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

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Note

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I. INTRODUCTION

Medical malpractice liability jury awards have soared in recent years and have contributed to a serious “health care crisis”: costs of care are increasing while availability and quality of care are decreasing.\(^1\) From 1997 to 2006, the median jury award in a medical malpractice case in the United States more than tripled, swelling from $157,000 to $487,500,\(^2\) and Illinois has not been spared from increasing malpractice liability problem [hereinafter “the damages crisis”].\(^3\) Further, this threat to the stability of the health care system is not a recent phenomenon.\(^4\) Over the last forty years, medical malpractice liability costs and insurance

\(^1\) AMERICAN MEDICAL ASSOCIATION, MEDICAL LIABILITY REFORM—NOW! 3-7 (2008), available at http://www.ama-assn.org/go/mlrnw (last visited Nov. 4, 2010) [hereinafter REFORM NOW]. The cost of health insurance has made it impossible or impracticable for millions of Americans to purchase insurance. Zachary J. Houghton, Treating America’s Ailing Healthcare System: Is the Illinois Covered Act a Panacea for America’s Uninsured Poor?, 58 DEPAUL L. REV. 759, 765 (2009). In 2006, forty-seven million Americans did not have insurance for the entire year. Id. Many argue that the increasing cost of liability insurance has contributed to rising costs and decreased availability of quality health care. E.g., P.A. 94–677, Art. 1, § 101 (eff. Aug. 25, 2005); see infra notes 4–5 (describing the increasing cost of medical malpractice liability and the challenges that such costs impose on the health care system).

\(^2\) REFORM NOW, supra note 1, at 4.

\(^3\) See Carolyn Victoria J. Lees, The Inevitable Reevaluation of Best v. Taylor in Light of Illinois’ Health Care Crisis, 25 N. ILL. U. L. REV. 217, 218 (2005) (“While the average jury verdict award in Cook County in 1998 was $1.07 million, the average verdict jumped to $4.45 million in 2003. Even more astounding is the fact that the average pain and suffering award in Cook County was $3.12 million in 2003.”).

\(^4\) REFORM NOW, supra note 1, at 2; Jane C. Arancibia, Statutory Caps on Damage Awards in Medical Malpractice Cases, 13 OKLA. CITY U. L. REV. 135, 136 (1988). In the 1970s, the health care system faced challenges both in availability and affordability, and the 1980s brought instability and uncertainty as premiums drastically increased for liability insurance, making health care less affordable and causing specialists to cut back on many risky procedures with high-risk patients. REFORM NOW, supra note 1, at 2; see also Arancibia, supra, at 139 (arguing that it is inaccurate to characterize the 1980s as a crisis of affordability when the prohibitive cost of insurance made it practically unavailable). In litigious states where the chance of being sued was higher and where costs of liability insurance were greater, some physicians were forced to close their practices altogether. REFORM NOW, supra note 1, at 2.
premiers have increased significantly.\textsuperscript{5} As a result, the growing potential jury awards in medical malpractice lawsuits continues to provide increasing incentive for frivolous lawsuits, and many claims are filed without merit.\textsuperscript{6} Because of the increasingly high costs that medical malpractice lawsuits are imposing on the health care system, Illinois needs liability reform that would stop this trend and improve the health care system.\textsuperscript{7}

Opponents of limiting malpractice liability argue against reform on the grounds that there is no proven correlation between limiting malpractice liability and overall health care costs.\textsuperscript{8} However, there is no consensus as to whether or not tort reform benefits the system or decreases health care costs because the research has been inconsistent.\textsuperscript{9} Moreover, whether or not there is a statistically significant relationship between health care costs and malpractice liability, the

\textsuperscript{5} Arancibia, supra note 4, at 137 (citing Patricia M. Danzon et al., \textit{The Frequency and Severity of Medical Malpractice Claims: New Evidence}, 49 LAW \& CONTEMPS. PROBS. 57 (1986)). The frequency and number of medical malpractice claims drastically increased from 1978 to 1984. \textit{Id}. The leading medical malpractice insurance company reported a fifty-five percent increase in total number of claims from 1980 to 1984. \textit{Id}. The American Medical Association also documented the increase in tort costs, medical malpractice liability insurance premiums, and frequency of claims against health care providers that started in the 1970s. \textit{REFORM NOW, supra note 1, at 4-5. Further, the St. Paul Fire & Marine Insurance Company reported that from 1969 to 1974, it saw the number of claims per physician increase from one claim for every twenty physicians to one claim for every ten physicians. Lees, supra note 3, at 218. In addition, the average claim went from $6,075 in 1969 to $12,534 in 1975. \textit{Id}.}

\textsuperscript{6} \textit{REFORM NOW, supra note 1, at 5 (citing David M. Studdert, et. al., \textit{Claims, Error, and Compensation Payments in Medical Malpractice Litigation}, 354 N. ENG. J. MED. 2024, 2024-33 (2006)}. Research shows that 40 percent of closed claims had no merit (37 percent involved no medical error and three percent did not even involve injury). \textit{Id}. \textsuperscript{7} \textit{See Dennis Byrne, Supreme Court Sets Bad Public Policy, CHI. TRIB., Feb. 9, 2010, at 15 (stating that the sky is the limit on damages in medical malpractice cases and that ridiculously high awards handed out in Illinois are a problem); see also infra note 17 (describing how malpractice liability caps have helped the health care system).}


\textsuperscript{9} Thomas P. Hagen, \textit{“This May Sting a Little”—A Solution to the Medical Malpractice Crisis Requires Insurers, Doctors, Patients, and Lawyers to Take Their Medicine}, 26 SUFFOLK U. L. REV. 147, 147-48 nn. 1–7 (1992) (citing numerous studies that argue in favor of and against tort reform).
increasing severity and frequency of medical malpractice suits has unquestionably caused liability insurance rates to rise and has forced physicians to practice “defensive medicine”—i.e., see more patients per day or refuse to perform risky surgeries—to avoid these costs. Although there are certainly other causes of the health care crisis, reducing malpractice liability would cut out some of the costs that are driving the health care crisis.

Fortunately, many states have acted to ameliorate this growing crisis by instituting caps on certain damages that juries may award in medical malpractice suits against health care providers. Over half of the fifty states have enacted caps on medical malpractice jury awards of damages [hereinafter “damages”], and since the damages crisis began, forty-nine states have enacted laws addressing the need to reduce costs from medical malpractice liability. In fact, although opponents of these laws argue that caps on damages are an insufficient mechanism to control the cost of liability insurance and ensure adequate availability of health care, states that limit damages have experienced lower costs of malpractice liability, lower medical expenditures

10 Id. at 147; Alec Shelby Bayer, Comments and Notes, Looking Beyond the Easy Fix and Delving Into the Roots of the Real Medical Malpractice Crisis, 5 HOUS. J. HEALTH L. & POL’Y 111, 114 (2005).
11 See Bayer, supra note 10, at 121 (arguing that the government has oversimplified the health care crisis, blaming it all on exorbitant jury awards and narrowly arguing for caps on noneconomic damages); see also supra note 9 (discussing sources that argue both sides of this debate).
12 P.A. 94-677, Art. 1, § 101 (eff. Aug. 25, 2005); see also notes 1–5 (discussing the problem with growing jury awards and the benefits experienced by states who have instituted caps on damages).
13 See, e.g., C.R.S.A. § 13-64-302 (West 2005) (limiting total damages for a course of care against a health care professional to $1,000,000.00 and limiting noneconomic damages in such cases to $300,000.00); R.C. § 2315.21 (limiting punitive damages in medical malpractice cases); Va. Code Ann. § 8.01-581.15 (limiting total damages in any medical malpractice verdict to $1,500,000.00 with a $50,000.00 increase in the cap each year starting July 1, 2000).
15 Carrie Lynn Vine, Addressing the Medical Malpractice Insurance Crisis: Alternatives to Damage Caps, 26 N. ILL. U. L. REV. 413, 420 & 436 (arguing that reducing the cost of medical malpractice liability requires a multi-faceted approach). As an alternative to damage caps, Vine proposes a merit-based system for calculating medical malpractice insurance for individual doctors based in part on a doctor’s history of being sued. Id. She also proposes implementing Australia’s “Most Extreme Case Model,” a more nuanced limit on damages. Id. at 433-437.
overall, and increased availability of health care services.\textsuperscript{17} It is clear, then, that limiting medical malpractice jury awards is an effective means of improving the availability and quality of health care.\textsuperscript{18}

Aware of the damages crisis facing Illinois and recognizing the efficacy of limiting medical malpractice jury awards,\textsuperscript{19} the Illinois General Assembly has proposed statutory caps on damages three times, but in each case the Illinois Supreme Court has found the caps unconstitutional.\textsuperscript{20} This Note examines the most recent Illinois Supreme Court decision to so

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\textsuperscript{17} REFORM NOW, supra note 1, at 7 (citing Office of the Assistant Sec’y for planning and Evaluation, U.S. Dep’t of Health and Human Servs., Special Update on Med. Liability Crisis (2002), available at http://aspe.hhs.gov/daltcp/reports/mlupd1.htm (last visited Sept. 27, 2010)); Newt Gingrich & Wayne Oliver, Which Is More Important, You Doctor or a Personal Injury Lawyer?, CHI. TRIB., Dec. 7, 2008, at 35 (stating that physicians and surgeons returned to neglected areas such as rural areas in Texas, New Mexico, Georgia, and even in Illinois after caps on damages had been instituted so that it was affordable for them). The Department of Health and Human Services report found that states without reasonable limits on noneconomic damages experienced significantly larger increases in liability insurance rates. Id. A study by Stanford University found malpractice liability reforms such as caps on noneconomic damages reduced the probability of a doctor being sued by 2.1%. REFORM NOW, supra note 1, at 14. (citing Daniel P. Kessler & Mark B. McClellan, The Effects of Malpractice Pressure and Liability Reforms on Physicians’ Perceptions of Medical Care, LAW & CONTEMP. PROBS. 81-106 (1997)). Further, the same research showed that premiums for doctors in states with this reform saw an 8.4% decrease in their liability insurance premiums within three years. Id. Even the Congressional Budget Office found that caps on noneconomic damages are extremely effective in reducing the amount of claims paid and medical liability insurance premiums. REFORM NOW, supra note 1, at 15 (citing Cong. Budget Office, Preliminary Cost Estimate, H.R. 4250, Patient Protection Act of 1998 (1998), available at http://www.cbo.gov/ftpdocs/7xx/doc701/hr4250.pdf (last visited Sept. 27, 2010)). Similarly, reforms have been shown to significantly reduce medical expenditures. REFORM NOW, supra note 1, at 14 (citing Daniel P. Kessler & Mark B. McClellan, Do Doctors Practice Defensive Medicine?, 445 Q. J. OF ECON. 353, 353-390 (1996), available at http://www.nber.org/papers/w5466.pdf (last visited Sept. 27, 2010)). Finally, states that have enacted malpractice liability reforms show an increased availability of health care. Id. (citing William E. Encinosa & Fred Hellinger, Have State Caps on Malpractice Awards Increased The Supply of Physicians?, HEALTH AFFAIRS, May 31, 2005, at W5-250-W5-W258, available at http://content.healthaffairs.org/cgi/reprint/hlthaff.w5.250v1 (last visited Sept. 27, 2010)). On average, states with caps on noneconomic damages have 2.2 percent more physicians per capita than states without these caps. Id.

\textsuperscript{18} Id.

\textsuperscript{19} See P.A. 94–677, Art. 1, § 101 (eff. Aug. 25, 2005) (describing the increasing costs of malpractice liability as the driving force behind the Act). For a more detailed description of the health care crisis in Illinois, see Lees, supra note 3, at 218 (describing increasing jury awards in Cook County and arguing that caps on noneconomic damages are the more effective means of stopping the health care “catastrophe”). Lees stated that Illinois is one of 19 states that, according to the American Medical Association, is facing a medical liability crisis. Id.

\textsuperscript{20} Robert Winning, Note, Direct Regulation of Medical Malpractice Premiums: The Least Dangerous Reform, 2010 COLUM. BUS. L. REV. 281, 303 (2010); see Wright v. Central DuPage Hospital Ass’n, 347 N.E.2d 736 (Ill. 1976) (invalidating a $500,000.00 cap on total damages in medical malpractice suits); Best v. Taylor Machine Works, 689 N.E.2d 1057 (Ill. 1997) (invalidating 735 ILCS 5/2-1115.1 (West 1996), which limited compensatory damages for noneconomic injuries in all common law tort claims to $500,000.00); Lebron v. Gottlieb Memorial Hosp., 930 N.E.2d 895 (Ill. 2010) (invalidating 735 ILCS 5/2–1706.5 (West 2008), which limited damages for noneconomic injuries in medical malpractice suits to $500,000.00).

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hold, *Lebron v. Gottlieb Memorial Hospital*. The *Lebron* court held that a cap on jury awards for noneconomic damages—any damages not awarded for out of pocket costs paid by the plaintiff as a result of the defendant’s conduct—violated the separation of powers doctrine because it functioned as *remittitur*, which the Illinois Supreme Court has determined is an inherent judicial function that cannot be limited by the General Assembly. *Remittitur* is the decision of a court to order a new trial or lower the damages awarded at trial.

To provide a basic understanding of caps on damages and whether they are constitutional under the separation of powers provision, Part II of this Note will summarize the background of cases that relate to *Lebron*’s holding and will specifically address the history of the separation of powers doctrine and the *remittitur* doctrine in Illinois. Part III will then discuss the court’s finding in *Lebron*, including the majority opinion and dissenting opinion. Part IV will critically analyze the issues and the arguments of both sides and conclude that statutory caps on damages do not violate the separation of powers provision. Primarily, Part IV will argue that statutory caps on damages are a policy determination and not a legislative form of *remittitur*. Next, Part V will discuss the impact of *Lebron*’s holding on the health care system, and will provide

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22 *Lebron*, 930 N.E.2d at 905.
23 *Black’s Law Dictionary* (9th ed. 2009), *remittitur*. The definition of *remittitur* in its entirety is: “1. An order awarding a new trial, or a damages amount lower than that awarded by the jury, and requiring the plaintiff to choose between those alternatives <the defendant sought a *remittitur* of the $100 million judgment>. 2. The process by which a court requires either that the case be retried, or that the damages awarded by the jury be reduced.” *Id.*
24 See infra, part II (discussing the development of the separation of powers doctrine and the *remittitur* doctrine in Illinois).
25 See infra, part III (discussing the facts of *Lebron*, the court’s holding, and the dissenting opinion).
26 See infra, part IV (analyzing the development of the separation of powers and the *remittitur* doctrines in Illinois and arguing that the court erred in holding the *Lebron* cap unconstitutional).
27 *Id.*
drafting recommendations for future legislative attempts to cap damages in Illinois. Finally, Part VI will provide a brief conclusion.

II.  BACKGROUND

This Part describes the background of the previous Illinois statutes that attempted to cap damages and the conclusions of Illinois Supreme Court cases that invalidated them. Further, this Part discusses important case law on the separation of powers clause in the Illinois Constitution, the provision that the Lebron court relied on when it invalidated the cap on damages at issue. Next, this Part will describe the incorporation of the doctrine of remittitur into American law and the development of that doctrine both in Illinois and the rest of the country. Finally, this Part will discuss Unzicker v. Kraft Foods Ingredients Corporation, a 2002 Illinois Supreme Court case that upheld a statutory limitation on joint and several liability, insofar as this case affirmed the right of the General Assembly to alter the judiciary’s finding of liability under the English common law.

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

The Illinois General Assembly first attempted to limit a plaintiff’s recovery in medical malpractice cases in 1975. The General Assembly limited total damages, including economic damages, in medical malpractice cases to $500,000. However, the Supreme Court found this

28 See infra, part V (discussing the implications of Lebron and the best prospects for established another cap on damages for medical malpractice actions in Illinois).
29 See infra, part VI (concluding this note).
30 See infra II.A. (discussing the court’s determinations regarding previous caps on damages in Illinois)
31 See infra II.B. (discussing the development and essential components of the separation of powers doctrine in Illinois).
32 See infra II.C. (discussing the development and essential components of the remittitur doctrine in Illinois).
33 783 N.E.2d 1024 (Ill. 2002).
34 See infra II.D. (discussing the court’s determination in Unzicker v. Kraft Foods Ingredients Corp., 783 N.E.2d 1024 (Ill. 2002)).
36 Id.
legislation unconstitutional in *Wright v. Central DuPage Hospital Association* because the law was arbitrarily applied to only medical malpractice cases; in other words, this limited cap was “special legislation” that was prohibited under Article 4, section 4 of the Illinois Constitution. Therefore, the *Wright* court established the rule that the General Assembly could not eliminate a common law form of action unless it also provided concomitant quid pro quo. Moreover, the court held that limiting the cap’s application to only medical malpractice cases was an arbitrary special privilege that violated the Illinois Constitution’s prohibition against making or passing a “special or local law when a general law is or can be made applicable.”

The court never argued or implied that the cap itself was arbitrary; rather, it determined that only applying the cap to medical malpractice actions was a special law that violated the Illinois Constitution. Under this rationale, then, a cap applying to all civil actions would have been valid.

In response to *Wright*’s “special privileges” restriction and the continued damages crisis, the General Assembly passed 735 ILCS 5/2-1115.1 [hereinafter “the cap in *Best*”], which capped compensatory damages for noneconomic injuries in all common law tort claims at $500,000.

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39 *Id.*
40 ILL. CONST. 1970, Art. 4, § 13. Article 4, section 13 further states:
   Either of the following kinds of legislative actions may be held to violate the restriction on local or special laws:
   (1) Making a law apply to one or more particular persons or things named in the law.
   (2) Making a law apply to a described class of person or things that is illogical and unfair. The latter violation overlaps with the prohibition on denying equal protection of the laws in Article 1, section 2, and is determined under the same standards.
41 *See Wright*, 347 N.E.2d at 743. The court distinguished the limit on recovery at issue in *Wright* from other limits on recovery cited by the defendants, such as the Dram Shop Act and the Wrongful Death Statute. *Lees, supra* note 3, at 225 (citing *Wright*, 347 N.E.2d at 743). According to the court, this statute required a different conclusion because it changed the common law, whereas the other limits to recovery involved statutory claims. *Id.*
42 *See Lees, supra* note 3, at 494–95 (arguing that the court in *Best*, which considered a statute similar to the one in *Wright* except that it applied generally to all tortfeasors, could have distinguished the cap from the one in *Wright* on the basis that it did not apply only to health care professionals and hospitals but applied generally to all tortfeasors).
43 735 ILCS 5/2–1115.1 (West 1996). This statute stated in relevant part:
   In all common law, statutory or other actions that seek damages on account of death, bodily injury, or physical damages to property based on negligence, or product liability based on any theory or
Compensatory damages are those that “indemnify the injured party for the loss suffered,” and noneconomic injuries, although difficult to assess, are limited to those injuries for which the injured party does not pay out of pocket expenses, such as pain, suffering, and loss of society.

Although this legislation applied to all common law claims, the court unexpectedly found in *Best v. Taylor Machine Works* that it was special legislation because the court believed the $500,000 amount was inherently arbitrary. The court in *Best* then bolstered the case against damage caps with its separation of powers discussion.

The court found that statutory limits on damages functioned as a type of *remittitur* instituted by the General Assembly and that *remittitur* was an inherent function of the judiciary. Thus, it held that the General Assembly violated the doctrine, recovery of non-economic damages shall be limited to $500,000 per plaintiff. There shall be no recovery for hedonic damages.

*Id.* Unlike the statute at issue in *Wright*, the preamble of the statute in *Best* stated the policy justifications for enacting the cap. *See Best*, 689 N.E.2d at 1067 (citing Public Act 89–7, which stated the findings of the General Assembly that states limiting noneconomic damages had experienced a decrease in health care costs); *but see* Public Act 79-960 (capping noneconomic damages in medical malpractice cases to $500,000.00 without discussing policy justifications). Similar policy discussions are common to statutory limits to damages which have been upheld in other states. *E.g.*, Zdrojewski v. Murphy, 657 N.W.2d 721. 739 (Mich. 2002) (discussing the House Legislative Analysis, SB 270 and HB 4033, 4403, and 4404 (eff. April 20, 1993), which stated that the legislation was prompted by the legislature’s concern over the availability and affordability of health care given the effect of medical liability costs); Arbino v. Johnson & Johnson, 880 N.E.2d 420, 479 (Ohio 2007) (stating that the General Assembly of Ohio reviewed evidence and found in an uncodified section of S.B. 80, Section 3(A)(1), 150 Ohio Laws, Part V, 8024, that tort reform was likely to improve the economy by reducing rising costs of the tort system).

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44 BLACK’S LAW DICTIONARY (9th ed. 2009), *damages*.
46 689 N.E.2d 1057 (Ill. 1997)
47 *Best*, 689 N.E.2d at 1072, 78. The court held that the cap would arbitrarily hurt individuals with significant noneconomic damages. *Id.* Plaintiffs with nominal damages would be unfairly advantaged because in some cases the cap would not even apply to reduce their award. *Id.* This finding was unprecedented; the court in *Wright* did not find the cap inherently arbitrary even though it had the opportunity to make the same finding. *Wright*, 347 N.E.2d. Instead, the court found that the General Assembly had authority to abolish the common law. *Id.* at 743. Special legislation falls under the “special or local law” described in Article 4, section 13 of the Illinois Constitution. *See supra* note 39 (quoting the Illinois Constitution’s prohibition of laws that unfairly apply specially to one or more person or class of persons). The prohibition of special legislation is in some ways similar to the Equal Protection Clause, which guarantees all Americans equal protection under the law. *Compare* U.S. CONST. amend. XIV, § 1, with ILL. CONST. 1970, art. 4, § 13.
48 *Best*, 689 N.E.2d at 1081.
49 *Id.* at 1079.
separation of powers provision in the Illinois Constitution by enacting any cap on damages in 
common law tort claims.\textsuperscript{50}

The court’s finding in \textit{Best} was a significant leap from its holding in \textit{Wright}, which did not view the issue as one of separation of powers despite the nearly identical set of facts.\textsuperscript{51} The finding was also unexpected because it was judicial dictum; the court had already resolved the case based on its finding of special legislation and went into a discussion of \textit{remittitur} only to provide an additional reason for finding the statute unconstitutional.\textsuperscript{52} Nonetheless, \textit{Best} strengthened the case law against statutory caps on damages in Illinois by affirming a new constitutional argument against these caps: that they function as legislative \textit{remittitur} and unduly infringe on the inherent power of the judiciary to remit jury awards.\textsuperscript{53}

In response to \textit{Best}’s special legislation finding and separation of powers dicta, the General Assembly enacted another cap on damages, section 2-1706.5 [hereinafter “the \textit{Lebron} cap”], which provided:

\begin{quote}
(1) In a case of an award against a hospital and its personnel or hospital affiliates, as defined in Section 10.8 of the Hospital Licensing Act, the total amount of noneconomic damages shall not exceed $1,000,000 awarded to
\end{quote}

\textsuperscript{50} \textit{Id.}

\textsuperscript{51} The court in \textit{Best} also evaluated Grace v. Howlett, 283 N.E.2d 474 (Ill. 1972) (finding a law which limited recovery for plaintiffs in automobile accidents to be unconstitutional because it was special legislation that arbitrarily limited recovery based on whether the defendant was using the vehicle for commercial or personal purposes), and Grasse v. Dealer’s Transport Co., 106 N.E.2d 124 (Ill. 1952) (finding that a law which limited recovery arbitrarily based on whether or not the tortfeasor was an employee under the Worker’s Compensation Act was special legislation that violated the Illinois Constitution). However, the court did not find in \textit{Wright} or either of these two cases that there was special legislation that resulted from an arbitrary cap on damages. \textit{Wright}, 347 N.E.2d 743; \textit{Grace}, 283 N.E.2d 474; \textit{Grasse}, 106 N.E.2d 124. Rather, the court in \textit{Wright} held that the legislature could eliminate common law actions. \textit{Wright}, 347 N.E.2d at 743.

\textsuperscript{52} \textit{Lebron}, 930 N.E.2d at 906-07; \textit{Best}, 689 N.E.2d at 1078-80. The majority opinion in \textit{Lebron} acknowledged that this holding regarding separation of powers was judicial dictum as opposed to obiter dictum because the \textit{Best} court had already decided the constitutionality of the statute. \textit{Lebron}, 930 N.E.2d at 906-07. Thus, the court found that the separation of powers analysis from \textit{Best} was to be weighed heavily and followed unless the analysis was found erroneous. \textit{Id.} In his dissenting opinion, Justice Karmeier agrees that the separation of powers analysis from \textit{Best} was dicta. \textit{Id.} at 926 (Karmeier J., dissenting in part and concurring in part). He also emphasized that judicial dictum does not preclude reconsideration of a legal issue. \textit{Id.}

\textsuperscript{53} \textit{Best}, 689 N.E.2d at 1078-80; see also \textit{Lebron}, 930 N.E.2d at 899 (discussing how the circuit court of Cook County relied on \textit{Best} in finding that caps on noneconomic damages in medical malpractice cases were unconstitutional because of the separation of powers doctrine).
all plaintiffs in any civil action arising out of the care.

(2) In a case of an award against a physician and the physician’s business or corporate entity and personnel or health care professional, the total amount of non-economic damages shall not exceed $500,000 awarded to all plaintiffs in any civil action arising out of the care.54

B. Description of the Separation of Powers Provision in the Illinois Constitution

The separation of powers provision of the Illinois Constitution states that “[t]he legislative, executive and judicial branches are separate. No branch shall exercise power properly belonging to another.”55 However, as with the U.S. Constitution and other state constitutions,56 the separation of powers doctrine does not require complete and absolute division of authority.57 Instead, the court has consistently held that the Illinois system of government

54 735 ILCS 5/2-1706.5 (West 2008).
56 E.g., Colorado General Assembly v. Lamm, 700 P.2d 508, 527 (Colo. 1985); Norwood v. Horney, 853 N.E.2d 1115, 1148 (Ohio 2006) (arguing that the separation of powers doctrine was intended to foster autonomy and comity); Hale v. Wellpinit School Dist. No. 49, 198 P.3d 1021, 1026 (Wash. 2009). Justice Jackson also affirmed this principle in his concurrence in Youngstown Sheet and Tube Company v. Sawyer, 343 U.S. 579, 635 (1952) (Jackson J., concurring). Justice Jackson argued that the Constitution requires not just separation and autonomy, but also interdependence and reciprocity. *Id.* The interpretations of the separation of powers doctrine by other states are relevant because they have applied the same basic separation of powers framework. *See* Devlin, *infra* note 241, at 1264-65 (discussing the similarities and difference between the separation of powers doctrine in different states and arguing that the similarities overwhelm the differences). Thus, the analysis among sister states will be similar or at least useful. *Id.* Further, the U.S. Constitution and federal interpretations thereof carry value that should be considered when state courts interpret their own constitutions. Lawrence Friedman, *The Constitutional Value of Dialogue and the New Judicial Federalism*, HASTINGS CONST. L.Q. 93, 106 (2000). Federal precedent is persuasive in that it “illuminat[es] the issues presented by analysis of the state constitutional text.” *Id.* at 106. Friedman describes three approaches to construing cognate constitutional provisions, and federal interpretations are relevant under each approach. *Id.* at 94–95. Under the lockstep approach, the state court sticks to the U.S. Supreme Court’s interpretation; under the criteria approach, the state court determines whether to depart from the federal interpretation based on whether there are unique factors that require such departure; and under the primacy approach, the court only uses federal interpretations for guidance. *Id.* at 95. Regardless of which approach a court adopts, it will consider federal precedent in interpreting its own constitutional provisions. *See* id. at 95 (discussing the three approaches to interpreting cognate constitutional provisions where all three entail considering precedent from the U.S. Supreme Court).

57 Strukoff v. Strukoff, 389 N.E.2d 1170 (Ill. 1979) (stating that separation of powers does not require a “complete divorce” of the three branches of our system of government); *see also* In re Barker’s Estate, 345 N.E.2d 484, 488 (Ill. 1976). The real purpose of the separation of powers doctrine is to prevent all power from being held in the hands of one branch of government. *Barker’s Estate*, 345 N.E.2d at 488. The *Barker’s Estate* court upheld an amendment to the Inheritance Tax Act, imposing a duty to assess inheritance taxes on the circuit judge instead of the county judge. *Id.* at 489–90. The court based its determination on the fact that no Illinois decision had determined whether or not the first assessment of taxes in the county court mandated by section 4(d) of the Transition Schedule, ILL. CONST. 1970, Transition Schedule, § 4(d), was a final judgment. *Id.* at 488. Thus, although the judicial authority was derived from the Illinois Constitution, the court allowed the General Assembly to modify the authority
inherently entails some powers that are shared between the three branches.\textsuperscript{58} Notably, the Illinois Supreme Court has held that the General Assembly has the power to legislate in regards to judicial authority so long as such laws do not “unduly infringe upon the inherent power of the judiciary.”\textsuperscript{59} Further, the Illinois Supreme Court has consistently upheld the General Assembly’s right to repeal, change, or eliminate all or part of the common law, which is judicially created law.\textsuperscript{60} Although the General Assembly is required to act within the Illinois Constitution and is bound to follow the Illinois Supreme Court’s interpretation of what laws are constitutional,\textsuperscript{61} its position in changing the common law is superior to the position of the court.\textsuperscript{62} Moreover, there is a strong presumption of constitutionality that comes with all legislative actions.\textsuperscript{63} The burden of proof is with the party challenging the statute to demonstrate its invalidity.\textsuperscript{64} This

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\item \textsuperscript{58} Gillespie v. Barrett, 15 N.E.2d 513, 514 (Ill. 1938); People ex rel. Witte v. Franklin, 186 N.E. 137, 139 (Ill. 1933).
\item \textsuperscript{59} People v. Taylor, 464 N.E.2d 1059, 1062–63 (Ill. 1984). In Taylor, the court upheld a statutory mandating natural life imprisonment for defendants convicted of murdering more than one victim despite a challenge based on the separation of powers doctrine. \textit{Id.} at 1064. The court reasoned that the legislature could restrict judicial discretion in sentencing because it did not unduly infringe upon the court’s power. \textit{Id.} at 1063–64. The court relied on the actions of other states in reaching this conclusion. \textit{Id.} (citing State v. Higgins, 592 S.W.2d 151, 155 (Mo. 1979), which noted that more than two-thirds of states had mandatory life sentences for those convicted of first degree murder).
\item \textsuperscript{60} People v. Gersch, 553 N.E.2d 281, 286 (Ill. 1990) (citing People v. Davis, 116 N.E.2d 372, 374 (Ill. 1953)).
\item \textsuperscript{61} David Fink, Best v. Taylor Machine Works, \textit{The Remittitur Doctrine, and The implications for Tort Reform}, 94 Nw. U. L. Rev 227, 261 (1999). Fink emphasizes that the \textit{Gersch} court held that “the judiciary is duty bound to strike down unconstitutional acts of the legislature.” \textit{Id.} (citing \textit{Gersch}, 553 N.E.2d at 287) (internal citations omitted). Thus, Fink argues that the court did not limit its power to evaluate the constitutionality of legislative actions. \textit{Id.} This point is well established in Illinois. \textit{See, e.g.,} Henson v. City of Chicago, 114 N.E.2d 778, 782 (Ill. 1953) (stating that the power of the court in determining legislative action’s unconstitutional is limited to deciding whether the law is within the legislature’s constitutional power); Sutter v. People’s Gaslight & Coke Co., 284 Ill. 634, 640-41 (1918) (stating that it is the plain duty of the court to find actions by the General Assembly unconstitutional when they violate the Illinois Constitution). The General Assembly may pass almost any law so long as it does not violate some constitutional provision. Droste v. Kerner, 217 N.E.2d 73, 76 (Ill. 1966).
\item \textsuperscript{62} \textit{Gersch}, 553 N.E.2d at 297.
\item \textsuperscript{63} Chicago Nat’l League Ball Club, Inc. v. Thompson, 483 N.E.2d 1245, 1250 (Ill. 1985); Sanelli v. Glenview State Bank, 483 N.E.2d 226, 235 (Ill. 1985).
\item \textsuperscript{64} \textit{Chicago Nat’l League}, 483 N.E.2d at 1250; \textit{Sanelli}, 483 N.E.2d at 235.
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premise attaches to any legislative cap on damages, and the party challenging the cap has a burden to prove that it is unconstitutional.65

C. Development of the Remittitur Doctrine

The court in Best found that caps on damages violated the separation of powers provision because it held that these caps functioned as a type of legislative remittitur.66 Remittitur is the exercise of limiting jury awards and reducing them if the court finds that the award is excessive;67 an award is not subject to remittitur if it is reasonable and supported by the particular facts of the case.68 Thus, remittitur requires thorough scrutiny of the facts of each particular case,69 and to be upheld, remittitur also requires that the plaintiff agree to the court’s determination that the damages are unreasonable.70

The court in Best reasoned that remittitur is an inherently judicial function because of tradition,71 and it cites primarily to U.S. Supreme Court cases to support this proposition.72

Indeed, the judiciary has had the power to correct excessive jury verdicts in limited situations for

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65 Lebron, 930 N.E.2d at 902. See infra Part IV.B.4 for a more detailed analysis of this presumption.
66 Best, 689 N.E.2d at 1079.
67 Id. An award is “excessive if it falls outside the range of fair and reasonable compensation or results from passion or prejudice.” Id. (citing Richardson v. Chapman, 676 N.E.2d 621, 628 (Ill. 1997)). In Richardson, the court also held that an award is excessive when it is so large that it shocks the judicial conscience. Richardson, N.E.2d at 628.
68 Best, 689 N.E.2d at 1079 (citing Lee v. Chicago Transit Authority, 605 N.E.2d 493, 509–10 (Ill. 1992)). The Illinois Supreme Court also affirmed this principle in Richardson v. Chapman, in which it held that a determination of what is excessive involves evaluating whether the damages are supported by the record. See Richardson, 676 N.E.2d at 628 (finding that damages awarded to the plaintiff were not excessive in part because the finding did not lack support from the record).
69 See Sandy v. Lake Street elevated R. Co., 85 N.E. 300, 302 (Ill. 1908) (discussing whether the damages were excessive “in view of the facts of the case”).
70 Best, 689 N.E.2d at 1079-80 (citing Haid v. Tingle, 579 N.E.2d 913, 916 (Ill. App. Ct. 1991). If a plaintiff is unwilling to agree to the judge’s determination that the excessive portion of the damages should be remitted, the judge is to order a new trial. Tingle, 579 N.E.2d at 917.
71 See Best, 689 N.E.2d at 1079 (“For over a century it has been a traditional and inherent power of the judicial branch of government to apply the doctrine of remittitur, in appropriate and limited circumstances, to correct excessive jury verdicts.”).
72 See id. (citing Dimick v. Schiedt, 293 U.S. 474, 484-85 (1935), and Hansen v. Boyd, 161 U.S. 397 (1896)). The most recent Illinois case that Best cites to in support of this proposition is Lee v. Chicago Transit Authority, 605 N.E.2d 493 (Ill. 1992).
over a century.\textsuperscript{73} The first Illinois case that discussed \textit{remittitur} was written in 1827.\textsuperscript{74} However, the authority behind judicial \textit{remittitur} has often been questioned, and its constitutionality has even been challenged in some jurisdictions.\textsuperscript{75} These challenges resulted from the fact that \textit{remittitur} was not initially applied in the United States and was not supported by authority from English common law.\textsuperscript{76} Ultimately, however, the legitimacy of judicial \textit{remittitur} was accepted because it was regularly applied in the court system.\textsuperscript{77}

The Illinois Supreme Court has also distinguished limitations on damages in civil actions based on statutory law from those based on common law.\textsuperscript{78} In \textit{In re Estate of Jolliff},\textsuperscript{79} the court determined that a legislative floor on recovery for statutory claims was not legislative \textit{remittitur} and did not violate the separation of powers provision.\textsuperscript{80} The court found that because the General Assembly created the claim\textsuperscript{81} for which it had also enacted a legislative floor, it had the

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\item \textsuperscript{73} Id. The practice was first adopted by Justice Story in 1822. \textit{See infra} note 75 for more in depth discussion of the incorporation of \textit{remittitur} into American law.
\item \textsuperscript{74} Jones v. Lloyd, 1 Ill. 225 (1827). Interestingly, the court acknowledged the practice of \textit{remittitur} based on a discussion of its application in New York courts. \textit{Id.} However, the Illinois Supreme Court did not remit the jury award in \textit{Jones} because it found that the trial court was responsible for doing so. \textit{See id.} (“The plaintiff should, at the trial, have required a correction of the verdict . . . .”)
\item \textsuperscript{75} \textit{See Dimick}, 293 U.S. at 483 (discussing Justice Story’s incorporation of \textit{remittitur} into U.S. doctrine in Blunt v. Little, 3 F. Cas. 760 (D. Mass. 1822)). The \textit{Dimick} Court found it remarkable that no cases following Justice Story’s conclusion challenged the constitutionality of judicial \textit{remittitur}. \textit{Id.} The Court points out that Justice Story cited no authority from English common law for this practice. \textit{Id.} Rather, he only cited authority for the ability of the court to grant a new trial when there are excessive damages. \textit{Blunt}, 3 F. Cas. at 761–62. Upon this basis, Justice Story created the court’s authority to remit the jury’s damage award. \textit{Id.} The Court in \textit{Dimick} went as far as arguing that if the question were before it again for the first time, it would reach the opposite conclusion as to the constitutionality of judicial \textit{remittitur}. \textit{Dimick}, 293 U.S. at 484–85. However, the Court affirmed the doctrine because it had been applied in federal courts for over a hundred years. \textit{Id.} The Court merely held that “the doctrine would not be reconsidered or disturbed at this late day.” \textit{Id.} Whereas the U.S. Supreme Court in \textit{Dimick} only questioned the constitutionality of judicial \textit{remittitur}, the Missouri Supreme Court banned \textit{remittitur} in an en banc decision in 1985. \textit{Firestone v. Crown Center Redevelopment Corp.}, 693 S.W.2d 99, 110 (Mo. 1985) (en banc). Although the Missouri legislature subsequently reestablished judicial \textit{remittitur}, Mo. Rev. Stat. § 537.068 (1987), the court in \textit{Firestone} found that the application of judicial \textit{remittitur} was inconsistent and confused. \textit{Firestone}, 693 S.W.2d at 110.
\item \textsuperscript{76} \textit{Dimick}, 293 U.S. at 483.
\item \textsuperscript{77} \textit{Id.} at 484–85.
\item \textsuperscript{78} \textit{In re Estate of Jolliff}, 771 N.E.2d 346 (Ill. 2002).
\item \textsuperscript{79} 771 N.E.2d 346 (Ill. 2002).
\item \textsuperscript{80} \textit{Id.} at 356–57.
\item \textsuperscript{81} The legislature enacted a statute which enabled relatives who had provided a certain amount of care for a disabled person to bring a claim against that disabled person’s estate upon their death. 755 ILCS 5/18-1.1 (West 2008).
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power to control the minimum amount of that claim.\textsuperscript{82} Thus, the court’s finding in \textit{Jolliff} gave the General Assembly the power to force the judiciary to award a certain amount of money to a defendant given a particular set of facts even if the common law did not enable any recovery at all.\textsuperscript{83}

\textbf{D. Unzicker v. Kraft Food Ingredients Corporation: \textit{Holding that the Illinois General Assembly Has Power to Limit a Defendant’s Liability in Common Law Claims}}

Five years after determining that caps on damages for noneconomic injuries were unconstitutional in \textit{Best}, the Illinois Supreme Court considered the constitutionality of a statute that limited joint liability in cases where one defendant was less than 25\% responsible for the injury.\textsuperscript{84} In \textit{Unzicker}, the plaintiff challenged the court’s apportionment of liability after he was injured at the defendant’s plant.\textsuperscript{85} Although the common law rule of joint and several liability would have allowed him to recover the entire amount from any defendant, section 2-1117 [hereinafter “the \textit{Unzicker} statute”] of the Code of Civil Procedure made the defendants severally liable for the damages.\textsuperscript{86} Therefore, the law enabled the General Assembly to determine what amount a particular defendant could be required to pay even if it required changing the common law,\textsuperscript{87} and the court in \textit{Unzicker} affirmed the General Assembly’s ability

\textsuperscript{82} \textit{Dimick}, 293 U.S. at 357.
\textsuperscript{83} See \textit{Jolliff}, 771 N.E.2d at 358 (holding that the General Assembly had power to establish statutory floors on damages in statutory causes of action). The Illinois Appellate made a similar finding in \textit{Knauerhaze} v. Nelson, 836 N.E.2d 640 (Ill. App. Ct. 2005). In \textit{Knauerhaze}, the court held that the General Assembly had power to limit damages under a statutory claim to the defendant’s maximum insurance coverage. \textit{Id.} at 665-67. Like the court in \textit{Jolliff}, the court found that this did not violate the separation of powers because the legislature had created the claim in the first place so it had authority over that claim. \textit{Id.}
\textsuperscript{84} 735 ILCS 5/2-1117 (West 1994).
\textsuperscript{85} \textit{Unzicker}, 783 N.E.2d at 1028–29. The jury found the defendant 1\% liable and the plaintiff’s employer 99\% liable for plaintiff’s injuries, so the court held the defendant severally liable for only 1\% of the damages. \textit{Id.}
\textsuperscript{86} \textit{Id.} at 1029.
\textsuperscript{87} Reply Brief of Defendants-Appellants Gottlieb Memorial Hospital and Florence Martinoz, R.N., 2008 WL 7890623, at 9, Lebron v. Gottlieb, Nos. 105741, 105745 [hereinafter Reply Brief]. Under common law, joint and several liability held tortfeasors accountable for the entire injury, and plaintiffs could recover any or all of the damages from any one of the defendants. Coney v. J.L.G. Industries, Inc., 454 N.E.2d 197, 199-200 (Ill. 1983). 735 ILCS 5/2-1117 abrogated the common law, dictating that “[a]ny defendant whose fault, as determined by the trier of fact, is less than 25\% of the total fault attributable to the plaintiff, the defendants sued by the plaintiff, and any third
to determine “when a defendant can be held liable for the full amount of a jury’s verdict.”

Moreover, the court held that lowering a defendant’s liability was not legislative remittitur. Therefore, Unzicker stands for the proposition that the separation of powers provision in the Illinois Constitution does not limit the General Assembly’s ability to change the common law in order to limit a defendant’s liability for damages in common law claims.

Thus, prior to Lebron, the doctrine of remittitur was an established function of the judiciary, but its inherency was questionable. Further, there was some evidence that caps on damages would be found unconstitutional as legislative remittitur in violation of the separation of powers provision, but this was not clear as the authority from Best was dicta and Unzicker upheld the power of the courts in reducing a defendant’s liability.

III. DISCUSSION

In Lebron v. Gottlieb, the Illinois Supreme Court struck down a cap on damages for noneconomic injuries in medical malpractice cases on the grounds that it violated the separation of powers provision of the Illinois Constitution. While the court agreed that the separation of powers provision except the plaintiff’s employer, shall be severally liable for all other damages.” 735 ILCS 5/2-1117 (West 2008).

88 Reply Brief, supra note 87, at 9 (citing Unzicker, 783 N.E.2d at 1042).
89 Id. The Unzicker court distinguished the statute it was addressing from the cap in Best by stating that the Unzicker statute did not reduce the amount of the jury’s verdict. Id. The court did not, however, affirm the analysis from Best that caps on damages functioned as judicial remittitur in violation of the separation of powers. See id. (distinguishing the Unzicker statute from the cap in Best without addressing the merits of the separation of powers analysis from Best). Thus, the separation of powers analysis from Best remained judicial dicta. See Lebron, 930 N.E.2d at 926 (arguing that the Best separation of powers analysis was judicial dicta and therefore not binding on the court in subsequent cases).
90 Lebron, 930 N.E.2d, at 910 (stating that the Unzicker court held that the General Assembly could determine when a defendant would be liable for all the damages the jury awarded to the plaintiff); see also Reply Brief, supra note 87, at 27 (arguing that Unzicker upheld the right of the General Assembly to limit a defendant’s liability in common law claims and that this extended to caps on damages).
91 See supra notes 71–77 (discussing the doctrine of remittitur and whether it is an inherent function of the judiciary).
92 See supra Part II.A–D (discussing the separation of powers provision and the analyses from Best and Unzicker).
93 Lebron, 930 N.E.2d at 914. The statute limited damage awards against hospitals and its personnel or hospital affiliates for noneconomic injuries to $1,000,000. 735 ILCS 5/2-1706.5 (West 2008). It also limited damage awards against a physician and his business or corporate entity to $500,000. Id. The Lebron holding was a controversial decision that incited further debate on whether damage caps should be part of reforming the health care
powers analysis from *Best* was judicial dicta, it upheld *Best’s* analysis on the basis that judicial dictum is to be followed unless it is clearly erroneous.94 This Part will present the basic facts of *Lebron* and provide the finding of the trial court.95 Subsequently, it will discuss the majority opinion and dissenting opinion of the Illinois Supreme Court.96

**A. The Facts of Lebron**

Frances Lebron (hereinafter “Lebron”) was under the care of Dr. Levi-D’Ancona during her pregnancy and was admitted to Gottlieb on October 31, 2005 to deliver her baby.97 Dr. Levi-D’Ancona delivered Abigaile Lebron by Caesarean section, and Florence Martinoz assisted in the delivery and provided nursing care throughout the duration of Lebron’s admission.98 As a result of the delivery, Abigaile sustained numerous permanent injuries, including severe brain injury, cerebral palsy, cognitive mental impairment, inability to be fed normally, and abnormal neurological function; plaintiffs alleged that these injuries were the result of acts and omissions by the defendants, Gottlieb Memorial Hospital, Dr. Levi-D’Ancona, and Florence Martinoz.99

The case arose in November 2006 when Lebron and her daughter filed a medical malpractice and declaratory judgment action in Cook County against defendants Gottlieb Memorial Hospital, Roberto Levi-D’Ancona, M.D., and Florence Martinoz, R.N.100 According to the complaint, Abigaile sustained numerous injuries during the Caesarean section that Dr.

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94 See infra Part III.B (discussing the majority opinion in *Lebron v. Gottlieb*).
95 See infra Part III.A (discussing the facts and trial court’s holding in *Lebron v. Gottlieb*).
96 See infra Part III.B–C (discussing the majority and dissenting opinions in *Lebron v. Gottlieb*).
97 Id. at 899-900.
98 Id.
99 Id. at 900.
100 Id. at 899.
Levi-D’Ancona performed on Lebron. Most relevant for this Note, plaintiffs sought declaratory judgment on the constitutionality of the cap at issue in Lebron. Specifically, they sought a judicial determination that the Lebron cap was unconstitutional and did not apply to their cause of action on the basis that it violated the separation of powers clause. Plaintiffs contended that Abigaile had sustained injuries and endured pain and suffering, the damages for which would exceed the Lebron cap, but that the cap would displace the judiciary’s power to determine damages. Plaintiffs also alleged that the cap violated the prohibition of improper special legislation, the right to a trial by jury, the due process clause, the equal protection clause, and the right to a certain and complete remedy, all provisions of the Illinois Constitution.

The Lebron cap was part of Public Act 94-677, a focused effort by the Illinois General Assembly to remedy the health care crisis: the General Assembly found that health care costs were increasing at unsustainable rates and that the availability of such care was simultaneously going down, threatening the health and safety of Illinois citizens. To combat this trend, the General Assembly made changes to the Illinois Insurance Code, the Medical Practice Act of

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101 Id. at 900. Florence Martinoz assisted in the delivery and providing nursing care to Lebron when she was admitted into the hospital. Id. The complaint alleged that as the direct and proximate result of acts and omissions by defendants, Abigaile sustained “brain injury, cerebral palsy, cognitive mental impairment, inability to be fed normally, and inability to develop normal neurological function.” Id. (citing plaintiff’s complaint) (internal citations omitted).

102 Id. The most relevant constitutional challenge to the statute was the separation of powers challenge. See id. (citing ILL. CONST. 1970, Art. II, § 1).

103 Id. (citing ILL. CONST. 1970, Art. II, § 1).

104 Id. (citing ILL. CONST. 1970, Art. II, § 1).

105 Id. (citing ILL. CONST. 1970, Art. IV, § 13).


110 Id. See ILL. CONST. 1970 for the text of each of these constitutional provisions.

111 P.A. 94-677, Art. 1, § 101 (eff. Aug. 25, 2005). The cap was only one of several necessary reforms to the civil justice system which was required to remedy the health care crisis. Id. The General Assembly pointed to increasing medical liability insurance costs in Illinois which are thought to reduce availability of health care and discourage individuals from practicing medicine in Illinois. Id. It found that the people of Illinois would benefit from increasing availability of health care. Id. The cap at issue in Lebron was enacted to achieve this goal. Id.
1987, and the Good Samaritan Act.\textsuperscript{112} It also initiated the “Sorry Works! Pilot Program Act” to determine if prompt apologies and offers for settlement by health care professionals have an effect on the costs of malpractice claims.\textsuperscript{113} Thus, it is clear that the \textit{Lebron} cap was just one of several key reforms that the General Assembly enacted to remedy the health care crisis.\textsuperscript{114} Yet, according to the plaintiffs, the \textit{Lebron} cap violated the separation of powers provision and other provisions in the Illinois Constitution.\textsuperscript{115}

The circuit court, relying on the separation of powers analysis from \textit{Best}, held that the \textit{Lebron} cap was unconstitutional based on the separation of powers doctrine because it operated as legislative \textit{remittitur}.\textsuperscript{116} Pursuant to the inseverability provision of the Act, the circuit court declared the entire Act invalid on its face solely because it violated the separation of powers provision of the Illinois Constitution.\textsuperscript{117} The circuit court also held that the \textit{Lebron} cap was unconstitutional as applied to plaintiffs, and the defendants appealed directly to the Illinois Supreme Court on the basis of Supreme Court Rule 302(a).\textsuperscript{118}

\textbf{B. The Majority Opinion}

The Illinois Supreme Court first reversed the circuit court’s finding that the \textit{Lebron} cap was unconstitutional as applied because it was unnecessary and implied that the statute could be validly applied to the plaintiffs, and because there were no evidentiary hearings or findings of fact to determine how the cap applied to plaintiffs.\textsuperscript{119} The court then addressed the argument that

\textsuperscript{112} \textit{Id.} at 903 (citing Pub. Act 94-677, §§ 310, 315 & 340)
\textsuperscript{113} \textit{Id} at 906 (citing Pub. Act 94-677, §§ 401–95).
\textsuperscript{114} See \textit{id.} (discussing other reforms that were included in P.A 94-677).
\textsuperscript{115} \textit{Id.} at 900 (citing \textit{ILL. CONST.}, Art. II, § 1). The plaintiffs cited to \textit{Best}, arguing that the \textit{Lebron} cap functioned to replace the judiciary’s power of determining whether \textit{remittitur} was necessary based on the particular facts of a case. \textit{Id.}
\textsuperscript{116} \textit{Id.} at 901.
\textsuperscript{117} \textit{Id.} at 899 & 903.
\textsuperscript{118} \textit{Id.} at 901–02 (citing 210 Ill.2d R. 302(a)).
\textsuperscript{119} \textit{Lebron}, 930 N.E.2d at 902. The court found that the circuit court’s conclusion that the statute was unconstitutional as applied to plaintiffs implied that there were circumstances under which it could be held
the cap was facially invalid—that there were no circumstances under which the statute could be upheld. The court primarily relied on the court’s reasoning in *Best* to reach its conclusion. Thus, before it addressed the substantive arguments regarding separation of powers, the court disposed of defendants’ argument that the separation of power analysis in *Best* should not be followed as non-binding dicta. The *Lebron* court agreed that the separation of powers analysis in *Best* was not necessary to the conclusion. However, the court distinguished between obiter dictum and judicial dictum, and concluded that the separation of powers analysis in *Best* was judicial dictum. According to the court, judicial dictum was to be given much deference and applied unless the analysis was erroneous.

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unconstitutional. *Id.* Because the circuit court found that the statute was unconstitutional on its face, the as applied finding was unnecessary. *Id.*

120 *Id.* at 902 (citing Napleton v. Village of Hinsdale, 891 N.E.2d 839 (Ill. 2008)).

121 *Id.* at 900 (arguing that the court did not decide the case on a “blank slate” but had to consider the analysis from *Best* to guide its findings); Jeffrey A. Parness, *Judicial Versus Legislative Authority after Lebron*, 98 Ill. B.J. 324, 324–25 (2010); Bethany Krajelis, *Court Strikes Down Medical Malpractice Law*, CHI. DAILY L. BULL., Feb. 4, 2010, at 1. The *Lebron* court provides a detailed discussion of the court’s finding in *Best* in its opinion. *Lebron* at 903-06. For further discussion of the Illinois Supreme Court’s finding in *Best*, see discussion *supra* Part II.

122 *Id.* at 906–08.

123 *Lebron*, 930 N.E.2d at 906. Obiter dictum is a “remark or opinion that a court uttered as an aside, and is generally not binding authority or precedent within the *stare decisis* rule.” *Id.* at 907 (citing Exelon Corp. v. Department of Revenue, 917 N.E.2d 899, 907 (Ill. 2009); see also BLACK’S LAW DICTIONARY (9th ed. 2009), obiter dictum (“A judicial comment made while delivering a judicial opinion, but one that is unnecessary to the decision in the case and therefore not precedental (although it may be considered persuasive).”). According to the *Lebron* court, obiter dictum, which is not given much weight, is treated differently than judicial dictum. *Lebron*, 930 N.E.2d at 907. Judicial dictum is a statement by the court that is not essential to the outcome of the opinion. *Id.; see also* BLACK’S LAW DICTIONARY (9th ed. 2009), dictum (defining judicial dictum as “[a]n opinion by a court on a question that is directly involved, briefed, and argued by counsel, and even passed on by the court, but that is not essential to the decision”). The *Lebron* court also states that judicial dictum arises only when both parties argue the issue, but the court deliberately passes on the issue. *Lebron*, 930 N.E.2d at 907. Further, it argues that these characteristics were present in *Best* because the parties briefed the issue of separation of powers and the court deliberately passed upon it. *Id.* The court also holds that the conclusion in *Best* was expressed as a holding, making it more persuasive. *Id.* (citing *Best*, 689 N.E.2d at 1081; Unzicker, 783 N.E.2d at 1042). Finally, it concludes that the defendants did not argue that the analysis from *Best* was erroneous. *Id.* The court points out that the defendants only argued that *Best* was not controlling because the statute at issue in *Lebron* was distinguishable from the statute at issue in *Best*. *Id.*

124 *Id.* at 907 (citing Exelon, 917 N.E.2d at 907). The court’s judicial dictum is erroneous if it is incorrect or inconsistent with the law or facts. *Exelon*, 917 N.E.2d at 907; BLACK’S LAW DICTIONARY (9th ed. 2009), erroneous.
The court continued by addressing substantive constitutional issues relating to the caps on damages. However, it did not find the statute unconstitutional on the basis that it was unlawful special legislation and even opposed the defendants’ attempts to conflate the special legislation analysis with the separation of powers arguments from Best. The court also rejected defendants’ argument that the statute should be upheld because it was part of a comprehensive attempt by the General Assembly to ameliorate the damages crisis. According to the court, this left only one question: whether the General Assembly violated the separation of powers provision by performing an inherent function of the judiciary.

Distinguishing Unzicker, the authority relied on by defendants that the General Assembly could limit a defendant’s liability without violating the separation of powers, the court stated that unlike Lebron the issue in Unzicker was whether the General Assembly could enact a statute that determined when a defendant was liable for the full amount of a damages awarded. The

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126 Lebron, 930 N.E.2d at 908–12.
127 Id. at 908. The court argues that the Attorney General conflated the analysis of these two issues when it argued in the context of separation of powers that the statute at issue in Lebron was rationally related to the government’s purpose of addressing the growing health care crisis even though the statute in Best was not. Id. According to the court, this discussion is not relevant to the separation of powers issue and was not addressed in the separation of powers analysis from Best. Id. In addition to the special legislation challenge, the Lebron court did not address in its opinion due process and the right to a certain and complete remedy, other Illinois constitutional protections that were raised by the plaintiffs. Id.; Parness, supra note 121, at 324–25.
128 Lebron, 930 N.E.2d at 909–10. The court stated that this does not affect whether or not a statute is unconstitutional. Id.
129 Id. The court also uses this analysis to discard defendants’ argument that the statute should not be held unconstitutional because it does not burden one class of plaintiffs as did the statute at issue in Best. Id. at 909. The court did not evaluate whether the statute disadvantaged any one group. Id.
130 Lebron, 930 N.E.2d at 910 (citing Unzicker, 783 N.E.2d at 1042); Parness, supra note 121, at 324–25. Defendants argued that the separation of clause does not prevent the General Assembly from limiting a defendant’s liability even if the defendant would be liable under common law. Brief and Appendix of Defendants-Appellants Gottlieb Memorial Hospital and Florence Martinez, R.N., 2008 WL 7890597, at 26–27, Lebron v. Gottlieb, Nos. 105741, 105745 [hereinafter Defendants’ Brief]. In their brief, defendants relied in part on the court’s holding in Unzicker, where the court reasoned that altering common law joint and several liability “is simply not a legislative remittitur.” Id. at 27 (citing Unzicker, 783 N.E.2d at 1042). These defendants also cite to Siegall v. Solomon, 166 N.E.2d 5 (Ill. 1960), where the Illinois Supreme Court held that the General Assembly did not violate the separation of powers clause by limiting punitive damages. Defendants’ Brief, at 28. However, the Lebron court distinguished compensatory damages from punitive damages. See supra notes 141–143 and accompanying text (discussing how the Lebron court distinguished punitive damage caps from damage caps for noneconomic injuries). The court reasoned that the statute in Unzicker was not a cap on damages and it “did not require a trial judge to enter a judgment ‘at variance with the jury’s determination and without regard to the court’s duty to consider, on a case-by-
Lebron court emphasized that the Unzicker opinion actually distinguished itself from Best and argued that the statute changing joint and several liability was not the same as a legislative remittitur.\(^{131}\) Therefore, the court concluded that because the Lebron cap did not merely limit when a defendant could be held liable for noneconomic damages\(^ {132}\)—instead, it altogether eliminated the ability of the court to award damages above a certain amount—Unzicker did not apply.\(^ {133}\)

The majority opinion then distinguished the facts of Lebron from the facts of Burger v. Lutheran General Hospital,\(^ {134}\) where the court addressed a statute that mandated maintenance of medical records and regulated disclosure of those records.\(^ {135}\) Although defendants argued that the statute in Burger affected and infringed upon the court’s authority over discovery procedures, the Lebron court simply asserted that the statute did not impinge the court’s power because the statute did not regulate the conduct of discovery.\(^ {136}\) Similarly, defendants cited to Chicago case basis, whether the jury’s verdict is excessive.” Parness, supra note 121, at 324 (citing Lebron, 930 N.E.2d at 911).

\(^{131}\) Lebron, 930 N.E.2d at 910.

\(^{132}\) See infra, note 124 (discussing the Lebron court’s finding that the cap at issue went beyond just limiting liability and forced the court to enter judgment regardless of the jury’s award and findings of fact).

\(^{133}\) Lebron, 930 N.E.2d at 910–11; see also Goldhaber, supra note 93, at 20 (describing how the Lebron court found that the cap at issue required trial courts to decrease jury awards and enter judgment in an amount equal to the cap); Helen Gunnarsson, Illinois Supreme Court: Statutory Med-Mal Caps are Unconstitutional, 98 Ill. B.J. 122, 122 (2010) (emphasizing the Lebron court’s finding that the cap at issue would require the court to override a jury’s award and reduce damages regardless of the particular facts of the case).

\(^{134}\) 759 N.E.2d 533 (Ill. 2001).

\(^{135}\) Id. at 536–38. The statute at issue in Burger enabled hospital staff to discuss the standard of treatment of a plaintiff with attorneys for the hospital. Id. at 537–38 (citing 210 ILCS 85/6.17 (West 2008)). The court held that the discussions between hospitals and their staff or agents were “intracorporate conversations” regarding the property and responsibility of the hospital. Id. at 548. Further, it held that this information was not triggered by litigation but promoted the general health and welfare of the public by allowing hospitals to investigate the treatment of patients. Id. Thus, the court held that these provisions did not regulate discovery and therefore did not impinge upon an inherent power of the judiciary. Id. Defendants relied on Burger to argue that the legislature can enact a statute affecting litigation so long as the statute serves a legitimate legislative goal. Lebron, supra note 20, at 911. The Lebron defendants also argued that “the separation of powers allows the legislature to enact statutes affecting the conduct of litigation if its purpose is to serve legitimate legislative goals. Defendants’ Brief, supra note 130, at 37–38. In arguing this point, the defendants relied on Chicago Nat’l League Ball Club, Inc. v. Thompson, 483 N.E.2d 1245 (Ill. 1985), and Struko v. Struko, 389 N.E.2d 1170 (Ill. 1979). Defendants’ Brief, supra note 130, at 37-38. See infra, note 137–139 for a more detailed discussion of these cases.

\(^{136}\) Lebron, 930 N.E.2d at 911.
National League Ball Club, Inc. v. Thompson\textsuperscript{137}, which upheld the General Assembly’s right to pass nuisance laws, and Strukoff v. Strukoff,\textsuperscript{138} which upheld its right to regulate court proceedings that involved the Marriage and Dissolution of Marriage Act, but the court discarded these cases by simply stating that they were “inapposite.”\textsuperscript{139}

The heart of the court’s argument was that although the General Assembly is empowered to change the common law and available remedies, it must do so within the purview of the Illinois Constitution.\textsuperscript{140} The court emphasized that holding the statute in question unconstitutional did not violate the case precedent cited by the defendants in which the Illinois Supreme Court found that the General Assembly could limit punitive damages without violating the separation of powers.\textsuperscript{141} The court argued that punitive damages are distinguishable from compensatory damages in that they only uphold the interest of society and do not seek to repay an injured plaintiff.\textsuperscript{142} The court emphasized that the Smith opinion specifically distinguished its holding on punitive damages from compensatory damages.\textsuperscript{143}

\textsuperscript{137} 483 N.E.2d 1245 (Ill. 1985). In Chicago Nat’l League, the court held that the legislature did not violate the separation of powers by enacting a statute that governed nuisance even though a private nuisance claim would typically be brought by an aggrieved party before the judiciary. \textit{Id.} at 1248. The court held that the legislature clearly has broad discretion to enact policies that protect the public health and welfare. \textit{Id.}

\textsuperscript{138} 389 N.E.2d 1170 (Ill. 1979). Strukoff addressed a provision of the Marriage and Dissolution of Marriage Act, 750 ILCS 5/403(e) (West 2008), which mandates the rules civil procedure in divorce cases. \textit{Strukoff}, N.E.2d at 1171. The court recognized that the judiciary has authority to make rules which regulate the trial of cases. \textit{Id.} However, it emphasized that the separation of powers does not prevent one branch of government from exercising functions that are traditionally exercised by another. \textit{Id.} at 1172. Further, the Marriage and Dissolution of Marriage Act was statutory in nature, giving the legislature authority to modify the court’s rulemaking process as to that Act. \textit{Id.} at 1172–73.

\textsuperscript{139} Lebron, 930 N.E.2d at 911.

\textsuperscript{140} Id. at 912. In arguing that the legislature is bound to act within constitutional bounds, the court cites \textit{People v. Gersch}, 553 N.E.2d 281, 286–87 (Ill. 1990). According to the court, \textit{Gersch} recognizes the role of the legislature in altering the common law while also recognizing the court’s obligation to overrule unconstitutional legislative action. \textit{Lebron}, 930 N.E.2d at 912 (citing \textit{Gersch}, 553 N.E.2d at 286–87).


\textsuperscript{142} \textit{Lebron}, 930 N.E.2d at 912 (citing \textit{Smith}, 147 N.E.2d at 326). It is commonly argued that punitive damages and compensatory damages should be viewed differently by the law because they serve different functions: compensatory damages are intended to compensate the plaintiff for something that he has been deprived of, whereas punitive damages are intended to deter similar wrongful behavior in the future and are aimed at retribution. \textit{See}
In addressing comparable statutes in other states, the court emphasized that the other statutes varied significantly from the one at issue in Illinois, and therefore because the court could not know the bases upon which those statutes were upheld, the decisions from other states were not persuasive. Indeed, though the court found that the decisions provided guidance in making its own determination as to the constitutionality of damage caps, it ultimately held that it could not base its interpretation of Illinois law on the actions of other states. Instead, the court relied on the separation of powers analysis from Best to reach its conclusion.

After disposing of defendants’ challenges to the separation of powers analysis from Best, the Lebron court relied on Best to hold the limitation on noneconomic damages in medical malpractice cases unconstitutional on the grounds that it violated the separation of powers provision of the Illinois Constitution. The court held that remittitur has been a traditional and inherent power of the judiciary for over a century and that the determination of whether to lower

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Laura Clark Fey, et al., *The Supreme Court Raised Its Voice: Are the Lower Courts Getting the Message? Punitive Damages Trends after State Farm v. Campbell*, 56 BAYLOR L. REV. 807, 813 (2004) (discussing *State Farm v. Campbell*, which distinguished compensatory damages and punitive damages and held that there are constitutional limits to the government’s imposition of punitive damages under the Due Process Clause and the Fourteenth Amendment; *but see* Consorti v. Armstrong World Industries, Inc., 72 F.3d 1003, 1012 (2nd Cir. 1995) (reasoning that the question of whether compensatory damages exceed what is permitted by law is not materially different from the question of whether punitive damages exceed what is permitted by law when determining whether to apply state or federal law); Mark Geistfeld, *Access to Justice: Can Business Coexist with the Civil Justice System?*, 38 LOY. L.A. L. REV. 1093, 1114–15 (2005) (describing the commonly held understanding of tort law that punitive damages serve the purposes of general deterrence and private punishment, a view which is similar to the view of compensatory damages which provide private compensation and general deterrence).

Lebron, 930 N.E.2d at 912.

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

Lebron, 930 N.E.2d at 913–14.

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

*Id.* The *Lebron* court stated that it was not deciding the case on a “blank slate” because it followed the Best analysis, which reflected the same basic holding as *Lebron*. Arthur D. Postal, *Illinois High Court Rejects Limits on Med Mal Awards*, NAT’L Underwriter Prop. Casualty, Feb. 5, 2010; *see also* Parness, *supra* note 121, at 324–25 (discussing *Lebron’s* application of Best).

*Id.* (citing ILL. CONST. 1970, Art. II, § 1).
a jury’s award should only be considered by the courts on a case-by-case basis.\footnote{Lebron N.E.2d at 908 (citing Best, 689 N.E.2d at 1079). The court did acknowledge that the legislature has authority to limit certain types of damages, such as those that are recoverable based on statutory causes of action. Lebron at 906 (citing Best at 1079).} Further, the court held that capping noneconomic damages in medical malpractice cases functioned as a type of legislative re\textit{mittitur} that undercut the inherent power of the judiciary to reduce excessive verdicts.\footnote{Lebron at 908 (citing Best at 1078–79). The court reasoned that although the \textit{Lebron} cap operates in fewer cases than the cap in \textit{Best}, the constitutional violation was the same. \textit{Id}.} Thus, the court held that, like the cap in \textit{Best}, the \textit{Lebron} cap was on its face an unconstitutional violation of the separation of powers provision; it reversed the judgment of the circuit court finding the statute unconstitutional as applied and affirmed its judgment finding the statute facially unconstitutional.\footnote{\textit{Id}. at 914–17. Before concluding, however, the court addressed the dissent’s challenges to subject matter jurisdiction for lack of ripeness and standing. \textit{Id}. at 915–17. The court argued that although subject matter jurisdiction cannot be waived, objections to standing and ripeness are waived if they are not raised in a timely manner in the trial court. \textit{Id}. at 916 (citing Skolnick v. Altheimer & Gray, 730 N.E.2d 4, 19 (Ill. 2000), and In re General Order of October 11, 1990, 628 N.E.2d 786, 788 (Ill. App. Ct. 1993)). The court then emphasized that defendants Gottlieb and Martinoz did not challenge ripeness and standing. \textit{Id}. Further, although Dr. Levi-D’Ancona did assert these affirmative defenses, the circuit court rejected his arguments based on \textit{Best}. \textit{Id}. The circuit court found that the constitutionality of the damage cap was ripe for review and that plaintiffs had a sufficient and direct interest in the application of the statute just like the plaintiffs in \textit{Best} because they had suffered from serious injuries. \textit{Id}. (citing \textit{Best}, 689 N.E.2d at 1066). More importantly, the court notes that Dr. Levi-D’Ancona did not renew his challenges to ripeness and standing. \textit{Id}. The court then emphasizes that under Rule 341, “points not argued in the appellant’s brief are waived.” \textit{Id}. (citing 210 Ill. 2d R. 341(h)(7)). Based on this rule, the court did not address the issues further. \textit{Id}. at 916–17. \textit{See infra} note 152 text for a discussion of the dissent’s finding on the ripeness and standing issues raised in \textit{Lebron}.} 

\section*{C. The Dissenting Opinion}

The dissenting opinion agreed that the statute was not unconstitutional as applied to the plaintiffs and primarily focused on whether or not the statute was facially invalid.\footnote{\textit{Id}. at 921. Although it is not the focus of this Note, the dissent first vehemently argued that the constitutional issue before the court was not properly decided because the court did not have jurisdiction. \textit{Id}. at 921–26. First, the dissent argued that the court should have exercised restraint in hearing the claim which could still have been decided on other grounds. \textit{Id}. at 920–22. The dissent, labeling this a jurisprudential argument, argued that a claim cannot be heard prematurely. \textit{Id}. at 922. That is, a constitutional issue should only be resolved if it is necessary to decide the case. \textit{Id}. (discussing People v. Hampton, 867 N.E.2d 957, 960 (Ill. 2007)). The dissent argued that plaintiffs’ claim could have been resolved without addressing the constitutional issues because the defendants could still have prevailed before a jury, meaning that the statutory limit on damages would not have applied. \textit{Id}. The dissent argued that by answering whether the cap was constitutional, the court violated fundamental principles that promote judicial economy and efficiency. \textit{Id}. Next, the dissent argued that the plaintiffs lacked standing and that the claim was not ripe for review. \textit{Id}. at 922–26. The dissent questioned justiciability on the basis of standing and ripeness. \textit{Id}. at 923. It described justiciability which requires that the controversy be appropriate for review by the court. \textit{Id}. It}
first described the damages crisis, which has prevented millions of Americans from obtaining health care coverage.\(^{153}\) Citing to a speech by President Barack Obama before a joint session of the United States Congress,\(^{154}\) the dissenting opinion described rising medical costs and the “unsustainable burden on taxpayers” and recognized medical malpractice reform as one of many potential remedies intended by Public Act 94-677.\(^{155}\)

The dissent then gave a much more in depth description of the entire Act at issue, Public Act 94-677.\(^{156}\) The Act included numerous provisions in addition to the LeBron cap that were enacted to decrease costs of medical care so that society could afford the significant financial burden.\(^{157}\) This was relevant to the dissent because it demonstrated that the LeBron cap was just

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\(^{154}\) Id. (citing Obama, supra note 153). President Barack Obama noted that health insurance premiums in America have gone up three times faster than wages. Obama, supra note 153. Further, one in three Americans go without health insurance at some point, and individuals that become sick are often dropped from their insurance carrier or are not covered for the full cost of care. Id. President Obama also stated, “I have talked to enough doctors to know that defensive medicine may be contributing to unnecessary costs. So I am proposing that we move forward on a range of ideas about how to put patient safety first and let doctors focus on practicing medicine.” Id.

\(^{155}\) LeBron, 930 N.E.2d at 917-918 (citing to P.A. 94–677, § 101(4) (eff. Aug. 25, 2005)) (“This health care crisis, which endangers the public health, safety, and welfare of the citizens of Illinois, requires significant reforms to the civil justice system currently endangering health care for citizens of Illinois.”) (internal citations omitted).

\(^{156}\) Id. at 918–20 (citing Public Act 94–677).

\(^{157}\) Id. The dissenting opinion described provisions of the Act which included provisions that increased oversight and reporting requirements for medical malpractice insurance carriers. Id. (citing 215 ILCS 5/1 et seq. (West 2004)). It also provided for increased availability of information pertaining to physicians’ criminal and disciplinary histories using the internet, and it mandated new written report requirements for physicians. Id. (citing 225 ILCS 60/1 et seq. (West 2004), 735 ILCS 5/2-1704.5 (West 2006) and 735 ILCS 5/2-622 (West 2004)). The court also described the amendments to the Good Samaritan Act, which made retired physicians immune from liability and provided more state funding for free clinics. LeBron, 930 N.E.2d at 919 (citing 745 ILCS 49/30 (West 2006)).

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one of many policy determinations over which the General Assembly had power, including broad regulatory authority and discretion to determine what measures would further the public interest. The dissent also argued that the power to determine public policy rested with the General Assembly and not in the courts because the General Assembly was uniquely positioned to gather data and information from constituents about public opinion and the impact of policy changes. Based on the General Assembly’s authority to make public policy, then, the dissent emphasized that the court has to give substantial deference the party challenging legislative action related to public policy has to overcome a heavy burden and must clearly establish that the law violates constitutional principles.

Next, the dissent argued that the majority opinion erred in applying Best because the determination regarding separation of powers in Best was dicta and therefore non-binding

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158 Lebron, 930 N.E.2d at 919–20. This dissent reasoned that public policy determinations are a matter for the legislature and that the function of the judiciary is not to evaluate the public policy of legislative action. Id. (citing Roselle Police Pension Bd. v. Village of Roselle, 905 N.E.2d 831, 837 (Ill. 2009)).

159 Id. (quoting Burger v. Lutheran General Hospital, 759 N.E.2d 533, 545 (Ill. 2001)). For a more in depth discussion of Burger, see supra note 135 and accompanying text (describing the background and holding of Burger).

160 Lebron, 930 N.E.2d at 920. Further, the legislature is the only branch of government with the power to weigh competing societal, economic, and policy interests. Id. (citing Mohanty v. St. John Heart Clinic, S.C., 866 N.E.2d 85, 110 (Ill. 2006)). Moreover, the dissent contends that courts are poorly equipped to determine public policy because they do not have access to all parties, facts, or issues that are relevant to a given policy. Id. (citing Bd. of Education of Dolton School School District 149 v. Miller, 812 N.E.2d 688, 693 (Ill. App. 2004)). Further, public policy is inherently political, which is a determination for the legislature rather than the courts. Id.

161 Id. (citing People v. McCarty, 858 N.E.2d 15, 32 (Ill. 2006)). In McCarty, the defendant challenged 720 ILCS 570/401(a)(6.5)(D) (2004), a statute that established a fifteen year minimum sentence for manufacturing 900 grams or more of methamphetamine, on the grounds that it violated several constitutional protections. McCarty, 858 N.E.2d at 21–24. However, the court relied in part on the heavy presumption in favor of the constitutionality of statutes to uphold the legislature’s policy determination. Id. at 32.

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

163 Id. at 926–27. The dissent discusses the concurring opinion from Best written by Justice Bilandic, which acknowledged that the separation of powers discussion was dicta. Id. (citing Best, 689 N.E.2d at 1106). Justice Bilandic’s brief concurring opinion stated: “I write separately to state that I do not join in the majority’s discussion of the constitutionality of the damages cap under the separation of powers doctrine as that discussion is wholly unnecessary and constitutes dicta.” Best, 689 N.E.2d at 1106.
authority that did not prevent the court from reconsidering the issue at a later point.\textsuperscript{164} Second, the dissent argued that the statute at issue in \textit{Lebron} was substantially different from the one at issue in \textit{Best} because it specifically sought to curb rising health care costs in a focused and particular way,\textsuperscript{165} and therefore that because different statutes should be given new consideration rather than a blind application of \textit{stare decisis}, the \textit{Best} analysis was inappropriate.\textsuperscript{166}

Finally, the dissent argued that \textit{stare decisis} does not definitively or absolutely preclude reconsideration of an issue\textsuperscript{167} because when the court clearly makes a mistake, it must correct it no matter how long or how many times it has been upheld.\textsuperscript{168} Based on this mandate, the dissent addressed the argument that caps on damages are a legislative form of \textit{remittitur} that violate the separation of powers doctrine.\textsuperscript{169} First the dissent argued that \textit{remittitur} is not an inherent function of the judiciary because it is not in the U.S. Constitution and was not incorporated into U.S. law until 1822.\textsuperscript{170} Since then, judicial \textit{remittitur} has been questioned in the Supreme Court and has even been held unconstitutional in Missouri on the basis that it violates right to a trial by

\textsuperscript{164} \textit{Lebron}, 930 N.E.2d at 926 (citing Geer v. Kadera, 671 N.E.2d 692, 699 (Ill. 1996); \textit{Exelon Corp.}, 917 N.E.2d 899 (Ill. 2009)).
\textsuperscript{165} \textit{Id.} According to the dissenting opinion, the statute at issue in \textit{Best} was distinguishable as a comprehensive tort reform package which applied broadly to all common law claims. \textit{Id.} (discussing 735 ILCS 5/2-1115.1(a) (West 1996)).
\textsuperscript{166} \textit{Id} at 926–27 (discussing \textit{Arbino} v. Johnson & Johnson, 880 N.E.2d 420 (Ohio 2007)). The court in \textit{Arbino} was also reviewing legislation that was tailored to address the constitutional defects of a previous tort reform package. \textit{Arbino}, 880 N.E.2d at 429–30. While there was precedent that supported invalidating the statute on the basis that it violated separation of powers, the court found that the case required fresh review because it was “more than a rehashing of unconstitutional statutes.” \textit{Id.}
\textsuperscript{167} \textit{Lebron}, 930 N.E.2d at 927 (“The doctrine of \textit{stare decisis} is never an inexorable command.”).
\textsuperscript{168} \textit{Id.} (citing People v. Colon, 866 N.E.2d 207, 219 (2007)). The dissent acknowledges that \textit{stare decisis} is important to the stability of the law. \textit{Id.} However, it emphasizes that \textit{stare decisis} must be set aside where it would harm the public interest or where the prior reasoning is unworkable or unsound. \textit{Id.} (citing \textit{Tuite} v. \textit{Corbitt}, 866 N.E.2d 114, 124 (Ill. 2006)).
\textsuperscript{169} \textit{Id.} at 927–32.
\textsuperscript{170} \textit{Id.} at 927–28 (citing \textit{Blunt} v. \textit{Little}, 3 F. Cas. 760 (D. Mass. 1822), a case which Justice Story decided when he sat in the federal district court in Massachusetts). In \textit{Blunt}, Justice Story stated that he hesitated to interfere with the verdict and believed he was even going “to the very limits of the law.” \textit{Blunt}, 3 F. Cas. at 762. However, he held that so long as the plaintiff was willing to remit $500 of his damages, the court would not interfere any further. \textit{Id.}
jury,\textsuperscript{171} showing that remittitur is constitutionally suspect and not essential to the court’s power.\textsuperscript{172}

Even if remittitur was an inherent function of the judiciary, the dissent argued that caps on damages were not a form of remittitur; when the court applied the cap, it did not reexamine the jury’s verdict or its factual determinations but implemented a public policy decision by the legislature to reduce liability based on what was reasonable for the health care system.\textsuperscript{173} The dissent emphasized that this exercise was not meant to replace the jury’s determination as to what was reasonable but to prevent high damages as a matter of public policy.\textsuperscript{174} Further, the dissent noted that every state addressing this issue after Best, as well as the federal courts,\textsuperscript{175} rejected the Best separation of powers analysis, finding that caps on damages are not legislative remittitur,\textsuperscript{176} and although a decision should not be made based on popularity, the dissent reasoned that it is beneficial to learn from others who provide good analysis.\textsuperscript{177}

\textsuperscript{171} Lebron, 930 N.E.2d at 928 (citing Dimick v. Schiedt, 293 U.S. 474 at 484 (1935), and Firestone v. Crown Center Redevelopment Corp., 693 S.W.2d 99, 110 (Mo. 1985) (en banc)). The dissent describes how the court in Dimick only upheld judicial remittitur because it had been practiced in federal courts for over a century. \textit{Id.} It also quotes Dimick where the court stated, “if the question of remittitur were now before us for the first time, it would be decided otherwise.” \textit{Id.} (citing Dimick, 293 U.S. at 484) (internal citations omitted). The court also notes that remittitur exists in Missouri only because the legislature reauthorized the practice after Firestone. \textit{Id.} (citing Myers v. Morrison, 822 S.W.2d 906, 910 (Mo. App. 1991)).

\textsuperscript{172} \textit{Id.} Specifically, the dissent states that remittitur is not an essential part of the judiciary’s power as granted to courts in the Illinois Constitution of 1970. \textit{Id.}

\textsuperscript{173} \textit{Id.} (citing Estate of Sisk v. Manzanares, 270 F. Supp. 2d 1265, 1277–78 (D. Kan. 2003)).

\textsuperscript{174} \textit{Id.} “[R]eduction of an award to comport with legal limits does not involve substitution of the court’s judgment for that of the jury, but rather is a determination that a higher award is not permitted as a matter of law.” \textit{Id.} (citing Johansen v. Combustion Engineering, Inc., 170 F.3d 1320, 1330–31 (11th Cir. 1999)).

\textsuperscript{175} \textit{Id.} at 929–30. The dissent cites to a Note written by a student at Northwestern University Law School which contended that the court’s separation of powers analysis in Best would be a powerful weapon for those who opposed caps on damages. \textit{Id.} at 929 (citing Fink, \textit{supra} note 61, at 272)). According to the dissent, “the weapon proved to be a dud.” \textit{Id.}

The dissent argued that the separation of powers analysis from Best was also incorrect and should not have been applied in Lebron because it failed to recognize the General Assembly’s power to repeal or change the common law, which is superior to the judiciary’s authority over the common law and justifies the General Assembly’s power to limit damages as a function of public policy. Finally, the dissent affirmed that the separation of powers clause of the Illinois Constitution was to be interpreted based on the framers’ intent, but that this did not prevent the court from incorporating or considering the decisions of other states regarding similar laws, which are useful and appropriate for deciding similar cases in Illinois. Based on the foregoing arguments and the realization that the court’s determination would continue to contribute to increasing health care costs, the dissenting opinion opposed the majority opinion’s holding.

IV. ANALYSIS

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177 Id. at 930 (quoting Sophicles, Antigone (trans. E. Wyckoff)).
178 Id.
179 Id. at 930–31. For this proposition, the dissent cites to the Illinois Common Law Act, which states in relevant part, “[t]he common law of England . . . shall be the rule of decision, and shall be considered as of full force until repealed by legislative authority.” Id. (citing 5 ILCS 50/1 (West 2008)). Further, the dissent discusses the Illinois Constitution, which dictates that the General Assembly has legislative authority in Illinois. Id. (citing ILL. CONST. 1970, Art. IV, § 1). Finally, the dissent shows that even the Illinois Supreme Court has recognized the authority of the General Assembly to eliminate or change the common law. Id. The court has held that “[t]he Illinois General Assembly has the inherent power to repeal or change the common law, or do away with all or part of it.” Id. (citing People v. Gerasch, 553 N.E.2d 281, 286 (Ill. 1990)). The dissent notes that the General Assembly’s power to limit common law remedies is itself limited by Article I section 12 of the Illinois Constitution. Id. (citing ILL. CONST. 1970, Art. I, § 12). However, the dissent argues that this has not stopped the court from upholding the General Assembly’s authority to limit the time in which actions can be brought, raising the standard of care for tort liability, and restricting the type or amount of damages a party may recover. Id. (citing Bilyk v. Chicago Transit Authority, 531 N.E.2d 1, 7 (Ill. 1988)).
180 Id. at 932. The dissent cited to numerous Illinois cases in which the court found it appropriate to analyze applicable legal conclusions from other state courts. Id. (citing e.g., People v. Pawlaczyk, 724 N.E.2d 901, 912 (Ill. 2000); P.R.S. Intern., Inc. v. Shred Pax Corp, 703 N.E.2d 71, 78 (Ill. 1998)).
181 Id. at 932–34.
The decision in *Lebron* reinforced Illinois’ position in the scant minority of states that view legislative caps on damages as an unconstitutional violation of separation of powers.\(^{182}\) Moreover, it made this interpretation binding precedent,\(^{183}\) whereas it had previously only been judicial dicta.\(^{184}\) Although the court addressed *Unzicker* in its opinion, it did not recognize the contradiction between *Unzicker* and *Best* when it relied on *Best* to find the *Lebron* cap unconstitutional.\(^{185}\)

Accordingly, this Part briefly addresses the procedural arguments in *Lebron* before moving onto the substantive analysis.\(^{186}\) It evaluates the primary arguments against the court’s finding—that *remititur* is not inherent to the judiciary, that caps on damages are not *remititur*, that the General Assembly has broad latitude to change the common law, and that *Best* was non-binding judicial dicta—and discusses the contradiction between *Unzicker* and *Best*, showing that the majority in *Lebron* erroneously applied *Best* in finding caps on damages unconstitutional because *Unzicker* was binding precedent, superior to the judicial dicta from *Best*.\(^{187}\)

**A. The Illinois Supreme Court Erred in Addressing the Constitutional Issues for Lack of Ripeness and Standing**

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\(^{182}\) See Goldhaber, *supra* note 93, at 21 (describing the strong ruling in *Lebron* as a serious blow to the effort for caps on noneconomic damages and stating that it may be the last word from the Illinois Supreme Court on the issue). It is still unclear how the General Assembly will respond to *Lebron*, but bills have been proposed and state constitutional amendments have been discussed as options to try again to overcome the Illinois Supreme Court’s ruling. *Id.* at 21. See *supra* notes 237–238 and accompanying text for an in depth discussion of the other states that have addressed separation of powers in this context and found that caps on damages do not violate separation of powers.

\(^{183}\) See *Lebron*, 930 N.E.2d at 908–21 (holding that the *Lebron* cap was unconstitutional on the grounds that it violated the separation of powers provision of the Illinois Constitution).

\(^{184}\) *Lebron*, 930 N.E.2d at 906–07; Parness, *supra* note 121, at 324. Although the separation of powers reasoning from *Best* could be construed as obiter dictum, both the dissenting and majority opinions acknowledged that it was judicial dictum at the least. *Lebron*, 930 N.E.2d at 906–07, 927.

\(^{185}\) See *infra* notes 270–271 and accompanying text (arguing that *Best* and *Unzicker* contradicted each other because *Best* held that limits to liability were never permissible because of the separation of powers provision whereas *Unzicker* upheld a statute that limited a defendant’s liability); *but see* *Unzicker* v. Kraft Food Ingredients Corp., 783 N.E.2d 1024, 1042 (distinguishing the statutes at issue in *Unzicker* and *Best* because the provision in *Best* was a mandatory cap on plaintiffs’ recovery no matter what action was brought whereas the statute in *Unzicker* merely dictated when a defendant could be held liable for the entire amount that the jury’s verdict mandated).

\(^{186}\) See *infra* Part IV.A (discussing the ripeness and standing challenges to *Lebron*).

\(^{187}\) See *infra* Part IV.B.1–4 (analyzing these issues in relation to *Lebron*).
As a preliminary matter, the majority and dissent in *Lebron* disagreed as to whether the court could properly address the constitutional claims before it.\(^{188}\) Although the majority opinion described the circuit court’s reliance on *Best* in rejecting the objections to standing and ripeness, it never affirmed that the circuit court made the correct determination on the standing and ripeness objections.\(^{189}\) Instead, it merely observed that these issues were not raised again on appeal and asserted that they were therefore waived.\(^{190}\) The majority’s only basis for this determination is its claim that ripeness and standing do not implicate the court’s subject matter jurisdiction.\(^{191}\) However, after meticulously addressing each of the dissenting opinion’s procedural challenges to its determination, the court completely failed to discuss *People v. Capitol News, Inc.*,\(^{192}\) an Illinois Supreme Court case which the dissent cited in arguing that ripeness and standing can call subject matter jurisdiction into question.\(^{193}\) Although *Capitol News* does not address ripeness, the court relied on standing to dismiss a claim for lack of subject jurisdiction.

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\(^{188}\) Compare *Lebron*, 930 N.E.2d 915–17, with *Lebron*, 930 N.E.2d 923–26. The dissent’s arguments that the claim was not justiciable or jurisprudential is discussed at more length in Part III-C, supra, and the majority opinion’s responses are discussed in Part III-B, supra. Notably, the majority opinion does not address the argument that the claim is not jurisprudential, and it only addresses the one that the claim is not justiciable because it finds itself “constrained” to do so. *Lebron*, 930 N.E.2d at 915; see also Amicus Brief, 2008 WL 3857551, at *15–19, *Lebron* v. Gottlieb, Nos. 105741, 105745. However, it is evident that the claim could have been resolved without addressing the constitutional questions had the jury found that the defendants were not liable for any damages. *Lebron*, 930 N.E.2d at 922. Therefore, judicial economy should have constrained the court from hearing the claim until the plaintiffs were actually awarded damages exceeding the statutory cap. *People v. Hampton*, 867 N.E.2d 957, 960–61 (Ill. 2007) (holding that defendant’s constitutional challenge to an Illinois statute lacked ripeness because it was premature: there was a chance that the case would have been decided on the merits without needing to address the statute’s constitutionality).

\(^{189}\) See *Lebron*, 930 N.E.2d at 916 (describing the circuit court’s reliance on *Best* to determine that plaintiff had standing and a ripe claim without ever evaluating the legitimacy of the circuit court’s finding).

\(^{190}\) Id. at 916–17.

\(^{191}\) Id. at 916. The majority opinion neglected to even explain in the body of its opinion why it found that ripeness and standing did not implicate subject matter jurisdiction. Id. It made a simple assertion of that point and included a footnote discussing why it did not have to follow federal precedent. Id. (citing Greer v. Illinois Housing Development Authority, 524 N.E.2d 561, 576 (Ill. 1988)).

\(^{192}\) 560 N.E.2d 303 (Ill. 1990).

\(^{193}\) *Lebron*, 930 N.E.2d at 914–17, 923 (citing *People v. Capitol News*, 560 N.E.2d at 306). The *Lebron* court reasoned in a footnote that under federal law ripeness and standing implicate subject matter jurisdiction but that the Illinois Supreme Court does not have to follow federal courts on the issues of standing and ripeness. Id. at 914–17. *Capitol News* addressed charges against defendants for the sale or delivery of obscene materials. *Capitol News*, 560 N.E.2d at 305. The defendants challenged the constitutionality of the obscenity statute on grounds of vagueness, but the state argued that defendants lacked standing for this claim. Id.
matters jurisdiction. Specifically, the court in *Capitol News* held that lack of standing meant a claim was not justiciable, and therefore the court held that it lacked subject matter jurisdiction over the claim. Thus, as a threshold matter the Illinois Supreme Court in *Lebron* incorrectly heard the claim: the court lacked subject matter jurisdiction over the claim because it was not ripe for review and was brought by plaintiffs without standing. Therefore, because the binding precedent of *Capitol News* required the dismissal of a claim where it lacked subject matter jurisdiction, the majority opinion’s cursory dismissal of this issue undermined its holding on separation of powers.

### B. The Statutory Cap on Damages at Issue in Lebron Was Not an Unconstitutional Violation of the Separation of Powers Doctrine

Even if the *Lebron* court properly heard the separation of powers issue despite challenges to standing and ripeness, it erred in finding the statutory cap on damages unconstitutional. First, the General Assembly has authority to alter or eliminate the common law, which is exactly what the General Assembly was doing when it limited the amount a plaintiff can recover in

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194 *Capitol News*, 560 N.E.2d at 306 (holding that the Illinois Constitution limits the circuit courts to hearing justiciable matters and that a claim must be justiciable for it to have subject matter jurisdiction).

195 *Id.* In *Lebron*, Dr. Levi-D’Ancona challenged standing and ripeness before the circuit court, which held based on *Best* that the plaintiffs had standing and that the claim was ripe for review; the defendants did not renew the claim on appeal. *Lebron*, 930 N.E.2d at 916.

196 See *Capitol News*, 560 N.E.2d at 306 (finding that standing was required for subject matter jurisdiction and that a claim challenging subject matter jurisdiction at the trial level cannot be waived by a party that fails to raise that challenge at the appellate level). The plaintiffs did not have standing because they were not affected by the cap on damages: they never obtained judgment in their favor that exceeded the cap. *See supra* note 152 (discussing the dissent’s arguments as to why the court should have invalidated plaintiff’s claim for lack of standing). Further, the claim was not ripe for review because it was merely a hypothetical situation that assumed the plaintiffs would prevail and it could have been discarded if the trial court entered judgment against plaintiffs on the merits. *See supra* note 152 (discussing the dissent’s arguments as to why the could should have invalidated plaintiff’s claim because it was not ripe for review).

197 *See supra* note 193–194 and accompanying text (discussing the *Capitol News* court’s reliance on standing to dismiss an affirmative defense for lack of subject matter jurisdiction).

198 *See Lebron*, 930 N.E.2d at 926 (citing ILL. CONST. 1970, Art. VI, § 9) (arguing that the court’s premature hearing of separation of powers issue violated the constitution). According to the dissent, the Illinois Supreme has no place telling the General Assembly what does or does not violate constitutional protections if it could not follow the constraints on its own constitutional authority. *Id.*

199 *See infra* Part IV.B.1–4 (arguing that the separation of powers analysis from *Best* was erroneous and that, as judicial dicta and in light of the heavy presumption favoring the constitutionality of statutes, it should not have been applied in *Lebron*).
medical malpractice claims. Further, the separation of powers analysis from Best was non-binding judicial dicta, and the court in Best erroneously decided the separation of powers issue because statutory caps are not a type of *remittitur*, and *remittitur* is not an inherent judicial function. Finally, there is a heavy presumption supporting statutes that should have weighed in favor of the *Lebron* cap’s constitutionality.

1. The Separation of Powers Analysis Adopted by *Lebron* from Best was Erroneous

The *Lebron* court heavily relies on Best, clearly stating in its opinion that it had to consider the finding in Best and therefore was not deciding the case on a blank slate. However, the court’s finding in Best was erroneous because it incorrectly held that caps on damages function as legislative *remittitur* and it mistakenly found that *remittitur* is an inherent power of the judiciary. By.upholding Best, the *Lebron* court rejected the overwhelming consensus that caps on damages are not an unconstitutional violation of separation of powers.

a. The *Lebron* Cap Functioned Differently Than *Remittitur*

The majority opinion’s application of Best is problematic because Best held that the General Assembly’s passing of a cap on damages was an unconstitutional violation of separation of powers. Those who violently oppose damage caps have commonly done so based in part

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200 See infra Part IV.B.2 (arguing that the General Assembly’s power to change or eliminate the common law should have been given more weight in *Lebron*).
201 See infra Part IV.B.3. (analyzing Best and whether its separation of powers analysis was obiter dicta or judicial dicta).
202 See infra Part IV.B.1 (discussing the analysis from Best regarding damage caps as a violation of separation of powers).
203 See infra Part IV.B.4 (discussing the presumption favoring the constitutionality of statutes).
204 *Lebron* at 903, 914 (stating that the findings of other states were not determinative when there was an applicable Illinois holding).
205 See infra Part IV.B.1.a–b (arguing that the *Lebron* cap did not function as *remittitur* and that *remittitur* is not an inherently function of the judiciary).
206 See infra Part IV.B.1.c (arguing that the *Lebron* court did not give adequate weight to the findings of other states).
207 See infra Part IV.B.1.a–b (arguing that Best’s separation of powers analysis was erroneous).
on the grounds that it violates the separation of powers doctrine: they argue in favor of absolute independence of the judiciary in this area of law, but they typically fail to see the significance of checks and balances in our system of government which includes certain shared powers between the three branches. The Illinois Supreme Court has long rejected the notion that each branch of government should exercise its authority completely independent of the other branches. Rather than complete independence, the three branches of government have shared and overlapping powers. Thus, simply exercising a similar function of government is not sufficient to constitute a separation of powers violation; rather, the “General Assembly has the

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208 See Edward J. Kionka, Things to Do (Or Not) To Address the Medical Malpractice Insurance Problem, 26 N. ILL. U. L. REV. 469, 502-03 (2006) (arguing that because remittitur must be considered on a case-by-case basis, the legislature violated the separation of powers in applying an arbitrary cap on damages); Robert S. Peck, Tort Reform’s Threat to an Independent Judiciary, 33 RUTGERS L.J. 835, 917 (arguing that judiciary needs independence from legislature). Peck argues that history demonstrates the purpose of separation of powers and that letting the judiciary have too much power will essentially lead to authoritarianism. Peck, supra, at 917; Fink, supra note 61, at 268–69 (arguing that remittitur analysis from Best is powerful and could be applied in other states to find statutory caps on damages unconstitutional). Fink argues that thirteen states of the states which have upheld caps on noneconomic damages did not address a possible separation of powers violation. Fink, supra note 61, at 268. However, this article conveniently failed to mention that the Supreme Court of Virginia had recently held that remittitur was an entirely different function than caps on damages. Pulliam v. Coastal Emergency Serv., 509 S.E.2d 307, 313 (Va. 1999). Partially on that basis, the court rejected the claim that statutory limits on damages violated separation of powers. Id. Further, since Fink’s article, at least six state supreme court cases have upheld caps on damages despite a challenge on the basis that the caps functioned as legislative remittitur in violation of the separation of powers doctrine. Evans v. State, 56 P.3d 1046, 1055 (Alaska 2002); Garhart v. Columbia/Healthone, L.L.C., 95 P.3d 571, 581–82 (Colo. 2004); Kirkland v. Blaine County Medical Center, 4 P.3d 1115 (Idaho 2000); Gourley v. Nebraska Methodist Health System, Inc., 663 N.W.2d 43 (Neb. 2003); Rhyne v. K-Mart Corp., 594 S.E.2d 1 (N.C. 2004); Verba v. Ghaphery, 552 S.E.2d 406 (W. Va. 2001). Although there are several states that have not addressed remittitur arguments at all, every state other than Illinois that has addressed this question has rejected the analysis and the conclusion from Best. Lebron, 930 N.E.2d at 929–30. The federal court, applying Maryland state law, has also rejected this premise. Franklin v. Mazda Motor Corp., 704 F.Supp. 1325 (D. Md. 1989).

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

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

211 Gillespie, 15 N.E.2d at 514; Franklin, 186 N.E. at 139.
power to enact law governing judicial practices when the laws do not unduly infringe upon
the inherent powers of the judiciary.”

Remittitur is a procedure whereby a judge orders a reduction of a jury award; it originated
as a means for the judge to limit damages when it believed that the jury’s award was
unreasonable and against the manifest weight of evidence. Still, assessments of damages are
primarily a determination for the jury, and the court’s authority to intervene is limited to
instances where the jury award is excessive. Notably, the Illinois Supreme Court has held that
remittitur requires a case-by-case determination of what damages are reasonable. In contrast,
the General Assembly did not enact the Lebron cap such that it would make such a
determination; rather, the cap was a prospective blanket policy applicable to all cases irrespective

212 People v. Davis, 442 N.E.2d 855, 860 (Ill. 1982) (citing People v. Youngbey, 413 N.E.2d 416, 419 (Ill. 1980));
see Lebron, 930 N.E.2d at 908 (holding that the Lebron cap was an encroachment of the judiciary’s inherent power of remittitur).
213 Best, 689 N.E.2d at 1079–80; John C. MacQueen & George Woodworth, Improving Judicial Oversight of Jury
Damas Assessments: A Proposal for the Comparative Additur/Remittitur Review of Awards for Nonpecuniary
214 Philip H. Corboy et al., Illinois Courts: Vital Developers of Tort Law As Constitutional Vanguards, Statutory
has consistently held that the jury is responsible for determining damages because it is a question of fact. Lee v.
Chicago Transit Authority, 605 N.E.2d 493, 509–10 (Ill. 1992); Baird v. Chicago, Burlington & Quincy R.R. Co.,
349 N.E.2d 413, 417–18 (Ill. 1976); Corboy, supra, at 209–10. Great weight must be given to the jury’s
215 Richardson v. Chapman, 676 N.E.2d 621, 628 (Ill. 1997); Fink, supra note 61, at 232–33 (citing Morton J.
Horwitz, The TRANSFORMATION OF AMERICAN LAW 1780-1860, at 2 (1978)) (arguing that judicial remittitur is
based on the manifest weight of evidence, a fact-based determination); Richard W. Murphy, Separation of Powers
and the Horizontal Force of Precedent, 78 NOTRE DAME L. REV. 1075, 1151 (2003); see also Best, 689 N.E.2d at
damages based on its determination that the jury award was excessive). The majority opinion in Lebron even
recognizes that remittitur requires a focused examination of the facts of each case. Lebron, 930 N.E.2d at 906
(citing Best, N.E.2d at 1080). Although there is substantial authority behind the judiciary’s right to determine
damages, remittitur ensures the longevity of the jury even if there is misbehavior by some juries. Sunray Oil Corp.
v. Allbritton, 187 F.2d 475, 478 (C.A. Tex. 1951) (quoting William Blackstone’s Commentaries). Because the
historical premise for remittitur is based on the need to correct aberrant errors of the jury, remittitur clearly can only
be exercised on a case-by-case basis. Fink, supra note 61, at 242. Most commentators believe that judicial
remittitur represents the maximum incursion allowable on the power of the judiciary. Id.; see also Blunt v. Little, 3
F.Cas. 760, 762 (D. Mass. 1822) (“I have the greatest hesitation in interfering with the verdict, and in so doing, I
believe that I go to the very limits of the law.”). See supra note 75 for a more in depth discussion of the historical
development of remittitur and the subsequent challenges to its constitutionality.
of the facts in an effort to lower costs to the health care system. To some this only shows that damage caps are an improper exercise of remittitur because the case-by-case justifies remitting a jury award. However, remittitur inherently involves weighing evidence and the absence of a case-by-determination differentiated the basic function of the Lebron cap from remittitur. it

216 735 ILCS 5/2-1706.5 (West 2008); see also Kirkland v. Blaine County Medical Center, 4 P.3d 1115, 1122 (Idaho 2000) (citing Franklin v. Mazda Motor Corp., 704 F. Supp. 1325, 1331 (D. Md. 1989)) (arguing that there is a distinction between a legislative action that applies to all parties and an individualized determination of what is proper based on the facts of a particular case). The Lebron cap clearly applied “in any medical malpractice action or wrongful death action based on medical malpractice in which economic and non-economic damages may be awarded.” 735 ILCS 5/2-1706.5 (West 2008). Because the cap applied to all medical malpractice actions regardless of the circumstances, the statute functioned as a policy determination. See 735 ILCS 5/2-1706.5 (West 2008) (applying to all medical malpractice actions and describing the policy justifications for enacting the cap). The General Assembly’s clearly expressed intent also makes clear that the cap on damages was a prospective policy determination, and many commentators have discussed the public policy concerns that Illinois sought to address with section 2-1706.5. Goldhaber, supra note 19 (citing P.A. 94-677, § 101 (eff. Aug. 25, 2005)). Specifically, the General Assembly enacted this statute in part to prevent physicians who specialize in high-risk procedures and face high malpractice liability insurance premiums from leaving Illinois. Chiu, Shirley, A critical Look at the Non-economic Damage Cap of the Health Care Act of 2005 And Its Impact on Consumers, 18 LOY. CONSUMER L. REV. 85, 95 (2005). The intent of the legislature can also be inferred from the actions of other states, many of which have sought to reduce costs of medical liability through similar statutes that limited damages in medical malpractice cases. See, e.g., Cal. Civ.Code § 3333.2 (West 2009) (stating that the purpose of the Act was to reduce the cost of malpractice insurance in response to the crisis of rising costs); Laws 2005, Act 1, §§ 1, 14, 15 (eff. Feb. 16, 2005) (stating that the Georgia cap on damages was enacted to combat the crisis affecting the quality of health care); Kirkland, 4 P.2d at 1121 (citing I.C. § 6-1603 (West 2003)) (discussing the legislature’s intent to address the policy concerns that large jury awards were driving up the cost of liability insurance in Idaho); Johnson v. Superior Court, 124 Cal. Rptr. 2d 650, 657 (stating that the caps were enacted as part of a large effort to slow the rising cost of liability insurance); Cook v. Newman, 142 S.W.3d 880, 887 (Mo. App. 2004) (citing Mo.Rev.Stat. § 538.210 (2009)).

217 Blunt, 3 F. Cas. at 761–72; see Lebron, 930 F.2d at 928 (citing Firestone v. Crown Center Redevelopment Corp., 693 S.W.3d 99, 110 (Mo. 1985)) (describing how remittitur was questioned in Missouri because the court assumed the power to weigh evidence, which is a determination reserved for the trier of fact). Justice Story, who in fact created the doctrine of remittitur, Fink, supra note 61, at 231–33, described the exercise of remittitur as one “of discretion full of delicacy and difficulty.” Blunt, 3 F. Cas. at 761–72. He described the careful process of weighing the evidence that justified his determination. Id. The Richardson court described remittitur as the function of the court to replace its determination for the jury’s finding based on the evidence in the record. Richardson, 676 N.E.2d at 628. See supra note 215 and accompanying text for further analysis on why a case-by-case determination is required for remittitur and for a description of the historical development of that principle. Another inherent component of remittitur is that there is a problem with the jury’s fact finding—there must be some evidence that the jury acted with passion or prejudice against the defendant. Sandra Sperino, Judicial Preemption of Punitive Damages, 78 U. Chi. L. REV. 227, 256 (2009). The Lebron cap is therefore inherently different from remittitur because it does not require the jury to act with passion or prejudice; indeed, the cap could have applied where a jury reasonably and justifiably awarded damages in excess of the cap. See 735 ILCS 5/2-1706.5 (West 2008) (stating that the statute would apply to “any” jury award). If the cap infringed on any authority, it was that of the jury. Fink, supra note 61, at 234–35 (arguing that the jury alone has power to determine damages).
had a legislative effect and purpose that applied prospectively to all citizens in all incidents, analogous to repealing a cause of action or remedies thereof.\textsuperscript{219}

In the statute’s legislative history, the General Assembly argued that increasing medical liability insurance costs were contributing to the increasing cost of health care.\textsuperscript{220} It noted that capping non-economic damages in medical malpractice cases was one of the reforms that would benefit the state of Illinois by maintaining the health care system to protect the safety and welfare of Illinois citizens.\textsuperscript{221} Thus, the objective of the \textit{Lebron} cap was significantly different from that of judicial remitter.\textsuperscript{222} \textit{Remittitur} is a mechanism used to prevent jury awards that shock the judicial conscience.\textsuperscript{223} The \textit{Lebron} cap was properly within the scope of legislative power as a policy mechanism to reduce medical liability costs to an amount the health care system could sustain and increase availability of health care in Illinois.\textsuperscript{224}

The opposing viewpoint is that \textit{remittitur} and caps on damages have the same effect, making them practically the same exercise of power: in both cases, the government is reducing the amount of damages a plaintiff recovers.\textsuperscript{225} However, the question of whether the General Assembly infringes on the inherent power of the judiciary is a question of the power itself and not its effect.\textsuperscript{226}

\footnotesize{\textsuperscript{219} Franklin v. Mazda Motor Corp., 704 F. Supp. 1325, 1331 (D. Md. 1989); see also Kirkland, 4 P.3d at 1122 (citing \textit{Franklin}, 704 F. Supp. at 1331) (drawing a distinction between prospective legislative action that applies to all parties and an individualized judicial determination); see also supra note 216 (discussing the prospective policy nature of caps on damages).
\textsuperscript{220} P.A. 94-677, Art. 1, § 101 (eff. Aug. 25, 2005).
\textsuperscript{221} id.
\textsuperscript{222} See \textit{Lebron}, 930 N.E.2d at 927 (arguing that caps on damages are not a determination of what is reasonable but what is allowable as a matter of law).
\textsuperscript{223} id.; \textit{Richardson}, 676 N.E.2d at 628; Richter v. Northwestern Memorial Hospital, 532 N.E.2d 269, 257 (Ill. App. 1988). The \textit{Richardson} court described \textit{remittitur} as substituting the judge’s determination for that of the jury, which it could not do lightly. \textit{Richardson}, 676 N.E.2d at 628.
\textsuperscript{224} Lees, supra note 3, at 232 (discussing the findings of Reform Now, supra note 1, at 28).
\textsuperscript{225} Stephen B. Presser, \textit{Separation of Powers and Civil Justice Reform: A Crisis of Legitimacy for Law and Legal Institutions}, 31 \textit{Seton Hall L. Rev.} 649, 656 (2001) (describing the conclusion in \textit{Best} as being premised on the idea that the legislature took away the judiciary’s \textit{remittitur} role when it reduced damages).
\textsuperscript{226} ILL. CONST. 1970, Art. II, § 1 (stating that no branch shall exercise the actual power that belongs to another).}
Remittitur also functions only when the plaintiff agrees to it because the judge, after making the factual determination of what amount is reasonable, gives the plaintiff a choice between accepting that amount and proceeding to a new trial. This is not the case with the Lebron cap, which was enacted by the General Assembly to apply to all cases irrespective of the parties’ wishes. Again, this highlights that the prospective application of the Lebron cap differentiated it from the judicial function of adjudicating disputes between parties; the Lebron cap did not displace the judiciary’s function of determining whether the jury award was fair and reasonable in each particular case.

b. The Lebron Court’s Separation of Powers Analysis Erred in Finding that Remittitur is an Inherently Judicial Function

Moreover, the historical development and numerous constitutional challenges to the judiciary’s exercise of remittitur clearly show that the function is not an inherent power of the judiciary. Clearly, if the Illinois Constitution had explicitly given the judiciary power to remit...
jury awards, the courts would be justified in finding that it was inherent, but the framers of the Illinois Constitution failed to grant that authority.\textsuperscript{231} Furthermore, the American judiciary has not always exercised the power of \textit{remittitur}, but it was incorporated into American law in 1822, and the constitutionality of \textit{remittitur} has been challenged in several jurisdictions.\textsuperscript{232} Ultimately, the legitimacy of judicial \textit{remittitur} was accepted because it was regularly applied in the court system, not on the basis that the judiciary had an inherent power to exercise it.\textsuperscript{233} However, the duration for which judicial \textit{remittitur} has now been upheld in the federal courts has widely been lumped together with the inherency of that power and used to argue that \textit{remittitur} is an inherent judicial function.\textsuperscript{234} While duration supports the finding that a power is inherent, it is not an inherent power but goes to the “very limits of the law.” Fink, \textit{supra} note 61, at 234 (citing Blunt v. Little, 3 F. Cas. 760, 762 (D. Mass. 1822)).

\textsuperscript{231} Polich v. Chicago School Finance Authority, 402 N.E.2d 247, 251 (Ill. 1980) (stating that the power to tax was firmly in the General Assembly both because it was an inherent power and because it was specifically granted in the Constitution); People ex rel. Baricvic v. Wharton, 556 N.E.2d 253, 257 (Ill. 1990) (stating that the judiciary has inherent authority to administer and supervise the court system relying on the Illinois Constitution which specifically vest this power in the court). Not only does the Illinois Constitution not grant the power to remit jury awards to the judiciary, but the exercise of \textit{remittitur} is constitutionally suspect. \textit{Lebron}, 930 N.E.2d at 928; \textit{see infra} note 232 (discussing challenges to the constitutionality of the \textit{remittitur} doctrine).

\textsuperscript{232} First, federal courts were reluctant at times to incorporate the \textit{remittitur} doctrine and questioned its constitutionality. \textit{Dimick}, 293 U.S. at 484; Fink, \textit{supra} note 61, at 237 (arguing that the Supreme Court during the twentieth century pulled back from recognizing the legitimacy of \textit{remittitur} and casted doubt on its constitutionality). Missouri also questioned the constitutionality of \textit{remittitur} and even found it unconstitutional; however, it was established again by statute. \textit{See infra} note 75 (describing the \textit{remittitur} debate in Missouri). Finally, numerous legal scholars have questioned \textit{remittitur}. Fink, \textit{supra} note 61, at 238–39. Professor Irene Deaville Sann argued that tradition is not sufficient to justify the continue practice of \textit{remittitur} and that it should therefore be abolished. Irene Deaville Sann, \textit{Remittiturs (and Additurs) in the Federal Courts: An Evaluation with Suggested Alternatives}, 38 CASE W. RES. L. REV. 157, 172 & 221 (1988). According to Sann, tradition should not prevent the Court from upholding the constitution no matter how engrained a particular practice may be. \textit{Id}. Further, Leo Carlin has argued that \textit{remittitur} is unconstitutional because it undermines the right of the judiciary to award damages. Leo Carlin, \textit{Remittiturs and Additurs}, 49 W. VA. L. REV. 1, 24 (1942). Fink argued that \textit{remittitur}’s suspect constitutionality actually weakens the case for legislative caps. Fink, \textit{supra} note 61, at 298. Fink argued that if judicial \textit{remittitur} were unconstitutional, it would in fact mean that the legislature could not limit damages either. \textit{Id}. However, the court has established that \textit{remittitur} is constitutional in Illinois. Richardson v. Chapman, 676 N.E.2d 621, 628 (Ill. 1997). The questionable history of \textit{remittitur} and these constitutional challenges merely show that \textit{remittitur} is not so well established that it can be considered inherent to the judiciary’s power. \textit{Lebron}, 930 N.E.2d at 928.

\textsuperscript{233} \textit{Dimick}, 293 U.S. at 483.

\textsuperscript{234} \textit{See Best}, 689 N.E.2d at 1079–80 (arguing that \textit{remittitur} is an inherent judicial function because it has been upheld in federal courts for over a century); Corboy, \textit{supra} note 214, at 210 (asserting that Illinois courts are to use \textit{remittitur} “by tradition, and as an inherent power of the judicial branch”). In \textit{Best}, the court merely cites to a U.S. Supreme Court case that remitted a jury award to support the proposition that that function is inherent to the judiciary. \textit{Best}, 689 N.E.2d at 1079 (citing Hansen v. Boyd, 161 U.S. 397, 412 (1896)). The court also cites to and
not sufficient to show inherency; rather, inherency is a power that is critical to the exercise of all other powers.\textsuperscript{235} This element is critical to understanding why \textit{remittitur} is not inherent to the judiciary because for many years, courts were able to administer justice and execute their powers without the exercise judicial \textit{remittitur}.\textsuperscript{236}

c. The \textit{Lebron} Court Did Not Give Adequate Weight to the Separation of Powers Analysis from Other States

Finally, the \textit{Lebron} holding was surprising because the overwhelming majority of states that have addressed statutes similar to the \textit{Lebron} cap found that caps on damages are not unconstitutional.\textsuperscript{237} Of these states, several have specifically found that caps on damages are not comparable to legislative \textit{remittitur} and do not violate the separation of powers.\textsuperscript{238} Although the

\textit{Dimick}, which questions the constitutionality of \textit{remittitur}. \textit{See supra}, note 75 (discussing the \textit{Dimick} Court’s analysis of \textit{remittitur} as being constitutionally suspect). Further, Corboy cites to \textit{Richardson}, 676 N.E.2d at 628 (Ill. 1997), to support this proposition, but the \textit{Richardson} court merely applied the \textit{remittitur} doctrine and did not hold that power to be inherent to the judiciary. \textit{See Richardson}, 676 N.E.2d at 629 (finding that it was appropriate to remit the jury award to an amount that did not depart from the record). \textit{See} \textit{Roadway Exp., Inc. v. Piper}, 447 U.S. 752, 764 (holding that that inherent powers are “those which are necessary to the exercise of all others”) (internal citations omitted). The \textit{Roadway Express} court identified a contempt sanction as a prominent inherent power because it is necessary to maintain order and dignity in the court. \textit{Id.} The court then concludes that assessing attorney’ fees against counsel is an inherent judicial function because that power is necessary for the court to manage its own affairs. \textit{Id.} at 765. The \textit{Inherent-Powers Doctrine} guides the determination of what powers are inherent: Black’s Law Dictionary defines the Inherent-Powers Doctrine as “[t]he principle that allows courts to deal with diverse matters over which they are thought to have intrinsic authority, such as (1) procedural rulemaking, (2) internal budgeting of the courts, (3) regulating the practice of law; and (4) general judicial housekeeping. \textit{BLACK’S LAW DICTIONARY} (8th ed. 2004), “Inherent-Powers Doctrine”. The court in \textit{Best} describes the procedural aspects of judicial \textit{remittitur}, but it never argues that \textit{remittitur} is an inherent power of the judiciary on the basis of any one of these four categories or that it is necessary to the exercise of all other powers. \textit{See Best}, 689 N.E.2d at 1078–82 (holding that \textit{remittitur} promotes the administration of justice and the conclusion of litigation but not finding that \textit{remittitur} is essential to all functions of the judiciary). Contrary to the procedural and routine nature of the qualities described under the Inherent-Powers Doctrine, the court characterizes judicial \textit{remittitur} as a question of law exercised by the court. \textit{Id.} at 1079.

\textit{Dimick}, 293 U.S. at 483.


\textit{Evans}, 56 P.3d at 1055; \textit{Garhart}, 95 P.3d at 581–82; \textit{Kirkland}, 4 P.3d at 1121–24; \textit{Gourley}, 663 N.W.2d at 76; \textit{Judd}, 103 P.3d at 145; \textit{Verba}, 552 S.E.2d at 411; \textit{Owens-Corning}, 725 A.2d at 590–92; \textit{Zdrojewski}, 657 N.W.2d at 739. Of these eight cases, four specifically identified and rejected the reasoning from \textit{Best}. \textit{E.g.}, \textit{Gourley}, 663
proponents of caps argue that other states do not dictate Illinois law, the Illinois Supreme Court has on numerous occasions considered the findings of other states to inform its conclusion, holding that these findings are one factor of many to consider in adjudicating claims. Further, these conclusions should be persuasive in Illinois because the statutes at issue and the separation of powers provisions of those states are similar to the Lebron cap and Illinois separation of powers clause, demonstrating that their conclusions would not only have been

N.W.2d at 76 and Owens-Corning, 725 A.2d at 590-92. In Gourley, the Supreme Court of Nebraska acknowledged that the Illinois Supreme Court found in Best that a cap on damages impermissibly gave the legislature power to remit verdicts and judgments. Gourley, 663 N.W.2d at 76. However, the Supreme Court of Nebraska pointed out the overwhelming number of courts that have found caps on damages do not violate separation of powers. Id. It then argued in favor of this analysis because damages caps do not function as legislative remittitur. Id. The court argued that the cap on damages does not ask the legislature to evaluate a case and determine the amount of damages. Id. Rather, it is a limit to recovery as a matter of policy without regard to individual facts. Id. As a result of this distinction, the court held that the cap on damages in Nebraska did not violate its separation of powers provision in the Nebraska Constitution. Id.

Lebron, 930 N.E.2d at 914; Best, 689 N.E.2d at 1077–78.


See, e.g., Pawlaczyk, 724 N.E.2d at 912 (reasoning that decisions from other jurisdictions and law reporters supported the court’s determination); P.R.S. Intern., 703 N.E.2d at 78 (“We also find support in the judgments of other state courts which have reached the same conclusion in construing similar rules.”); O’Malley, 634 N.E.2d at 746 (concluding based on the weight of authority from the Seventh Circuit and other states that a right to a jury trial in civil proceedings in rem for the enforcement of statutory forfeitures existed prior to the adoption on the Illinois Constitution). The court can rely on the analysis of sister states because of the profound underlying similarities between the states. John Devlin, Toward a State Constitutional Analysis of Allocation of Powers: Legislators and Legislative Appointees Performing Administrative Functions, 66 Temp. L. Rev. 1205, 1264–65. Although there are small differences between the text of state constitutions and the historical circumstances in which those constitutions were drafted, these small differences do not overcome the basic similarities in which the constitutions were drafted. Id. at 1265. Ten state constitutions follow the federal framework by not expressly requiring separation of powers. Id. at 1236. Twelve states expressly state that there should be separation of powers, and the remaining states expressly state the separation of powers doctrine but go even further by stating that no person exercising power under one branch can hold office or exercise power under another branch. Id. at 1236–37. This is only one of the differences apparent in the text of different state constitutions. See id. at 1236–40 (discussing the major differences between state constitutions as to how they address the separation of powers doctrine). However, despite these differences, all states share the same basic separation of powers principles. Id. at 1241. Very few state charters were drafted during the revolutionary era; they were mostly drafted during the gilded age or later. Id. at 1124. Thus, most state constitutions were drafted by people who had experienced corruption and irresponsibility in government, and as a result they contained few broad grants of authority to any branch. Id. The constitutions incorporated numerous specific mandates and prohibitions so that each branch could check the power of the other branches. Id. According to Devlin, these fundamental similarities overcome the textual differences and warrant comparison between states when evaluating allocation of powers between branches in state government. Id. at 1264–65. Notably, most state court decisions that address separation of powers cite and rely on the determinations of other states. Id. at 1241.
reasonable but the most appropriate outcome in *Lebron*. The outcomes in these states also represent the nationwide public sentiment that surging jury awards need to be remedied and that the legislature is the most appropriate government body to deal with such policy.

In Virginia, the court found that *remititur* was not the same as a cap on damages because they do not apply in the same circumstances. *Remittitur* is applied only after the court determines that a party did not receive a fair and proper jury trial, whereas the cap is applied after a proper trial. Further, the cap on damages does not coincide with a right to a new trial, as is the case with *remititur*. Similarly, the Supreme Court of Idaho held that *remititur* does not infringe upon the rights of the judiciary but limits the rights of the plaintiffs. The court also emphasized the similarity between caps on damages and similar legislative modifications to the common law, such as statutes of limitations, statutes of repose, and new causes of action.

Based on Idaho’s Constitution, which grants the legislature the right to abrogate the common law, the court found that caps on damages did not violate separation of powers. While the Illinois Constitution does not grant the General Assembly the same authority, this principle has been upheld in the Illinois Supreme Court and has been incorporated by Illinois statute.

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242 State constitutions are quite similar and are often discussed collectively. See Frank P. Grad, *The State Constitution: Its Function and Form for Our Time*, 54 VA. L. REV. 928, 941 (1988) (contending that an analysis of all the state constitutions would lead one to the conclusion that they are fungible although they are not).

243 See infra note 323 (arguing that there is a mandate for tort reform and that judicial invalidations of caps on damages fly in the face of public opinion).

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

245 *Id.*, 509 S.E.2d at 313.

246 *Id.*

247 *Kirkland v. Blaine County Medical Center*, 4 P.3d 1115, 1122 (Idaho 2000).

248 *Kirkland*, 4 P.3d at 1122.

249 *Id.*

250 *People v. Gersch*, 553 N.E.2d 281, 286 (Ill. 1990) (citing *People v. Davis, 116 N.E.2d 372, 374 (Ill. 1953)*); see also 5 ILCS 50/1 (West 2008) (incorporating the common law of England into Illinois law and giving it authority so long as it is not repealed by the legislative authority).
The majority argues that the statutes in other states vary widely, making them inapplicable. However, this argument dodges the fact that the other state supreme courts have asked the same question: Is a statutory limit on damages a legislative remittitur that impermissibly violates the separation of powers clause of the state constitution? While the mechanics of each state statute are different and the separation of powers clauses vary, the basic question is the same, and Illinois is hopelessly outnumbered by the conclusions of other states.

The conclusions and analysis from other state courts in similar cases based on similar separation of powers provisions indicate that the conclusion in Best was assailable and could be overturned in the future as unsound reasoning. Considering that every other state and federal jurisdiction has rejected the separation of powers analysis from Best, it is surprising that the Lebron court upheld the analysis and it is clear that the court’s conclusion in Lebron was faulty.

2. The General Assembly has Power to Abrogate or Eliminate the Common Law

251 Lebron, 930 N.E.2d at 913.
252 E.g., Garhart ex rel. Tinsman v. Columbia/Healthone, L.L.C., 95 P.3d 571, 575 (Colo. 2004); Kirkland v. Blaine County Medical Center, 4 P.3d 1115, 1116 (Idaho 2000).
253 See supra notes 244–249 and accompanying text (discussing the state courts’ analyses in Idaho and Florida, which addressed the same basic issues and engaged in similar analysis when addressing caps on damages in those states).
254 Not only can the court consider the analysis of sister states as one of many factors in its determination, but it should rely on relevant precedent from other states as persuasive authority. Devlin, supra note 241, at 1264–65. Devlin argues that there are profound underlying similarities between the states. Id. at 1265. He further contends that the small differences between the respective state constitutions do not overcome the basic similarities. Id. Even states that do not have separation of powers clauses in their state constitutions have adopted pragmatic and rigid views of separation of powers. Id. Although Devlin acknowledges that the text is important and that there are differences between the states, he points out that the structural similarities among the states far outweigh their differences. Id. Thus, he argues that the state courts should rely on sister states in making determinations regarding the separation of powers doctrine. Id.
255 Lees, supra note 3, at 227; see also Lebron, 930 N.E.2d at 931 (stating that although the court’s view of the separation of powers doctrine should be dictated by the intent of the framers of the Illinois Constitution, “the preeminence of that intent . . . does not preclude reference to how other courts have analyzed similar provisions under similar circumstances).
256 Lebron, 930 N.E.2d at 931; see supra note 254 and accompanying text (explaining that Illinois is hopelessly outnumbered by other states and the federal courts in the question of whether caps on damages violate separation of powers).
The General Assembly’s authority to eliminate or change the common law when it sees a policy justification for doing so is a foundational principle of Illinois law that has long been upheld by the Illinois Supreme Court. There are numerous examples in Illinois where the General Assembly changed the common law, and there are even examples where it altered plaintiffs’ rights in recovering for common law claims, such as the imposition of statutes of limitation, the statute of repose, the Good Samaritan Act, and Worker’s Compensation Act.

The General Assembly’s authority to change or eliminate the common law is reinforced by the conclusions of other states, which have strongly affirmed this power when upholding the constitutionality of damage caps.

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257 See 5 ILCS 50/1 (West 2008) (giving the legislative authority the power to repeal the common law).

258 See 735 ILCS 5/13-213(b) (West 2008) (limiting the time within which a cause of action could be brought in products liability cases); 735 ILCS 5/13-214.3(c) (West 2008) (limiting the time within which a cause of action could be against an attorney); 745 ILCS 49/1 et seq. (West 2008) (eliminating common law negligence for certain health care professionals and individuals who voluntarily try to save the life of another); 745 ILCS 65/1 et seq. (West 2008) (eliminating negligence liability in certain instances for emergency and medical service providers). The court has rarely interfered with the legislature’s right to change the common law; Vreoegh v. J & M Forklift, 626 N.E.2d 1046, 1054 (Ill. App. Ct. 1993) (describing the trial court’s determination that an employee could not recover for a tort by his employer under the Worker’s Compensation Act, Ill. Rev. Stat. 1981, Ch. 48, parts. 626 N.E.2d 1046, 1054 (Ill. App. Ct. 1993) (finding that the statute of repose is constitutional because it only restricts when the action is brought and does not eliminate the cause of action altogether); Victor E. Schwartz et al., Illinois Tort Law: A Rich History of Cooperation and Respect Between the Courts and the Legislature, 28 LOY. U. CHI. L.J. 745, 753–55 (1997).

259 Kevin J. Gfell, The Constitutional and Economic Implications of a National Cap on Non-Economic Damages in Medical Malpractice Actions, 37 IND. L. REV. 773, 789 (2004); see also supra notes 248–250 (discussing the Idaho Supreme Court’s holding that damage caps were not an unconstitutional violation of separation of powers but were an exercise of the legislative authority to change the common law). The West Virginia Supreme Court also determined in Verba v. Gaphery that legislative caps on damages do not violate the separation of powers doctrine because of the legislature’s power to abrogate the common law. Verba v. Gaphery, 552 S.E.2d 406, 410–11 (W. Va. 2001)). The Illinois General Assembly’s authority to change the common law and the Illinois separation of powers clause are substantially similar to the rules in these other states, so the court in Lebron should have considered them more closely in its conclusion. See People v. Gersch, 553 N.E.2d 281, 286 (Ill. 1990) (finding that “[t]he Illinois General Assembly has the inherent power to repeal or change the common law, or do away with all or part of it”). Similarly, the North Carolina Supreme court held that the “common law may be modified or repealed by the General Assembly.” Rhyne v. K-Mart Corp., 594 S.E.2d 1, 8 (N.C. 2004). Also, the Illinois Constitution states that “[t]he legislative, executive and judicial branches are separate. No branch shall exercise power properly belonging to another.” ILL. CONST. 1970, Art. II, § 1. This provision is very similar to the North Carolina Constitution, which states that “[t]he legislative, executive, and supreme judicial powers of the State government shall be forever separate and distinct from each other.” N.C. CONST. Art. I, § 6. However, the North Carolina Constitution even goes one step further, stating that “[t]he General Assembly shall have no power to deprive the judicial department of any power or jurisdiction that rightfully pertains to it as a co-ordinate department of the government.” N.C. CONST. Art. IV, § 1. This specifically limits the General Assembly in North Carolina; yet, the Supreme Court still rejected
Indeed, the General Assembly has authority over the common law because it is uniquely positioned to make policy decisions. The former Chief Justice of Illinois Bilandic one stated that public policy “should emanate from the legislature” because “it is the only entity with the power to weigh and properly balance the many competing societal, economic, and policy considerations involved.” The General Assembly has access to resources and information unavailable to the judiciary and it hears the needs and desires of the people, enabling it to weigh the costs and benefits of various policies. Most importantly, the General Assembly can make rules prospective so as to prevent problems in tort law, whereas courts are limited to retroactive rulings. Not only does this enable the General Assembly to better avoid harms to the public, but it enables the General Assembly to provide “fair notice” to those who are affected. Thus, the judiciary should defer to the General Assembly’s authority to change the common law when supported by public policy, and the Lebron court did not give sufficient weight to this deference.

Moreover, the court should have upheld the cap in Lebron based on Unzicker, which affirms the right of the General Assembly to enact statutes and describes the strong presumption

the separation of powers argument and held that a statutory limit on damages was not legislative remittitur. Rhyne, S.E.2d at 9.


262 Schwartz, supra note 258, at 750–52 (1997); see also supra note 160 (describing the General Assembly’s ability to weigh social, economic, and policy interests). If further information is needed to make a determination, the legislature can recall witnesses or have them respond to written questions; the legislature has broader latitude in researching policy, making it the best branch to determine policy. Schwartz, supra note 258, at 751–52.

263 Schwartz, supra note 258, at 751–52.

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

265 See Lebron, 930 N.E.2d at 912 (acknowledging that the General Assembly may change the common law, but arguing that that is not the issue). The Lebron court says that the only question is whether the legislature’s attempt to limit damages is a violation of separation of powers. Id. However, this argument neglects the fact that the legislature’s authority over the common law is part of the separation of powers determination. See Charles v. Seigfried, 651 N.E.2d 154, 160–62 (Ill. 1995) (analyzing a separation of powers challenge in light of the General Assembly’s power to change or eliminate the common law).
of constitutionality that attaches to any statute enacted by the General Assembly.\textsuperscript{266} Although many will argue that the court justifiably relied on \textit{Best} because the cap in that case was most similar to the cap in \textit{Lebron}, the underlying question in \textit{Unzicker}—whether the General Assembly can change the common law such that a defendant will not be liable when they would have been otherwise under common law—is the same.\textsuperscript{267} Just like the statute at issue in \textit{Unzicker}, the \textit{Lebron} cap “determines when a defendant can be held liable for the full amount of a jury’s verdict.”\textsuperscript{268} More importantly, the separation of powers analysis from \textit{Unzicker} was a binding judicial opinion that contributed to the resolution of the case, so the \textit{Lebron} court should have given significant weight to \textit{Unzicker}’s separation of powers analysis.\textsuperscript{269}

The holdings in \textit{Best} and \textit{Unzicker} contradicted each other on the question of whether the General Assembly could reduce a defendant’s liability.\textsuperscript{270} \textit{Best} held that the General Assembly had no authority to reduce the damages, whereas \textit{Unzicker} held that the General Assembly could reduce a defendant’s liability even if the common law had dictated otherwise.\textsuperscript{271} When deciding \textit{Lebron}, the court could apply one case or the other because they stood for different

\textsuperscript{266} Unzicker v. Kraft Food Ingredients Corp., 783 N.E.2d 1024, 1037–38 (Ill. 2002). For further discussion of the presumption favoring constitutionality of statutes, see infra Part IV.B.4.

\textsuperscript{267} Compare \textit{Unzicker}, 783 N.E.2d at 1042 (determining “when a defendant can be held liable for the full amount of a jury’s verdict”), with \textit{Lebron}, 930 N.E.2d at 908 (“Under [the \textit{Lebron} cap], the court is required to override the jury’s deliberative process and reduce any noneconomic damages in excess of the statutory cap, irrespective of the particular facts and circumstances.”).

\textsuperscript{268} \textit{Unzicker}, 783 N.E.2d at 1042.

\textsuperscript{269} Id.; see also Parness, supra note 121, 324–25 (describing the \textit{Lebron} court distinguishing \textit{Unzicker}).

\textsuperscript{270} \textit{Unzicker}, 783 N.E.2d at 1042. For more detail on the contradictions between \textit{Best} and \textit{Unzicker}, see \textit{Best}, 689 N.E.2d at 1080 (reasoning that the legislature cannot interfere with the judiciary’s right to remit excessive verdicts based on a case-by-case determination of what is proper); \textit{Unzicker}, 783 N.E.2d at 1042 (finding that the legislature does not violate separation of powers by passing a statute that limits a defendant’s liability based on the percentage of his fault regardless of the amount the jury award and the common law rule of joint and several liability); see also Reply Brief, supra note 87, at 4 (discussing plaintiff’s brief which argued that \textit{Best} precluded the legislature from limiting liability in all circumstances and arguing that under this view, \textit{Best} could not be reconciled with \textit{Unzicker}). If \textit{Lebron}’s view had been applied to \textit{Unzicker}, the Illinois Supreme would have invalidated the statute in \textit{Unzicker} as well as the Innkeeper Protection Act, 740 ILCS 90/1 (1991)). Reply Brief, supra note 87, at 4.

\textsuperscript{271} Compare \textit{Unzicker}, 783 N.E.2d at 1042 (holding that the legislature can determine when a defendant should be liable for the entirety of the jury award), with \textit{Best}, 689 N.E.2d at 1081 (finding that the caps on damages infringes on the power of the judiciary to reduce excessive damages).
propositions. The court erred in applying Best because the legislature has authority to change the common law, as supported by the overwhelming number of jurisdictions that rejected the analysis from Best.

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

The majority and dissenting opinions in Lebron discuss at length whether the separation of powers analysis from Best was judicial dictum or obiter dictum. However, it is evident that the separation of powers analysis from Best was judicial dicta because it was not essential to the court’s conclusion: it had already found the Best cap unconstitutional as special legislation. Although the parties did brief the separation of powers issue, making it judicial dicta rather than obiter dicta, the Best court had already decided the case and it did not need to proceed to the separation of powers analysis. Moreover, judicial dicta is not binding and can be disregarded by the court in future decisions if the analysis is erroneous. Thus, the court should not have applied Best because the separation of powers analysis in Best was erroneous: remittitur is not an inherent judicial function and caps on damages do not function the same as remittitur.

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272 See Lebron, 930 N.E.2d at 906-07, 910-11 (considering the precedential value of Best and Unzicker and invalidating the Lebron cap on the basis of the judicial dicta from Best); see also supra, Part II.A-D for a more detailed description of the propositions in Unzicker and Best.
273 See supra notes 237–238 (describing the eight cases from other states that addressed separation of powers in the context of damage caps and reached the opposite result as Best). Four states specifically identified and rejected the reasoning from Best. E.g., Gourley, 663 N.W.2d at 76 and Owens-Corning, 725 A.2d at 590–92.
274 Lebron, 930 N.E.2d at 906, 926 (citing Best, 689 N.E.2d at 1106) (Bilandic J., specially concurring).
275 Best, 689 N.E.2d at 1076 (finding the Best cap unconstitutional for special legislation).
276 See supra notes 52, 124 & 164 (describing the separation of powers analysis in Best as judicial dicta because the issue was not necessary to resolution of the case but was briefed by the parties and addressed by the court); see also Matthew W. Light, Who’s the Boss?: Statutory Damage Caps, Courts, and State Constitutional Law, 58 WASH. & LEE L. REV. 315, 340–41 (2001) (criticizing the court’s reasoning in Best as to special legislation but not even acknowledging the fact that the court discussed separation of powers in its holding).
278 The majority again tried to dodge the core issue by arguing that the defendants did not claim that the finding in Best was erroneous. Lebron, 930 N.E.2d at 907. According to the majority, the defendants merely argued that section 2-1706.5 was distinguishable from the statute at issue in Best. Id. Although Gottlieb and Florence Martinez did not argue that the analysis from Best was erroneous, Dr. Levi-D’Ancona claimed that the circuit court “erroneously conflated the power of remittitur with the statutory limitation on damages. . . . [A] damages limitation and a remittitur are very different animals.” Brief and Appendix of Defendant-Appellant Roberto Levi-D’ancona,
4. The *Lebron* Court Did Not Give Sufficient Weight to the Heavy Presumption Favoring the Constitutionality of Statutes

In evaluating *Lebron*, it is crucial to consider the enduring presumption in favor of a statute’s constitutionality. The party challenging a statute must show that it is unconstitutional for the court to make such a determination. This burden is not an easy one to meet; rather, the...
court has characterized the presumption favoring statutes as strong and the burden as heavy, and all doubts are to be resolved in favor of the statute’s validity.\textsuperscript{281} The Illinois Supreme Court has repeatedly relied on this burden to uphold the constitutionality of statutes.\textsuperscript{282}

\textit{Polyvend}, 395 N.E.2d at 1382 (citing DeVeau, 363 U.S. at 160). On the basis of this reasoning for each constitutional challenge, the court briefly asserted the burden on the plaintiff to overcome the presumption favoring the constitutionality of statutes and simply stated that the plaintiff had not met the burden. \textit{Id.} at 1383. The presumption of constitutionality has also been upheld in federal court. \textit{Munn v. Illinois}, 94 U.S. 113, 123 (1876). Federal precedent is relevant to this issue because Illinois courts have relied on the weight of federal law in making its own determinations. \textit{See Polyvend}, 395 N.E.2d at 1382 (relying on a U.S. Supreme Court case as precedent for upholding to constitutionality of an Illinois statute). Further, the prevalence of this principle in state and federal courts demonstrates the importance of the presumption and the significant weight that it is to be afforded. \textit{E.g.}, \textit{Sperfslage v. Ames City Bd. of Review}, 480 N.W.2d 47, 49 (Iowa 1992); \textit{Schmidt v. State}, 584 P.2d 695, 668 (Nev. 1978); \textit{see also supra} note 255 (stating that the Illinois court can look to the findings of other states for reference to guide its determination). The challenging party’s burden to prove a constitutional violation is given such strong deference in federal courts that some have argued for relaxing the presumption; in response to these proposals, the court has applied heightened scrutiny of statutes in some circumstances to avoid impropriety by the legislature. \textit{See Samuel Issacharoff & Pamela S. Karlan, Where to Draw the Line? Judicial Review of Political Gerrymanders}, 153 U. PA. L. REV. 541, 548 (2004) (describing the three conditions in United States v. Carolene Products Company, 304 U.S. 144 (1938), under which the United States Supreme Court has relaxed the presumption of constitutionality favoring statutes). The authors of this article describe the current state of gerrymandering in the aftermath of two Supreme Court Cases that addressed shameless gerrymandering, one in Pennsylvania and one in Georgia. \textit{Id.} at 541–42. The authors argue that partisan gerrymandering is persistent and will never be eliminated completely. \textit{Id.}

Citing to \textit{Carolene Products}, the authors recognize that racial vote dilution cases, which explicitly discriminate against minorities, require a stronger view of democracy to justify increased judicial intervention and prevent impropriety. \textit{Id.} at 548. \textit{Carolene Products} allowed the normal presumption of a statute’s constitutionality to be relaxed where the legislation was within a specific prohibition of the Constitution, restricted political processes such that it a type of legislation usually repealed, or when the legislation was directed toward “discrete or insular minorities.” \textit{Carolene Products}, 304 U.S. at 152–52 n.4.

\textsuperscript{281} \textit{See infra}, note 282 (describing several statutes upheld despite constitutional challenges).

\textsuperscript{282} \textit{See Reed v. Farmers Ins. Group}, 720 N.E.2d 1052 (Ill. 1999). In \textit{Reed}, the court upheld a statute that required a plaintiff and her automobile insurer to go to arbitration. \textit{Id.} at 1055. The statute made arbitration binding on the parties where the amount awarded to plaintiff did not exceed $20,000. \textit{Id.} Plaintiff contended that this violated her due process rights, but the court relied on the presumption favoring constitutionality of statutes to uphold it. \textit{Id.} at 1058–59. Specifically, the court held that plaintiff did not overcome that presumption when she argued that the statute violated her right to contract. \textit{Id.; see also, e.g., Continental Illinois National Bank & Trust Co. v. Illinois State Toll Highway Com.}, 251 N.E.2d 253, 256–58 (Ill. 1969) (choosing to interpret the amended version of a statute that did not contain a constitutional violation so as to uphold the statute); \textit{Illinois Crime Investigating Com. v. Buccieri}, 224 N.E.2d 236, 239-40 (Ill. 1967) (inferring that the General Assembly meant to include notice and hearing requirements in a statute that enabled the circuit court to assist in requiring attendance and testimony of witnesses so that the court could uphold the statute’s constitutionality); \textit{Harris v. Manor Healthcare Corp.}, 489 N.E.2d 1374, 1380 (Ill. 1986) (construing the Nursing Home Care Act’s treble damages provision as an alternative to punitive damages and as a constitutional exercise of legislative power so as to uphold its constitutionality); \textit{Bilyk v. Chicago Transit Authority}, 531 N.E.2d 1, 2–3 (Ill. 1988) (citing the presumption favoring constitutionality of statutes in upholding the Metropolitan Transit Authority Act, which immunized the Chicago Transit Authority from liability for failure to protect passengers from the criminal acts of other parties). According to the court in \textit{Sayles v. Thompson}, “[i]t is our duty to construe acts of the legislature so as to affirm their constitutionality and validity, if it can be reasonably done, and further if their construction is doubtful, the doubt will be decided in favor of the validity of the law challenged.” 457 N.E.2d 440, 442 (Ill. 1983). In \textit{Sayles}, three prisoners brought an action seeking a declaration that inmates could not be transported out of state according to the transportation clause, which stated: “No person shall be transported out of the State for an offense committed within the State.” \textit{Id.} (citing ILL.
The majority opinion in Lebron recognizes this heavy burden, yet it still held to the contrary.\textsuperscript{283} It did not give sufficient weight to this presumption because it would have been reasonable and appropriate to find that the statute was constitutional: the Lebron cap was not a type of \textit{remititur} and \textit{remititur} is not an inherently judicial function, as has been concluded in numerous states that found comparable statutes did not violate separation of powers.\textsuperscript{284} The court’s previous holdings in \textit{Unzicker} and \textit{Best} contradicted each other as to whether the Illinois General Assembly could limit a plaintiff’s recovery in a common law claim.\textsuperscript{285} In light of the presumption favoring statutes, the fact that \textit{Best}’s separation of powers analysis was erroneous non-binding judicial dicta, and the General Assembly’s right to amend the common law, the \textit{Lebron} court should have applied \textit{Unzicker} and should have held that the \textit{Lebron} cap did not violate separation of powers.\textsuperscript{286}

\textbf{V. IMPACT}

This Part discusses in detail how decision in \textit{Lebron} strengthened the law against caps on damages in Illinois.\textsuperscript{287} The focus of this Part, however, is how Illinois might still enact a statutory cap on damages.\textsuperscript{288} First, this Part discusses why Illinois should adopt a constitutional amendment giving the General Assembly power to enact caps on damages.\textsuperscript{289} Second, it

\textsuperscript{283} Lebron, 930 N.E.2d at 903 (citing In re Marriage of Miller, 879 N.E.2d 292 (Ill. 2007); In Re Jolliff, 771 N.E.2d 346 (Ill. 2002)).
\textsuperscript{284} See supra notes 237—238 (describing the cases in other states that addressed the constitutionality of caps on damages and found that they did not violate the separation of powers doctrine).
\textsuperscript{285} See infra note 271 (comparing \textit{Unzicker} and \textit{Best}).
\textsuperscript{286} See infra Part IV for a discussion of each of these arguments.
\textsuperscript{287} See infra Part V.A (describing the \textit{Lebron} decision as reinforcing Illinois’ position in the minority of states that find caps on damages to be an unconstitutional violation of separation of powers).
\textsuperscript{288} See infra Part V.B—C (discussing the ways that Illinois could still enact a cap on damages despite the finding in \textit{Lebron}).
\textsuperscript{289} See infra Part V.B (discussing why a constitutional amendment should be adopted giving the General Assembly power to enact caps on damages).
discusses how a statute could still be drafted without a constitutional amendment that would limit damages and still withstand constitutional scrutiny.\footnote{See infra Part V.C (discussing drafting techniques for another cap on damages).}

\textbf{A. The Separation of Powers Analysis from Lebron Has Entrenched the Illinois Supreme Court’s Stance on Damage Caps and Made Any Change Difficult}

Unfortunately, the court’s mistake in \textit{Lebron} entrenches the separation of powers analysis against caps on damages because the court did not leave many unanswered questions.\footnote{22 No. 5 HTHLAW 19; Gunnarsson, \textit{supra} note x (quoting the ISBA President, John O’Brien who said that “the court has spoken on this issue in defense of our constitution and the role of the judiciary and juries”); Allen Adomite, \textit{Court Hands Gift to Trial Lawyers}, CHI. TRIB., Feb. 18, 2010, at 23 (stating that the court ended an eight year struggle for tort reform with a single sentence).} It argued quite broadly that any statute preventing a court from entering judgment in excess of a given amount is a form of legislative \textit{remittitur} in violation of the separation of powers doctrine regardless of whether it is broad or narrowly tailored to medical malpractice claims.\footnote{See supra, Part III.B (discussing the majority opinion).} Thus, the effort to curb liability costs and control the damages crisis in Illinois was seriously harmed by \textit{Lebron}.\footnote{Goldhaber, \textit{supra} note 93, at 21; see also Lynne Marek, \textit{Ill. High Court Uncaps Medical malpractice Damages Again}, 241 LEGAL INTELLIGENCER, Issue 26, Feb. 9, 2010, at 4 (quoting Robert Peck: “I would hope that the Legislature now, having gone to the well three times in Illinois, would understand that this is a non-starter constitutionally”).}

Indeed, \textit{Lebron} may have even been the “final[] blow” to this effort,\footnote{Goldhaber, \textit{supra} note 93, at 21.} and high medical malpractice jury awards will continue to add to surging health care costs unless \textit{Lebron} is somehow reversed or overcome.\footnote{See supra, notes 10 & 12 and accompanying text (discussing the correlation between increasing jury awards and increasing health care costs generally and arguing that increased liability forces doctors to practice defensive medicine); \textit{but see supra} note 8 (arguing that there is no significant connection between medical malpractice liability and increasing health care costs).} Physicians and health care professionals will continue to have difficulty finding affordable malpractice insurance, and this cost will drive up the price of health care for citizens of Illinois.\footnote{Arancibia, \textit{supra} note 4, at 136 (citing Shirley Qual, \textit{A Survey of Medical malpractice Tort Reform}, 12 WM. MITCHELL L. REV. 417, 420–21 (1986)).} Almost every other state in the United States has enacted
some statute to reduce the costs of health care and make it accessible, and Illinois will continue to face increasing costs and decreasing availability of health care if it does not somehow limit medical malpractice liability.\textsuperscript{297}

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

However, there is still a glimmer of hope for controlling these costs.\textsuperscript{298} Passing a constitutional amendment is arguably the most difficult but also the most effective means of enacting a statutory limit on damages.\textsuperscript{299} Indeed, Texas faced a predicament similar to current one in Illinois after the Texas Supreme Court invalidated a statutory limit on damages in \textit{Lucas v. U.S.},\textsuperscript{300} which held that the cap on damages was unconstitutional.\textsuperscript{301} In response, the legislature enacted H.B. 4, another cap on damages in medical malpractice claims.\textsuperscript{302} Knowing that the Texas Supreme Court would likely invalidate the second cap, Governor Rick Perry campaigned in support of Proposition 12, which was ultimately passed and gave the Texas legislature power to determine limits of liability for damages other than economic damages in all claims brought


\textsuperscript{298} See infra Part V.B–C (discussing the alternatives that might enable Illinois to reduce the surging costs of medical liability insurance).

\textsuperscript{299} Goldhaber, \textit{supra} note 93, at 21; see also FRANK KOECKY & MARY SHERMAN HARRIS, \textit{UNDERSTANDING THE ILLINOIS CONSTITUTION} 59, 60 (Illinois Bar Foundation 1986) (stating that constitutions require some inflexibility to ensure that changes are properly considered); infra note 315 and accompanying text (arguing in favor of rigid constitutions to ensure that they reflect the collective will).

\textsuperscript{300} 757 S.W.2d 687 (Tex. 1988).

\textsuperscript{301} \textit{Id.} at 690. The court held that the statute catastrophically infringed on a plaintiff’s right to “remedy by due course of law” under Article I, section 13 of the Texas Constitution. \textit{Id.} (citing TEX. CONST. Art. I, § 13 (2007)).

\textsuperscript{302} \textit{Id.} The Texas Supreme Court found that the statute was an unconstitutional violation of the Texas Open Courts doctrine, TEX. CONST. Art. I, § 13 (2003), which guarantees access to the court system. Lucas v. U.S., 757 S.W.2d 687, 690 (Tex. 1988). The Open Courts doctrine provides that “[a]ll courts shall be open, and every person for an injury done him, in his lands, goods, person or reputation, shall have remedy by due course of law.” TEX. CONST. Art. I, § 13 (2003). Lucas invalidated the Medical Liability and Insurance Act passed in 1977, the purpose of which was to limit noneconomic damages in medical malpractice cases. Michael J. Cetra, \textit{Damage Control: Statutory Caps on Medical Malpractice Claims, State Constitutional Challenges, and Texas’ Proposition 12}, 42 DUQ. L REV. 537, 551 (2004). The statute limited non-economic damages to $500,000 in 1975 and was indexed to the Consumer Price Index. \textit{Id.}
against medical or health care providers for malpractice claims arising under common law or based on statute.\(^{303}\)

Constitutions are expressions of the collective will regarding to the structure of government and the balance of powers therein;\(^{304}\) they are a mechanism to secure faith in and stability of the government.\(^{305}\) Although the United States Constitution is relatively brief, providing for just the most fundamental protections, state constitutions provide more detail and more depth, addressing many local concerns.\(^{306}\) The greater length of state constitutions largely arises from the fact that they are easier to amend or change; indeed, they are changed frequently and have regularly been expanded to address political or social concerns of the state.\(^{307}\) This is true in Illinois where there have been four constitutions, the latest adopted in 1970; further, there have been ten constitutional amendments to the 1970 Illinois Constitution and seven more failed amendment proposals.\(^{308}\) Not only is the Illinois Constitution flexible to allow change, but it is


\(^{304}\)JOHN A. JAMESON, A TREATISE ON CONSTITUTIONAL CONVENTIONS: THEIR HISTORY, POWERS, AND MODES OF PROCEEDING 84 (Chicago, Calaghan & Co. 1887); see also, e.g., U.S. CONST. pmbl. (“We the People . . .”); James A. Gardner, Consent, Legitimacy and Elections: Implementing Popular Sovereignty Under the Lockean Constitution, 52 U. Pitt. L. Rev. 189, 202–10 (1990–1991) (describing Lockean theory of popular sovereignty and how the Constitution reflects the popular will). According to Gardner, the language of the U.S. Constitution throughout reflects the idea that the document represents the popular will. Gardner, supra, at 202–10.

\(^{305}\)See George Washington, Two Basic Reasons to Support the Constitution, in 2 THE DEBATE ON THE CONSTITUTION 178, 179 (The Library of America 1993) (arguing that the powers granted in the U.S. Constitution were distributed between branches of government so as to prevent oppression or abuse of power).

\(^{306}\)Schlam, supra note 279, at 275 (citing Donald S. Lutz, The Purposes of American State Constitutions, 12 PUBLIUS: J. FEDERALISM, Winter 1982, at 41). Lutz described the three reasons that state constitutions tend to be longer: they spend time addressing local and county government, they address local public concerns that arise from the Tenth Amendment residuary power, and they have been expected to “exalt a way of life.” Id. (citing Lutz, supra, at 41) (internal citations omitted).

\(^{307}\)There have been over 230 state constitutional conventions and 5,198 state constitutional amendments in the United States. Janice C. May, Constitutional Amendment and Revision Revisited, 17 PUBLIUS: J. FEDERALISM, Winter 1987, at 162–64.

\(^{308}\)KOPECKY, supra note 299, at 59. Through 1985, seven constitutional amendments were proposed to the 1970 constitution, three of which were approved. Id. at 62; CONSTITUTION OF THE STATE OF ILLINOIS: AMENDMENTS AND CONVENTIONS PROPOSED, http://www.ilga.gov/commission/lrb/conampro.htm (last visited Nov. 2, 2010) [hereinafter “AMENDMENTS AND CONVENTIONS”]. Since 1986, there have been an additional ten amendment proposals and seven of those proposals were approved. AMENDMENTS AND CONVENTIONS, supra. Notably, the 1970 constitutional convention was the sixth constitutional convention in Illinois: the other four conventions failed
inclined toward change: the 1970 Constitution provides for an automatic proposal to revise the constitution every twenty years.\textsuperscript{309}

Not only are state constitutional amendments common, but they are useful because they enable states to test policies and determine which are effective and should be adopted more expansively.\textsuperscript{310} Moreover, constitutional amendments allow citizens to check the powers of the government where it does not reflect the will of the people or support the welfare of the state.\textsuperscript{311} In Illinois, government abuses of power have in the past led to the enactment of constitutional provisions designed to check that power.\textsuperscript{312} There have also been constitutional amendment proposals that dealt with the allocation of powers and amendments that addressed issues as
marginal as collecting delinquent taxes or eliminating the possibility of bail in criminal cases where life imprisonment was a possible sentence.\textsuperscript{313}

Illinois should follow Texas’ example and pass a similar constitutional amendment under the procedure and authority set forth in Article XI, section 3 of the Illinois Constitution so that the General Assembly can enact another cap on damages in medical malpractice cases.\textsuperscript{314} It is true that reckless, hasty amendments to the constitution erode the stability thereof and undermine the importance of a social consensus on values.\textsuperscript{315} Further, any constitutional amendment carries with it self-interest that promotes the welfare of some at the expense of minority interests.\textsuperscript{316}

However, constitutions can never be perfect, and although they should be difficult to change, some flexibility is important to reflect the broad public welfare.\textsuperscript{317} Passing an amendment that allows the General Assembly to deal with growing jury awards would stabilize the burgeoning liability insurance costs and provide affordable coverage for the citizens of

\begin{thebibliography}{99}
\bibitem{kopecy} KOPECKY, supra note 299, at 62. A constitutional amendment was proposed but failed in 1974 to reduce the governor’s amendatory veto power and another. \textit{Id.} Another amendment providing that two non-judicial members sit on the Courts Commission was passed in 1998 after James Heiple of the Illinois Supreme Court refused to recuse himself from voting on the appointment of another justice to the Commission, knowing that he would oversee an impeachment hearing filed against Heiple. 1970 ILL. CONST., Art. 6, § 15 (amended Nov. 3, 1998); Jerome B. Meites, Steven F. Pflaum & Carolyn H. Krause, \textit{Justice James D. Heiple: Impeachment and the Assault on Judicial Independence}, LOY. U. CHI. L.J. 741, 786 (1998).
\bibitem{ilconst} ILL. CONST. 1970, art. XI, § 3. The Illinois Constitution provides that amendments “may be proposed by a petition signed by a number of electors equal in number to at least eight percent of the total votes cast for candidates for Governor in the preceding gubernatorial election. . . . If the petition is valid and sufficient, the proposed amendment shall be submitted to the electors at that general election and shall become effective if approved by either three-fifths of those voting on the amendment or a majority of those voting in the election.” \textit{Id.}
\bibitem{kopecy} KOPECKY, supra note 299, at 59; Kenneth Ward, \textit{Originalism and Democratic Government}, 41 S. TEX. L. REV. 1247, 1272 (2000); see Judith Olans Brown, et al., \textit{The Failure of Gender Equality: An Essay in Constitutional Dissonance}, 36 BUFF. L. REV. 573, 621 (citing Shapiro v. Thompson, 393 U.S. 618 (1969)) (stating that the majority insisted on a flexible approach to the equal protection laws so as to reflect modern egalitarian values).\end{thebibliography}
Illinois. Although such an amendment would promote the interests of hospitals, doctors, and insurance companies at the expense of those suffering serious injury from negligent care, it would slow the exodus of capable medical practitioners from Illinois, thereby promoting the welfare of the general public. Further, a constitutional amendment would clarify the struggle for power over damage caps between the judiciary and the General Assembly. The General Assembly is most equipped to reflect the will of Illinois citizens, and there is a mandate from the people of Illinois to limit growing jury awards. Because of the broad support for caps on damages that would promote the public welfare, Illinois should pass a constitutional amendment giving the legislature authority to enact such a cap.

C. The Illinois General Assembly Should Also Enact Another Carefully Drafted Cap on Damages

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318 Cetra, supra note 302, at 552. While this would be ideal for addressing the health care concerns, it would be a very difficult mechanism for curbing medical liability costs. See supra, note 315 (discussing the rigid nature of constitutions and the reasons for maintaining rigidity). Proposition 12, for instance, was debated heavily and was only passed with 51% of the vote. Cetra, supra note 302, at 552.


320 See supra note 17 (citing to several studies that showed lower medical malpractice liability insurance rates and higher per capita rates of physicians in states that had caps on damages). The Lebron cap was enacted to prevent physicians from leaving Illinois. Chiu, supra note 216, at 95.

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

322 See supra notes 261–263 and accompanying text (discussing the General Assembly’s superior access to a breadth of information and ability to balance competing social and political interests to reflect the will of the people).

323 See Sherman Joyce, Tort Reform: Two Steps Forward, One Back, 6 METRO. CORP. COUNS., Issue 2, Feb. 1, 1998, at 1 (arguing that court decisions invalidating tort reform laws fly in the face of public opinion); Lynne Marek, Ill. High Court Uncaps Medical malpractice Damages Again, 241 LEGAL INTELLIGENCER, Issue 26, Feb. 9, 2010, at 4 (quoting the Loyola University Health system, which said that the supreme court ignored the will of the citizens as expressed through their representatives who enacted the cap); Dean Olsen, State Health Plan Bother Official, STATE J.-REG. (SPRINGFIELD ILL.), Jan. 14, 2008, at 15 (quoting Dr. Rodney Osborn) (stating that the Illinois Supreme Court should consider public opinion regarding skyrocketing medical liability insurance rates). A 1994 public opinion poll by Voter/Consumer Research of Bethesda, Maryland showed that 92% of Illinois voters believe that frivolous lawsuits have caused higher medical costs and 94% of voters believe that those lawsuits directly cost them in higher insurance premiums. Ray Quintanilla, Group Again Seeks Limits on Lawsuits, CHI. TRIB., July 26, 1994, at 3.

324 See supra note 323 (describing the overwhelming support for damage caps) and supra note 17 (describing how damage caps would benefit the public welfare).
Alternatively, the General Assembly could pass another statute limiting damages in medical malpractice cases that is tailored to avoid any separation of powers challenges similar to those in *Best* and *Lebron*.

This would be a difficult task, but the urgency of the problem requires that the General Assembly take any action that will reduce the cost of medical malpractice liability and slow down the health care crisis. The most promising drafting technique is to enact another limit on liability that applies in a manner similar to the *Unzicker* statute because it would be upheld by the Illinois Supreme Court just as it upheld the *Unzicker* statute.

Using this precedent, the Illinois General Assembly could at the very least enact a statute that makes defendants in medical malpractice cases only severally liable for plaintiff’s injuries no matter what percentage of the responsibility they bear. Although it has been found that several liability does not always increase the likelihood of settlement, it would effectively decrease the amount of damages paid by medical professionals and health care providers.

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325 See Goldhaber, supra note 93, at 21 (describing the political discussion that took place among Republicans and Democrats in the Illinois General Assembly after the *Lebron* decision came down). Members of the legislature have already proposed a number of bills, including a constitutional amendment, to address the health care crisis. *Id.; see also Unzicker*, 783 N.E.2d at 1042 (upholding a limit to liability for certain defendants despite a constitutional attack based on separation of powers).

326 See P.A. 94-677, Art. 1, § 101 (eff. Aug. 25, 2005) (discussing the urgency of the health care crisis); Goldhaber, supra note 93, at 21 (describing the flurry of legislative activity and debate in the wake of *Lebron* trying to find solutions to the health care crisis).

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

328 This statute would be distinguishable from the *Unzicker* statute because it would only hold defendants in medical malpractice cases severally liable no matter what percentage of the injury they contributed to, but the authority of the legislature to enact such a statute is clearly established in Illinois. See *Unzicker*, 783 N.E.2d at 1042. (holding that the General Assembly has the authority to limit a defendant’s liability based on his contribution); see also McKinney’s CPLR § 1601 (establishing that defendant’s liable for less than 50% of the injury shall only be severally liable for their proportion of the noneconomic injuries).

329 Lewis A. Kornhauser, *Settlements Under Joint and Several Liability*, 68 N.Y.U. L. REV. 421, 441–42 (1993). Under joint liability, a defendant who settles for more than his share of liability can seek contribution from other defendants. *Id.* at 442. Thus, it is more likely that they will settle under those circumstances than with several liability where the defendant would be forced to pay the entire settlement without any right to contribution. *Id.* Thus, neither theory of liability reliably increases settlement rates. *Id.* at 492.

Many argue that the cost savings from these types of tort reform are merely hoarded by insurance companies so that doctors continue paying high insurance premiums and the public interest is not promoted. 331 Indeed, health care costs have continued to rise even in states that have tort reform because there are many causes to increasing health care costs. 332 However, studies show mixed results 333 and some show that states with damage caps have seen medical liability insurance costs increase at a lower rate and that health care practitioners are more available in those states. 334 Thus, this statute would improve the quality of health care in Illinois. 335 Further, several liability is more equitable; although it is unjust for an injured plaintiffs to go without compensation for his or her injuries when there is a solvent defendant that contributed to some of the injury, it is dangerous for the tort system to create an injustice of its own by shifting that liability to a defendant that has already paid for his wrongs. 336

If the propositions set forth above are not successful, the General Assembly should consider passing a statutory cap on damages in medical malpractice cases that can be waived by

Opponents to several liability have argued that when defendants expect to pay out less in damages, they merely take less care, which ultimately leads to greater likelihood of injury. Id. at 647–49 (citing Comment, The Case of the Disappearing Defendant: An Economic Analysis, 132 U. PA. L. REV. 145, 166-67 (1983)). However, this effect is mitigated because an individual will not continue to lower the level of care to a point that he or she alone can cause an injury. Id. Moreover, the level of care is economically efficient at the point a defendant is held liable only for his own fault because he will not be forced to take additional precaution for the possibility of being held liable for the torts of others. Id. Therefore, eliminating joint liability reduces costs to the health care system to the extent that health care providers are not accountable for the torts of insolvent defendants. Id.

332 Edgar supra note 331, at 786–90. Edgar argues that the median medical liability insurance premium in states that have capped damages has actually increased at a higher rate than in states without caps on damages. Id. at 788 (citing Adam D. Glassman, The Imposition of Federal Caps in Medical Malpractice Liability Actions: Will They Cure the Current Crisis in Health Care?, 37 AKRON L. REV. 417, 417 (2004)); see also supra note 8 (describing the argument that there is no correlation between damage caps and decreasing health care costs).
333 There is strong evidence supporting both opponents and proponents of damage caps. Cathleen B. Tumulty, Capping Non-Economic Damages: Is It Really What the Doctor Ordered? Predicting the Effect of Federal Tort Reform by Examining the Impact of Tort Reform at the State Level, 39 SUFFOLK U. L. REV. 817, 818 (2006); see also supra note 9 (arguing that there is no consensus about the effect of damage caps).
334 See supra note 17 (citing several studies that showed lower medical malpractice liability insurance rates and higher per capita rates of physicians in states that had caps on damages).
335 Id.
336 Manzer, at 644–46, 651. Internalizing costs to only the amount for which an individual might himself be liable coincides with deterrence and justice objectives because a defendant should not be liable for the torts of another person. Id.
Concerns over the separation of powers and other constitutional challenges would be minimized when the judiciary can make the final decision as to whether or not a cap should be applied in a particular case. Yet, the cap would lower damage awards in medical malpractice cases if it were crafted so that the waiver was used sparingly by the judiciary. Further, it would decrease damage awards by providing a measure for the jury as to what amount of damages is sustainable for the health care system: damages are difficult to measure, and juries have difficulty determining reasonable damages without any standards or principles to guide them. Damage awards have increased drastically because juries focus on the facts of each particular case without considering broader implications of their finding, even though the courts have encouraged consideration of public policy in making judicial determinations.

There are other reforms that the Illinois General Assembly could adopt to decrease the costs of liability insurance, including a quid pro quo for medical malpractice cases, insurance

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337 The General Assembly is able to evaluate public policy. Leo. M. Romero, Punitive Damages, Criminal Punishment, And Proportionality: The Importance of Legislative Limits, 41 CONN. L. REV. 109, 115 (2008) (citing Justice Stevens and Justice Ginsburg in Exxon Shipping Co. v. Baker, 128 S. Ct. 2605 (U.S. 2008), who believe that Congress, rather than the Court, should make the policy judgments regarding limits on punitive damages). Legislative bodies, politicians, and researchers have determined that caps would help prevent excessive costs to the health care system. See supra notes 153–155 (discussing evidence that shows reducing malpractice liability would help limit the costs to the health care system); see also supra notes 1-5 (discussing evidence that shows drastically increasing jury awards of damages and the toll they are taking on the health care system). From 1998 to 2003, there was a 415% increase in non-economic damages in Cook County. Robert M. Ackerman, Medical Malpractice: A Time for More Talk and Less Rhetoric, 37 Mercer L. Rev. 725, 746 (1986).

338 Gfell, supra note 259, at 798-99. This policy alternative has been advocated by scholars and was even included in a 1993 congressional proposal. Id. (citing Patricia J. Chupkovich, Comment, Statutory Caps: An Involuntary Contribution to the Medical Malpractice Insurance Crisis or a Reasonable Mechanism for Obtaining Affordable Healthcare?, 9 J. CONTEMP. HEALTH L. & POL’Y 337, 371–75 (1993)) (arguing in favor of the Healthcare Liability Reform and Quality of Care Improvement Act of 1992 which provided for a national liability cap that the judiciary had discretion to waive).

339 Chupkovich, supra note 338, at 372. A more limited waiver provision would increase the likelihood of invalidation for violating the separation of powers, but leaving the final determination with the judiciary would nonetheless decrease that likelihood. Gfell, supra note 259, at 798–99. See Chupkovich, supra note 338, at 371-73 for a more in depth discussion of the Healthcare Liability Reform and Quality of Care Improvement Act of 1992 and the implications of its waiver provision.

340 Ackerman, supra note 337, at 746. There are no guiding principles in determining damages, which make consistency very difficult. Id.

341 Mulliken v. Lewis, 615 N.E.2d 25, 26 (Ill. App. Ct. 1993) (arguing that the jury should have considered public policy interests); Chupkovich, supra note 338, at 341 (citing David Burda, AHA Offers Solutions to Malpractice Crisis, HOSPITALS, May 5, 1986, at 53).
reform, and. While these proposals are not the focus of this Note, all possibilities for retarding for the damages crisis that is threatening the viability of our health care system should be considered so that Illinois can offer cost-effective, high quality health care.

VI. CONCLUSION

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

In light of the presumption favoring the constitutionality of statutes, the legislature’s authority to change or eliminate the common law, and the fact that *Best*’s separation of powers

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342 See, e.g., Gfell, *supra* note 259, at 798–800 (discussing a quid pro quo as one of numerous options that could reduce rising medical liability costs); Winning, *supra* note 20, at 304–11 (discussing insurance reform as an alternative to caps on damages).

343 See *supra* note 326 (stating that the Illinois General Assembly should enact any potential reforms to address the urgency of the health care crisis).
analysis was merely judicial dicta, *Lebron*’s application of *Best* was shocking. Thus, Illinois should strive to enact other limits to liability: first, the people of Illinois should pass a constitutional amendment giving the General Assembly authority to enact caps on jury awards of damages; alternatively, the General Assembly should enact other statutes that would limit liability in medical malpractice cases and avoid constitutional challenges. Illinois is in the midst of a health care crisis whereby costs are increasing and availability of health care providers is decreasing. Surging damage awards in medical malpractice cases are contributing to this crisis, and taking action to reverse *Lebron* will help to slow it down. 

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