, 701 N.W.2d 440 (Wis. 2005) (striking down cap on non-economic damages for medical malpractice cases under rational basis “with teeth” review in equal protection challenge).

127. Jeffrey M. Shaman, *On the 100th Anniversary of Lochner*, 72 TENN. L. REV. 455, 496 (2005). In *Lochner v. New York*, the Court struck down a maximum hour law for New York bakers on due process grounds holding that the state’s regulation impermissibly interfered with the bakers’ fundamental liberty to contract. 198 U.S. 45 (1905).

128. Shaman, *supra* note 127, at 491.

129. *Id.* at 491-92.

130. See Jack M. Balkin, “*Wrong the Day It Was Decided*”: *Lochner* and Constitutional

problem with *Lochner* is not its use of heightened review under substantive due process.¹³¹ Rather, *Lochner*'s invalidity stems primarily from its now-discredited recognition of a fundamental liberty of contract.¹³² The Court's substitution of its own laissez-faire economic agenda for the protective interests of the New York legislature, and the Court's refusal to test the legitimacy of the legislature's motivations against empirical evidence and data, fueled the criticism of the decision that led to a constitutional crisis.¹³³ Yet even the dissenting Justice Harlan applied a strict scrutiny standard using alternative economic assumptions and factual information submitted in the case to uphold the New York maximum hour law for bakers.¹³⁴ Harlan's application of strict scrutiny that challenges pretextual legislative motives and demands empirical and factual support for legislation is precisely the standard of judicial review advanced here.

Some have argued that the Supreme Court may have "overreacted" to *Lochner* and its political fallout by abandoning exacting due process review for all economic legislation.¹³⁵ The Court certainly has not abandoned substantive due process review in whole. Indeed, substantive due process review under a heightened standard has flourished under the Court's privacy cases.¹³⁶ This use of substantive due process to challenge state regulation is alive and well, and lends support to the use of heightened analysis for fundamental remedial rights.¹³⁷

Historicism, 85 B.U. L. Rev. 677 (2005); George L. Priest, *The Constitutionality of State Tort Reform Measures and Lochner*, 31 SETON HALL L. REV. 683 (2001) (arguing against a *Lochner*-like approach to evaluating tort reform and advocating an economic efficiency driven approach).

131. Balkin, *supra* note 130, at 678; Shaman, *supra* note 127, at 491 (summarizing arguments to this effect). See David E. Bernstein, *Lochner Era Revisionism, Revised: Lochner and the Origins of Fundamental Rights Constitutionalism*, 92 GEO. L. J. 1, 12 (2003) (arguing for a renewed focus on *Lochner*'s primary jurisprudential importance as an originator of constitutional analysis of fundamental liberties).

132. Shaman, *supra* note 127, at 491.

133. Balkin, *supra* note 130, at 686; Shaman, *supra* note 127, at 592 (citing *Williamson v. Lee Optical Co.*, 348 U.S. 483, 488 (1955) and its holding that "the day is gone when this Court uses the Due Process Clause of the Fourteenth Amendment to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought" and *Olsen v. Nebraska*, 313 U.S. 236, 246 (1941), "We are not concerned . . . with the wisdom, need, or appropriateness of the legislation.").

134. Shaman, *supra* note 127. The Court's continued invalidation of legislation for economic and labor protections enacted during the Depression led President Franklin Roosevelt to threaten the Court with his plan of expanding the Court to fifteen justices and mandating retirement for senior Justices. *Id.* at 497.

135. *Id.*

136. *Id.* at 499.

137. Bernstein, *supra* note 131, at 12; Robert Riggs, *Constitutionalizing Punitive Damages: The Limits of Due Process*, 52 OHIO ST. L.J. 859, 869 (1991) ("Substantive due process thus continues alive and well, although its application to punitive damages appears to have much more in

Moreover, the Court has signaled a return to substantive review of economic regulation in the punitive damages cases.¹³⁸ In these cases, *BMW v. Gore*¹³⁹ and *State Farm v. Campbell*,¹⁴⁰ the Court has adopted a heightened standard of scrutiny to review the award of punitive damages under state law. The protection of a fundamental property right to money damages has justified the adoption of a heightened review of the challenged remedy. In assessing the arbitrariness of punitive damages awards under the Due Process Clause, the Court has adopted a demanding standard of scrutiny that requires that the interest served by the judicial action be compelling in light of the reprehensibility of the defendants' conduct and that it be narrowly tailored to the amount of compensatory damages and regulatory sanctions.¹⁴¹ Extending this heightened scrutiny of punitive damages to the related tort issue of non-pecuniary damages is a small stretch, regardless of whether the courts are evaluating arbitrariness at the ceiling or floor of relief.¹⁴²

The strict scrutiny calculus as applied to the remedial jurisdiction stripping statutes, and tort remedy restrictions in general, would demand compelling state interests for the remedial restrictions that were accomplished through the least restrictive legislative alternative.¹⁴³ In the few cases that have subjected tort reform statutes to heightened scrutiny in the past, the legislation has been struck down.¹⁴⁴ Tort reform damages caps have also been invalidated by state courts applying an

common with the old economic substantive due process, now largely disavowed, than with the new substantive due process of privacy and fundamental rights.”).

138. Mark Geistfeld, *Constitutional Tort Reform*, 38 LOY. L.A. L. REV. 1093, 1093-94 (2005) (endorsing expanded substantive due process review beyond punitive damages to all tort damages); Shaman, *supra* note 127, at 501-02 (“A majority of the Court, then, appears willing to revive economic substantive due process review in this specialized area of the law that overlaps with procedural concerns.”).

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

140. *State Farm Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003).

141. Other scholars have agreed with an expanded use of the economic due process analysis in the context of tort damages, but have sought to achieve a judicial ceiling rather than a minimum flooring for arbitrary awards. Geistfeld, *supra* note 138, at 1107-08; Paul DeCamp, *Beyond State Farm: Due Process Constraints on Noneconomic Compensatory Damages*, 27 HARV. J.L. & PUB. POL'Y 231 (2003).

142. See DeCamp, *supra* note 141; see also *State Farm*, 538 U.S. at 416 (discussing close parallel between noneconomic and punitive damages).

143. Cf. *Ferdon ex rel. Petrucelli v. Wis. Patients Compensation Fund*, 701 N.W.2d 440, 456 (Wis. 2005) (stating that, if strict scrutiny applied in that case, that the Defendant would have the burden of proving that the statutory “cap on noneconomic damages . . . promotes a compelling governmental interest and that it is the least restrictive means for doing so”)

144. *Kenyon v. Hammer*, 688 P.2d 961 (1984); *Bell*, 757 P.2d at 259; *Morris*, 576 N.E.2d at 780-81 (Sweeney, J., concurring in part and dissenting in part) (applying strict scrutiny to invalidate damages cap).

intermediate level of scrutiny.¹⁴⁵ These courts have found the importance, but not the fundamentality, of the right to a remedy to merit more judicial scrutiny than the usual deferential review. This application of a heightened standard does not mean the per se invalidation of tort reform remedy restrictions; instead, it requires more reasoned justification from the legislature than currently exists.¹⁴⁶

Under strict scrutiny, the state bears a more significant burden in justifying its economic legislation with a compelling, rather than superficially rational interest.¹⁴⁷ The Court will delve more closely into the interests asserted for the legislation to determine whether they are meritorious or pretextual.¹⁴⁸ It will no longer be possible for the state to rely upon “common sense” to justify its economic legislation.¹⁴⁹ Rather than merely giving the state carte blanche to legislate, the court will inquire as to the credibility of the asserted economic interest.¹⁵⁰ Certainly many have discredited the asserted state interests of tort reform that purport to solve the problem of the litigation explosion, the runaway

145. See, e.g., *Carson v. Maurer*, 424 A.2d 825, 831 (N.H. 1980) (equal protection challenge); *Morris v. Savoy*, 576 N.E.2d 765 (Ohio 1991) (requiring a “real and substantial relation” between the damages caps and the state’s interest); *Knowles ex rel. Knowles v. United States*, 544 N.W.2d 183 (N.D. 1996); see also *Ferdon*, 701 N.W.2d at 460-61 (applying “rational basis with teeth” to strike down caps on noneconomic damages in medical malpractice actions).

146. *Geistfeld*, *supra* note 138, at 1094 (“Constitutional tort reform therefore can serve the valuable role of forcing state courts and legislatures to identify more clearly the substantive objectives of tort law, an issue of critical importance that has not been adequately addressed by the reform movements of the last century.”).

147. Cf. *Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74, 94 (1980) (Marshall, J., concurring) (“Indeed, our cases demonstrate that there are limits on governmental authority to abolish ‘core’ common-law rights, including rights against trespass, at least without a compelling showing of necessity or a provision for a reasonable alternative remedy.”).

148. See Lucinda M. Finley, *The Hidden Victims of Tort Reform: Women, Children, and the Elderly*, 53 EMORY L.J. 1263, 1266 (2004) (concluding that non-economic damages caps discriminate against women based upon research showing that women are awarded greater shares of non-economic damage awards, while men obtain greater economic and total damage awards); Martha Chamallas, *The Architecture of Bias: Deep Structures in Tort Law*, 146 U. PA. L. REV. 463, 467, 499-502 (1998) (arguing that there is gender bias implicit in the devaluation of non-pecuniary and emotional loss).

149. When the Republican Party gained control of both houses of Congress in 1994, tort reform was a critical component of the House Republicans’ platform, “Contract with America,” which called for a variety of tort reforms designated the “Common Sense reform bills.” Note, “*Common Sense Legislation: The Birth of Neoclassic Tort Reform*,” 109 HARV. L. REV. 1765, 1769 (1996); see also Benjamin H. Davidson, et. al., *Texas Statutory Caps and Settlement Credits After House Bill 4*, 46 S. TEX. L. REV. 1217, 1225 (2005) (“Describing the caps as a balance of ‘common-sense’ tort reform and protection of injured parties’ rights.”); Light, *supra* note 9, at 350 (“Intuition suggests that reducing large tort awards will reduce the level of the premiums necessary to fund the awards. This may be factually wrong, but it is at least plausible.”).

150. *Frontiero v. Richardson*, 411 U.S. 677, 689 (1973) (searching for “concrete evidence” to support the government’s “questionable” explanation of its statutory scheme in strict scrutiny analysis under due process).

juries, or the insurance crisis.¹⁵¹ Moreover, it could be argued that the legislative interests of protecting big business and repeat wrongdoers from accepting the externalities of their illegal actions fails to meet the compelling interest standard.¹⁵²

Under the second prong of a strict scrutiny analysis, courts would examine tort reform legislation to ensure that the statutes are sufficiently tailored or connected to the compelling interest. Courts applying heightened scrutiny to tort reform statutes in the past have struck down laws that are underinclusive by forcing only the most severely injured victims to bear the full social responsibility of insuring health care.¹⁵³ It could also be argued that the tailoring connection is not met by imposing penalties for frivolous lawsuits on prevailing plaintiffs with meritorious claims. Tailoring questions are also raised by the fact that total compensatory damages have risen despite the non-economic caps, and by suggestions that these increases in economic damages may be exacerbated by the enactment of non-economic damages caps.¹⁵⁴ In

151. Peck, *supra* note 9, at 843-60; Kathryn Zeiler, *Turning From Damages Caps to Information Disclosure: An Alternative to Tort Reform*, 5 YALE J. HEALTH POL'Y L. & ETHICS 385 (2005) (asserting that statutory caps on medical malpractice damages are not effective in addressing health insurance concerns).

152. See *Ferdon*, 701 N.W.2d at 464.

The primary, overall legislative objective is to ensure the quality of health care for the people of Wisconsin. The legislature obviously did not intend to reach this objective by shielding negligent health care providers from responsibility for their negligent actions. After all, it is a major contradiction to legislate for quality health care on one hand, while on the other hand, in the same statute, to reward negligent health care providers. A cap on noneconomic damages diminishes tort liability for health care providers and diminishes the deterrent effect of tort law.

Id. at 464.

Wealthy interests with experience as disappointed defendants given to habitual negligence or intentional recklessness, use their raw political power to take their complaints to the legislature in order to rig the legal system in their favor. . . . [they] seek to hijack the civil justice system so that it does not serve the objective of redressing grievances but instead minimizes liability for wrongdoing.

Peck, *supra* note 9, at 856-60, 894-95; see also Daniel J. Capra, *An Accident and a Dream: Problems with the Latest Attack on the Civil Justice System*, 20 PACE L. REV. 339 (2000).

153. *Sheward*, 715 N.E.2d at 1094-95; cf. *Ferdon*, 701 N.W. 2d at 465 ("Those who suffer the most severe injuries will not be fully compensated for their noneconomic damages, while those who suffer relatively minor injuries with lower noneconomic damages will be fully compensated."). See also Note, *Resurrecting Economic Rights: The Doctrine of Economic Due Process Reconsidered*, 103 HARV. L. REV. 1363, 1378-79 (1990). The author states that:

By analogy to the takings clause, the Court could declare that the due process clause "bars Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." Thus, laws that single out one group to bear an economic burden that cannot fairly be said to have been caused by that group effect an impermissible end.

Id.

154. See Catherine M. Sharkey, *Caps and the Construction of Damages in Medical*

addition, it could be argued that capping damages is not the “least restrictive alternative.” Capping damages for all tort plaintiffs appears overly broad and as compared to narrower limitations on damages that are excessive, unsupported by the evidence, or significantly out of line with similar awards.¹⁵⁵ This more demanding tailoring is necessitated by the involvement of a fundamental right to an adequate remedy.

V. CONCLUSION

A stricter standard of scrutiny for tort reform statutes holds legislatures accountable for their actions. It blocks attempts to circumvent public scrutiny through the evasive technique of remedies stripping. Legislatures are required to provide sound reasons for their economic decisionmaking that can be supported with reliable data and logical analysis. The accountability and reliability achieved with the strict scrutiny standard directs states to legislate in a way that does not misuse remedies simply to accomplish political ends.

Malpractice Cases, in MEDICAL MALPRACTICE AND THE U.S. HEALTH CARE SYSTEM: NEW CENTURY, DIFFERENT ISSUES 148-66 (Rogan Kersh & William Sage, eds. forthcoming 2006) (manuscript on file with the *Akron Law Review*).

155. See *Lucas v. United States*, 757 S.W.2d 687, 690 (Tex. 1988).