

**IDAHO NONECONOMIC DAMAGE CAPS: FORTY YEARS OF TORT LIABILITY
REFORM AND CONSTITUTIONAL QUESTIONS**

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ABSTRACT:

It started as a violation of the equal protection clause and has since evolved to become a readily accepted part of our civil justice system. The legislative and judicial history surrounding the noneconomic damage caps in Idaho reveals, however, uncertainty in whether the cap accomplishes its stated goals and whether the cap is constitutional.

Damage caps in Idaho have evolved over the past 40 years. The legislature and the Idaho Supreme court have differed on the justifications and constitutionality of damage caps. There have been three major provisions that have introduced caps. The first provision was passed in 1975 and was called the Hospital Liability Act which focused on limiting medical malpractice liability to alleviate consumer healthcare costs. The second provision was introduced in 1987 which aimed to limit tort liability laws generally. The third provision came in 2003 as an amendment to the 1987 cap lowering the cap on damages substantially.

The Idaho jurisprudence addressing the constitutionality of noneconomic damage caps has come full circle. In Jones v. Idaho Board of Medicine, the Idaho Supreme Court examined the 1975 cap's constitutionality. The Court held that the cap was not justified and subsequently struck down the provision holding it violated the

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Idaho Constitution's equal protection clause. In Kirkland v. Blaine, the Idaho Supreme Court examined the 1987 cap's constitutionality. Kirkland held the cap to be constitutional under the Seventh Amendment's right to a jury. However, the Kirkland court did not address the equal protection jurisprudence of Jones.

The constitutionality of noneconomic damage caps in Idaho should be challenged for two reasons. First, the Kirkland court did not consider the equal protection issue, which has had recent success in other states. Second, the 2003 changes of the cap would be timely per the inconsistent goals of tort reform and the equal protections issues the cap creates. This Comment explains why damage caps could be found unconstitutional under Idaho's equal protection clause.

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INTRODUCTION

Imagine you wake up in a hospital bed. You attempt to move and stretch out as you gain consciousness. You realize that your left leg has been entirely removed from your hip down. After you overcome the shock of what happened, you then suspect that your leg was removed as a result of the hospital and doctor's medical malpractice. You feel that you have been the victim of great injustice, so, you turn to the legal system for compensation for having been robbed of your leg for the remainder of your life.

The tragic effect of personal injury caps upon some of society's most severely injured individuals is just one of the many problems facing the American healthcare system. It is apparent that the system has problems that desperately need to be addressed. Most Americans have felt the burden of ever rising cost of healthcare.¹ In conjunction, healthcare providers are constantly calling for a complete reform of the system as medical malpractice insurance premiums continue to rise.²

Many hail caps on damages in medical malpractice actions to be the solution to the rising costs of healthcare, shifting the burden from hospitals and physicians to the few who are severely and tragically injured by their malpractice.

Caps on non-economic damages have existed in more than half of the states.³ The Idaho Code defines "Noneconomic damages" as "subjective, nonmonetary losses including, but not limited to, pain, suffering, inconvenience, mental anguish, disability or disfigurement incurred by

¹ Milly Dawson, *Cost of Health Care a Burden for Most U.S. Households*, CENTER FOR ADVANCING HEALTH (Mar. 13, 2014), <http://www.cfah.org/hbns/2014/cost-of-health-care-a-burden-for-most-us-households>.

² AM. MED. ASS'N, *MEDICAL LIABILITY REFORM—NOW!* (2018), <https://www.ama-assn.org/sites/ama-assn.org/files/corp/media-browser/premium/arc/mlr-now.pdf>.

³ See USLAW Network, Inc., *50-State Analysis of Liability Damages Caps*, COMPENDIUM OF LAW 2017, https://www.uslaw.org/files/Compendiums2017/50State%20Analysis%20of%20Liability%20Damages%20Caps/USLAW%2050-State%20Analysis%20of%20Liability%20Damages%20Caps%20_%202017.pdf; See also Carol A. Crocca, *Annotation, Validity, Construction, and Application of State Statutory Provisions Limiting Amount of Recovery in Medical Malpractice Claims*, 26 A.L.R. 5TH 245 (1995).

the injured party; emotional distress; loss of society and companionship; loss of consortium; or destruction or impairment of the parent-child relationship."⁴

Many states have passed legislation imposing caps on non-economic damages in general tort or personal injury actions.⁵ These caps have been a legislative response to climbing medical malpractice insurance premiums, which have been argued to be at the source of a perceived healthcare crisis.⁶ The caps have come under attack for being unconstitutional and having a questionable impact on healthcare costs, largely due to the inherent inequity in burdening the most severely injured victims of malpractice.⁷ However, these attacks have had mixed results.⁸

State damage caps have likely been driven by a national effort to impose a national damage cap. Since 1995, the U.S. House of Representatives passed legislation over seven times that would have imposed a national cap on non-economic damage awards in medical malpractice actions.⁹ But historically, such measures have failed to pass through the U.S. Senate.¹⁰ The vote on these

⁴ IDAHO CODE § 6-1601(5).

⁵ See Ctr. for Justice & Democracy at N.Y. Law School, CAPS ON COMPENSATORY DAMAGES: A STATE LAW SUMMARY (June 22, 2017), <https://centerjd.org/content/fact-sheet-caps-compensatory-damages-state-law-summary>.

⁶ Patricia J. Chupkovich, *Statutory Caps: An Involuntary Contribution to the Medical Malpractice Insurance Crisis or a Reasonable Mechanism for Obtaining Affordable Healthcare?*, 9 J. CONTEMP. HEALTH L. & POLICY 337, 338 (Spring 1993) (citing Daryl L. Jones, *Fein v. Permanente Medical Group; The Supreme Court Uncaps the Constitutionality of statutory Limitations on Medical Malpractice Recoveries*, 40 U. MIAMI L. REVIEW 1075, 1078 (1986) (Explaining that physicians, the insurance industry, and legislators refer to increases in malpractice claims as a "medical malpractice crisis").

⁷ See Crocca, *supra* note 3, at § 3(b).

⁸ *Id.*

⁹ See Help Efficient, Accessible, Low-Cost Timely Healthcare (HEALTH) Act of 2003, H.R. 5, 108th Cong. (2003); Help Efficient, Accessible, Low-Cost Timely Healthcare (HEALTH) Act of 2002, H.R. 4600, 107th Cong. (2002); Balanced Budget Act of 1997, H.R. 2015, 105th Cong. (1997); Health Coverage Availability and Affordability Act of 1996, H.R. 3160, 104th Cong. (1996); Common Sense Product Liability Legal Reform Act of 1996, H.R. 956, 104th Cong. (1996); Balanced Budget Act of 1995, H.R. 2491, 104th Cong. (1995); see also Perry H. Apfelbaum & Samara T. Ryder, *The Third Wave of Federal Tort Reform: Protecting the Public or Pushing the Constitutional Envelope*, 8 CORNELL J.L. & PUB. POL'Y 591, 630-31 (Spring 1999).

¹⁰ See Sheryl Gay Stolberg, *Senate Refuses to Consider Cap on Medical Malpractice Awards*, N.Y. TIMES (July 10, 2003) <http://www.nytimes.com/2003/07/10/us/senate-refuses-to-consider-cap-on-medical-malpractice-awards.html> (for example, The Help Efficient, Accessible, Low-Cost Timely Healthcare Act of 2003, which would have capped non-economic damage awards in medical malpractice actions at \$250,000, was passed by the United States House of Representatives in March of 2003, but in July, a similar measure was blocked by a filibuster in the Senate).

measures has generally come down along party lines, with the most recent pieces of legislation being backed by Republican Party leaders.¹¹ As the political spur to pass national caps continues to grow, it is important to analyze the merits of statutory caps as they have worked within the states.

This Comment will address Idaho's unique history involving statutory caps starting in the 1970s through Idaho's current statutory cap today. The Comment will also analyze the Idaho statutory non-economic damage caps and their constitutional implications in tort actions. Part I will discuss the context of damage caps nationally, and the statutory history of caps in Idaho. Part II will discuss the Idaho statutory cap and its constitutional jurisprudence. Lastly, Part III will discuss why the current statutory cap in Idaho should be challenged.

I. THE CURRENT STATE OF DAMAGE CAPS IN IDAHO

The current state of damage caps in Idaho is multifaceted. It is first necessary to consider the national healthcare crisis and how damage caps were used as an attempt to alleviate the crisis. Next, this section of the Comment will consider how damage caps have been instituted in Idaho specifically. Understanding the context, motivations, and contours of both the tort reform debate and the salient Idaho statutes will provide background for the Idaho jurisprudence discussion in Part II.

A. Damage Caps and the National healthcare crisis

In the last fifty years, the increasing cost of healthcare has been one of the most pressing problems in America. Scholars, politicians, and industry experts have all attempted to explain and

¹¹ *Id.*

pin-point the chief cause of these rising costs.¹² Some of the many culprits include the aging of the baby boom generation, high costs of prescription drugs, a broken insurance system, and a rampant medical malpractice litigation problem.¹³ The blaming of medical malpractice litigation seems to have a long-established history.

Since the 1970s, increased insurance premiums for healthcare professionals and facilities have been referred to as the primary reason for increasing healthcare cost.¹⁴ Physicians and the insurance industry frequently blame trial lawyers, excessive litigation, and out-of-control jury awards.¹⁵ One proposed solution was to impose caps on non-economic damages in medical malpractice and other tort liability cases, a notion which found its way into numerous state legislatures, as well as the United States Congress.¹⁶

Yet, in the last decade, medical liability insurance rates have been historically low.¹⁷ Despite these rate reductions, the liability insurance companies seem to have reaped enormous profits. For example, ProAssurance, the nation's fourth largest malpractice insurer, posted profit margins of

¹² Kimberly Amadeo, *The Rising Cost of Healthcare by Year and Its Causes*, THE BALANCE (Oct. 26, 2017), <https://www.thebalance.com/causes-of-rising-healthcare-costs-4064878>.

¹³ *Id.*; See also Editorial, *The High Cost of Health Care*, N.Y. TIMES (Nov. 25, 2007), <http://www.nytimes.com/2007/11/25/opinion/25sun1.html>.

¹⁴ See generally James R. Posner, *Trends in Medical Malpractice Insurance, 1970-1985*, 49 L. & CONTEMP. PROBS. 37, 38 (1986).

¹⁵ TEX. A&M UNIV. CORPUS CHRISTI, *Malpractice and Its Effects on the Healthcare Industry*, (Sep. 27, 2016), <https://online.tamucc.edu/articles/malpractice-and-its-effects-on-the-healthcare-industry.aspx>; See also *10 Years of Tort Reform in Texas Bring Fewer Suits, Lower Payouts*, INSURANCE JOURNAL (Sep. 3, 2013), <https://www.insurancejournal.com/news/southcentral/2013/09/03/303718.htm>.

¹⁶ See Martin D. Weiss, Ph.D., Melissa Gannon & Stephanie Eakins, Weiss Ratings, Inc., *The Impact of Non-Economic Damage Caps on Physician Premiums, Claims Payout Levels, and Availability of Coverage*, FLORIDA SUPREME COURT (June 2003), <http://www.floridasupremecourt.org/library/webcites/SC11-1148%20Medical%20Malpractice%20Caps.%20Weiss%20Ratings.pdf>.

¹⁷ Taylor Lincoln, *Medical Malpractice Payments Remained at Historic Low in 2013 Despite Slight Uptick*, PUBLIC CITIZEN (Oct. 2014), <https://www.citizen.org/sites/default/files/medical-malpractice-2013.pdf> (citing Jeffrey Bendix, *Competition Driving Malpractice Premiums Down*, MEDICAL ECONOMICS (Nov. 25, 2013)) (“Medical liability rates vary by region and provider and are reported anecdotally. But the trend is downward. For instance, rates charged by the Doctors Company, a major provider of liability insurance, fell 35 percent between 2005 and 2012.”); see also Saurabh Nair, *Competition Driving Medical Malpractice Rates Lower*, SNL INSURANCE DAILY (Mar. 4, 2014) (“In 2013, the Doctors Company decreased rates from 2.8 percent to 45.7 in Oregon, Illinois, Idaho, Mississippi and Washington, reported SNL Insurance Daily.”).

91% in 2011, 86% in 2012, and 64.7% in 2013.¹⁸ In 2010, the insurer recorded a massive 103% profit margin on its premiums nationwide.¹⁹

Tort reform opponents like the American Association for Justice (AAJ) argue that “health care costs are rising; however, medical malpractice litigation has nothing to do with it.”²⁰ This is because medical malpractice has amounted to “less than 2 percent of overall health care spending.”²¹ The AAJ also argues that since the physician-to-patient ratio has increased by more than 40% since 1990, healthcare providers are not fleeing the industry and the access to medical care remains abundant.²²

In the last decade, the complex landscape of healthcare issues in America changed through the Affordable Care Act (ACA), also known as Obamacare.²³ The ACA, which was signed into law in 2010,²⁴ aimed to alleviate healthcare prices for consumers.²⁵ The ACA’s success or failure in achieving that goal is not the topic of this Comment, but suffice it to say that healthcare costs are

¹⁸ Cary Spivak, *Malpractice Insurance Business Is Booming; Huge Profits Are a Change from Previous Decades*, JOURNAL SENTINEL (June 28, 2014, 5:00 PM), <http://archive.jsonline.com/watchdog/watchdogreports/malpractice-insurance-business-is-booming-in-wisconsin-and-nation-b99294575z1-265035931.html/>.

¹⁹ *Id.*

²⁰ *Debunking the Myths*, AM. ASS’N FOR JUST., <https://www.justice.org/what-we-do/promote-accountability-safety/debunking-myths> (last visited Mar. 1, 2018).

²¹ *Limiting Tort Liability for Medical Malpractice*, CONG. BUDGET OFF., 6 (Jan. 8, 2014), <https://www.cbo.gov/sites/default/files/cbofiles/ftpdocs/49xx/doc4968/01-08-medicalmalpractice.pdf>.

²² AM. ASS’N FOR JUST., *supra* note 20.

²³ *Affordable Care Act (ACA)*, HEALTHCARE.GOV, <https://www.healthcare.gov/glossary/affordable-care-act/> (last visited Mar. 1, 2018).

²⁴ *Id.*

²⁵ *Id.* (“The law has 3 primary goals: [1] Make affordable health insurance available to more people. The law provides consumers with subsidies (“premium tax credits”) that lower costs for households with incomes between 100% and 400% of the federal poverty level. [2] Expand the Medicaid program to cover all adults with income below 138% of the federal poverty level. (Not all states have expanded their Medicaid programs.); [3] Support innovative medical care delivery methods designed to lower the costs of health care generally.”)

²⁵ *See id.* The ACA was a unique attempt to try and provide healthcare insurance for all Americans and alleviate healthcare costs.

still rising despite the ACA.²⁶ Healthcare costs are also rising despite pre-ACA reforms.²⁷ Despite the ACA and the pre-ACA reforms from the past fifty years, the issue of rising healthcare costs remains.

Today, the Trump administration has signaled a return to the tort reform crusade. President Trump proposed to include medical malpractice liability reform in his 2018 budget.²⁸ The reform's stated purpose is to "reduce defensive medicine . . . limit liability, reduce provider burden, promote evidence-based practices, and strengthen the physician-patient relationship."²⁹ To achieve these goals, the proposed reform will apply several measures, including a national cap on non-economic damages of \$250,000.³⁰

In lockstep with preceding tort reform advocates,³¹ a non-economic damage cap was at the top of President Trump's list.³² Commentators opine that "[t]he \$250,000 cap [would be]

²⁶ *National Health Expenditures 2016 Highlights*, CTRS. FOR MEDICARE & MEDICAID SERVS., <https://www.cms.gov/Research-Statistics-Data-and-Systems/Statistics-Trends-and-Reports/NationalHealthExpendData/Downloads/highlights.pdf> (last visited March 1, 2018) ("U.S. health care spending increased 4.3 percent to reach \$3.3 trillion, or \$10,348 per person in 2016. Health care spending growth decelerated in 2016 after the initial impacts of ACA coverage expansions and strong retail prescription drug spending growth in 2014 and 2015. The overall share of gross domestic product (GDP) related to health care spending was 17.9 percent in 2016, up from 17.7 percent in 2015.").

²⁷ *Id.*

²⁸ *Major Savings and Reforms, Budget of the U.S. Government, Fiscal Year 2018*, OFFICE OF MGMT. AND BUDGET, 114, <https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/budget/fy2018/msar.pdf> (last visited Mar. 1, 2018).

²⁹ *Id.*

³⁰ *Id.*; see also, Alex Stein, *President Trump's Tort Reform*, HARV. L. BILL OF HEALTH (June 5, 2017), <http://blogs.harvard.edu/billofhealth/2017/06/05/president-trumps-tort-reform/>. "To achieve these goals, the reform will introduce the following measures: A cap on non-economic damage awards of \$250,000 (adjustable to inflation); a three-year statute of limitations; allowing courts to modify attorney's fee arrangements; abolition of the "collateral source" rule (to allow judges and jurors to hear evidence of the plaintiff's income from other sources such as workers' compensation and insurance); creating a safe harbor for clinicians who follow evidence-based clinical-practice guidelines."

³¹ See generally, 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 (2004) (the author quotes President George W. Bush a strong advocate for damage caps: "To improve our health care system, we must address one of the prime causes of higher cost, the constant threat that physicians and hospitals will be unfairly sued. Because of excessive litigation, everybody pays more for health care, and many parts of America are losing fine doctors.").

³² Stein, *supra* note 30.

unconscionably low, especially for victims in cases of wrongful death and catastrophic injury.”³³ President Trump’s agenda could be susceptible to constitutional challenges since a proposed cap would discriminate between medical malpractice victims and other tort victims,³⁴ giving rise to an equal protection challenge under the Fourteenth Amendment.³⁵ This is possible since, recently, some states have struck down their statutory caps per equal protection constitutional challenges.³⁶

In harmony with President Trump’s agenda, Rep. Steve King (R-IA4) sponsored House Bill 1215 (H.R. 1215), also known as the Protecting Access to Care Act (PACA).³⁷ PACA, *inter alia*, imposes a \$250,000 cap on non-economic damages in “health care lawsuits.”³⁸ The non-economic damages would affect healthcare tort victims alleging damages of emotional distress, suffering, or mental anguish that exceed the statutory cap.³⁹ PACA delineates “[e]conomic damages sought by patients, including health care costs and salary loss, [which] would not be affected by this bill.”⁴⁰ The chief purpose of the bill is to curtail costs of healthcare. One commentator explains: “Health care costs are skyrocketing. . . . The Centers for Medicare and Medicaid Services projects that it will rise . . . to 19.9 percent by 2025.”⁴¹

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ “To withstand this challenge, the government must have a demonstrable legitimate interest in the nationwide cap. Specifically, the cap’s introduction must have the potential for reducing defensive medicine and the costs of medical care. This “legitimate interest” claim would not be easy to sustain in light of its recent repudiation in *McCall v. United States*, 134 So.3d 894 (Fla. 2014)—a decision that voided Florida’s \$1M cap on non-economic damages recoverable in connection with a malpractice victim’s death.” *Id.*

³⁷ H.R. 1215, 115th Cong. (2017).

³⁸ *Id.* at section 10.

³⁹ Jesse Rifkin, *Protecting Access to Care Act would cap most medical malpractice lawsuits at \$250 thousand. Would it bring health care costs down?*, GOVTRACK INSIDER (April 1, 2017), <https://govtrackinsider.com/protecting-access-to-care-act-would-cap-most-medical-malpractice-lawsuits-at-250-thousand-ee9365c160e3>.

⁴⁰ *Id.*

⁴¹ *Id.*

PACA supporters argue the bill would counter a critical part of healthcare cost growth: “[j]ust imagine what savings would occur if such reforms were attached to all federal health care programs, as this bill would do. This bill goes a long way to respect states’ rights and give states the authority to raise or lower the cap for non-economic damages.”⁴²

Those who oppose noneconomic damage caps counter that claims of malpractice insurance and defensive medicine driving up healthcare costs are largely a myth, and that H.R. 1215 could harm patients’ rights.⁴³ For example, a recent Harvard School of Public Health study estimated that total malpractice liability costs make up 2.4 percent of American healthcare spending.⁴⁴ Opponents also argue that medical malpractice premiums have been declining even without an H.R. 1215 cap.⁴⁵

Despite the opposition and potential constitutional issues of PACA, the Act has gained some momentum in congress. The bill was approved by the House Judiciary Committee with an 18-17 vote⁴⁶ and ultimately passed in the House of Representatives 218-210.⁴⁷ Next, the bill will need to pass in the Senate to become law. Whether PACA becomes law or not, the continued debate is indicative of a lingering question: will damage caps actually alleviate the healthcare crisis?

⁴² SteveKingIA, *Congressman Steve King Remarks on His Bill H.R. 1215 "Protecting Access to Care Act"*, YOUTUBE (Feb. 28, 2017), <https://www.youtube.com/watch?v=rPx-SHo0Aj0&feature=youtu.be> (last visited Oct. 10, 2018).

⁴³ Rifkin, *supra* note 39.

⁴⁴ Todd Datz, *Medical liability costs in U.S. pegged at 2.4 percent of annual health care spending* (Sep. 7, 2010), <https://www.hsph.harvard.edu/news/press-releases/medical-liability-costs-us/> (The Harvard study’s figures came from before the Affordable Care Act took full effect and so it is unclear whether the percentage going to malpractice liability costs has changed since then).

⁴⁵ PUB. Citizen’s Congress Watch, *supra* note 17.

⁴⁶ Protecting Access to Care Act of 2017: Roll Vote No. 14, *CONG. REC.*, vol. 163 (Feb. 28, 2017), <https://judiciary.house.gov/wp-content/uploads/2017/02/RC-14.pdf>.

⁴⁷ Protecting Access to Care Act of 2017: Final Vote Results for Roll Call 337, *CONG. REC.*, vol. 163 (Feb. 28, 2017), <http://clerk.house.gov/evs/2017/roll337.xml>

Proponents of caps blame the tort system generally. The line of reason goes like this: less tort damages means less tort payouts, lower damages mean lower insurance premiums, lower premiums mean lower healthcare costs.⁴⁸ Proponents attribute increased jury awards to juries irrationally overcompensating victims of malpractice with excessive awards of pain and suffering and other non-economic damages.⁴⁹ From this perspective, non-economic damages are problematic because they are subjective, making them a less-essential component to a fair system of compensation.⁵⁰

On the other hand, opponents of caps refute that tort reform has achieved its goal of alleviating the healthcare crisis. Statistics show that plaintiffs prevail less often in medical malpractice suits than any other tort or personal injury claim.⁵¹ Opponents also doubt that caps alleviate healthcare costs or improve healthcare quality. For example, Dr. Harvey F. Waschman stated:

These tort reform measures have four things in common: insurance companies save money; incompetent doctors avoid blame and any meaningful form of discipline; patients and their families, who have been destroyed in the process, are prevented from obtaining financial compensation, the only kind of justice available to them; and, the general public is left unprotected from doctors who may maim and kill their patients.⁵²

⁴⁸ American Medical Association, *Medical Liability Reform Now!* (2018), <https://www.ama-assn.org/sites/default/files/media-browser/premium/arc/mlr-now.pdf>.

⁴⁹ See generally, Martha Chamallas, *The Disappearing Consumer, Cognitive Bias and Tort Law*, 6 ROGER WILLIAMS U.L. REV. 9 (2001).

⁵⁰ *Id.* at 27.

⁵¹ Thomas H. Cohen, *Federal Tort Trials and Verdicts, 2002-03* (Aug. 17, 2005), <https://www.bjs.gov/index.cfm?ty=pbdetail&iid=888>.

⁵² Dr. Harvey F. Wachsman, *Individual Responsibility and Accountability: American Watchwords for Excellence in Healthcare*, 10 ST. JOHN'S J. LEGAL COMMENT. 303, 317 (1995).

Opponents of caps have warned that insurance companies' mismanagement of premiums and unethical practices are the real problem in rising insurance rates.⁵³ For example, J. Robert Hunter, a previous advisor to President Ford at the birth of the healthcare crisis in the 1970s, wrote to President George W. Bush criticizing his reliance on a Department of Health and Human Services (HHS) report for policy making.⁵⁴ Hunter explained that the HHS report was "one-sided and full of errors" and "appears to have relied solely on biased statistics developed by the insurance industry."⁵⁵ Hunter asserted that "the economic cycle" of the insurance industry and the industry's own "business practices" were the true culprit of the healthcare crisis, as was the case in the 1970s and 1980s.⁵⁶

In essence, there are no guarantees that physicians and consumers will see any benefit from caps. Discouraging medical malpractice litigation will mostly benefit insurers who pocket the savings.⁵⁷ Opponents warrant caution in the intrusive measures of noneconomic caps into the tort law system,⁵⁸ especially since studies indicate that the healthcare system receives little or no benefit from tort reform.⁵⁹

⁵³ CONSUMER FED'N OF AMERICA, *Letter to President Bush on HHS Study of Medical Malpractice Insurance Rates*, (July 30, 2002), <https://consumerfed.org/testimonial/letter-to-president-bush-on-hhs-study-of-medical-mal-practice-insurance-rates/> (last visited Mar. 1, 2018).

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ Michael Hiltzik, *New Study Shows that the Savings from 'tort reform' are Mythical*, L.A. Times, (Sept. 20, 2014), <http://www.latimes.com/business/hiltzik/la-fi-mh-another-study-shows-why-tort-reform--20140919-column.html>.

⁵⁸ See AM. ASS'N FOR JUST., *supra* note 20.

⁵⁹ Hiltzik, *supra* note 57.

B. Idaho's persistent imposition of statutory caps

The original statutory cap in Idaho was called the Hospital-Medical Liability Act (HLA), signed into law in the Idaho Code⁶⁰ in 1975.⁶¹ True to the healthcare crisis narrative, the act focused its purpose on the necessity of keeping healthcare premiums low. In fact, the HLA cap was proposed as a response to an alleged healthcare emergency.⁶² The HLA's Declaration of Necessity and Purpose stated:

It is the declaration of the legislature that appropriate measures are required in the public interest to assure that a liability insurance market be available to persons licensed to practice [medicine] . . . and to [all] licensed hospitals providing health care in this state and that the same be available at reasonable cost, thus assuring the availability of such hospitals and physicians for the provision of care to persons in the state.⁶³

The statute's explanatory statement in the Senate echoed the same, citing a "rapidly increasing frequency and size of malpractice claims and judgments against healthcare providers,"⁶⁴ and an alleged "increased cost to the consumers of healthcare."⁶⁵ The statement claimed that some physicians have gone so far as to "seriously consider retiring from the practice of medicine" altogether.⁶⁶ Ultimately the HLA limited the civil liability of health care providers to "\$100,000 per claimant or, in the case of more than one claimant from the same occurrence, an aggregate of \$300,000."⁶⁷

⁶⁰ Idaho Code §§ 39-4201 to -4313 (1975).

⁶¹ S.B. 1186, 43rd Leg., 1st Reg. Sess. (Idaho, 1975) (available at Idaho State Capital legislative library).

⁶² *Id.* (emergency status was added as an amendment to the bill within the section 14 sunset clause).

⁶³ *Id.*

⁶⁴ S. Comm. Rep. No. 1186, at 1 (Idaho 1975) (available at Idaho State Capital legislative library).

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

Then, in 1976 (approximately one year after the HLA became law), the HLA's constitutionality was challenged.⁶⁸ In *Jones v. State Board of Medicine*, the Court expressed serious doubt regarding the constitutionality of the HLA statute and set forth an equal protection framework to be considered on remand.⁶⁹ Applying the *Jones* framework on remand, the district court held the HLA statute indeed violated Article I § 18 of the Idaho Constitution.⁷⁰

Twelve years later, the legislature signed into law a second statutory cap, “An Act Relating to Tort Liability Laws,” which included Idaho Code § 6-1603, the “Limitation on Noneconomic Damages.”⁷¹ This 1987 cap took a wider berth in limiting more than damages recoverable in personal injury and medical malpractice actions. The Act included a periodic payment of judgements, limitations on punitive damages, limitations on officers and directors of charitable corporations and organizations, and modified comparative and contributory negligence responsibility.⁷² This Comment focuses on the constitutionality of the noneconomic damage cap exclusively, so the other provisions are beyond the scope of this discussion. Suffice it to say, the 1987 statute did much more to tort law than merely limit tort recoveries via statutory cap.

The stated purpose of the 1987 statutory cap was reminiscent to the previously struck 1975 statute. The new cap was allegedly a response to “public concerns that some aspects of the civil justice system have contributed to the high cost of liability insurance for businesses and

⁶⁸ *Jones v. State Bd. of Med.*, 555 P.2d 399, 404, 97 Idaho 859, 864 (1976) (Idaho Supreme Court remanded with instruction on the constitutionality of the provision after which the district court held that the statute violated equal protection); see also Edward W. Taylor & William G. Shields, *The Limitation on Recovery in Medical Negligence Cases*, 16 U. RICH. L. REV. 799 (1982) (“Perhaps the most exhaustive examination of the issue has been in Idaho in *Jones v. State Board of Medicine*, where, the supreme court, in a well-reasoned opinion, seriously questioned the constitutional validity of the 1976 Hospital Medical Liability.” (Internal citations omitted)).

⁶⁹ *Id.*

⁷⁰ *Jones v. State Bd. of Medicine*, No. 55586 (4th Dist. Ct. Ada County, Idaho, Nov. 3, 1980).

⁷¹ S.B. 1223, 49th Leg., 1st Reg. Sess. (Idaho, 1987).

⁷² *Id.* (hospitals and large healthcare groups are often charitable and non-profit organizations which likely fit within the healthcare crisis narrative).

individuals.”⁷³ To combat these alleged defects in the civil justice system, “[t]he bill limited the amount of damages that could be recovered for nonquantifiable [also known as non-economic] injuries.”⁷⁴

The 1987 cap was set at \$400,000. The statute stated: “In no action seeking damages for personal injury, including death, shall a judgement for non-economic damages be entered for a claimant exceeding the maximum amount of four hundred thousand dollars (\$400,000).”⁷⁵ The Idaho legislature passed the cap soundly with a 40-2-0 in the senate and 76-7-1 in the house.⁷⁶ The Idaho Liability Reform Coalition and the Idaho Trial Lawyers Association were the main players involved in the passage of the 1987 statutory cap.⁷⁷ Legislators seemed to be juxtaposed between two problems: (1) the tort system’s perceived effect on businesses and insurers; and (2) the imminent sacking of legal recourse for tort victims.⁷⁸

On one side, “the people of the State of Idaho *perceived* that our [justice] system needed some correcting . . . [a] *perception manifested itself in a group of business people* and formed the Liability Reform Coalition.”⁷⁹ The “business people” noted in the meeting minutes that day, who apparently had some lodged interest in limiting Idaho tort liability, included representatives from Monsanto Company, Idaho Hospital Association, Idaho Association of Realtors, and Boise Cascade.⁸⁰ Not a single Idaho “person” actually spoke in favor of the Act, instead all persons that

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ S.J. Res. 20525C1, 49th Leg. 1st Sess. (Idaho. 1987) (both Idaho Liability Coalition and Idaho Trial Lawyers representatives spoke at the Senate Judiciary and Rules Committee).

⁷⁸ *Id.*

⁷⁹ *Id.* (emphasis added).

⁸⁰ *Id.*

day were speaking on behalf of either an Idaho corporation or an Idaho industry.⁸¹ This is not to detract from the credibility or sincerity of Idaho businesses, but the question remains: Who actually stood to benefit from the Act's passage.?

The legislature was admittedly cautious in tampering with the tort system. The meeting notes state: “[Y]ou cannot just take wide, easy swipes to make the solutions . . . [t]he law has been built *carefully over centuries* . . . when you enter this area, you must enter it very carefully.”⁸² The statutory cap was considered to be one of the primary “corner stones of [the] legislation.”⁸³ And the statutory cap was successfully put into law at the benefit of Idaho “business people” that felt the “system needed some correcting.”⁸⁴ Yet, the true effect of the statutory cap, and its “wide swipes” at Idaho tort law, would be almost exclusively borne by future Idahoan tort victims.⁸⁵ In essence, the 1987 Act would benefit Idaho business at the expense of future Idaho tort victims.

Thirteen years later, in *Kirkland v. Blaine*, the 1987 cap survived its first constitutional challenge.⁸⁶ In *Kirkland*, the Idaho Supreme Court held Idaho Code § 6-1603 to be constitutional.⁸⁷ The Court reasoned that § 6-1603 did not violate separation of powers doctrine, did not infringe on the judiciary’s traditional power of remitter of damage awards, and reflected nothing more than a change in tort common law.⁸⁸ The *Kirkland* court also found that § 6-1603 was not “an arbitrary, capricious, or unreasonable method” for addressing the legitimate interest in protecting

⁸¹ *Id.* (one Idaho little league coach did speak in favor of the Act three years later in February 15, 1990, when the sunset clause was to take effect, which would null and void the Act. The coach shared an anecdote in which a player on his team was injured and he feared the possibility of litigation).

⁸² *Id.* (emphasis added).

⁸³ *Id.*

⁸⁴ S.J. Res. 20525C1, 49th Leg. 1st Sess. (Idaho. 1987).

⁸⁵ *Id.*

⁸⁶ See *Kirkland v. Blaine Cty. Med. Ctr.*, 4 P.3d 1115, 134 Idaho 464 (2000).

⁸⁷ *Id.* at 465.

⁸⁸ *Id.* at 470-71.

availability of liability insurance.⁸⁹ Thus, the statutory cap did not constitute impermissible special legislation in violation of State Constitution.⁹⁰

The third and last statutory cap provision was an amendment of the 1987 cap in 2003 reducing the noneconomic damage cap from \$400,000 to \$250,000. The Idaho legislature reconsidered the 1987 rules on tort liability in Idaho.⁹¹ The stated purpose was to modify the law in three ways: (1) it would modify joint and several liability by repealing exceptions associated with medical devices and pharmaceutical products; (2) it would reduce the cap on non-economic damages to \$250,000; and (3) it would impose limits on punitive damages.⁹² The legislative history is addressed at length in the last section of this Comment.

This third statute, which dramatically modifies the 1987 cap, has not been constitutionally challenged since the changes were made in 2003. *Jones* and *Kirkland* are the two most salient constitutional challenges to statutory caps in Idaho and are discussed next in Part II of this Comment.

II. JONES AND KIRKLAND: THE CONSTITUTIONAL JURISPRUDENCE

The constitutionality of statutory caps in Idaho involves two major cases: *Jones v. Board of Medicine*, and *Kirkland v. Blaine*. The *Jones* petitioners challenged the caps based on substantive due process and equal protection grounds. In contrast, the *Kirkland* case was a Seventh Amendment challenge on the statutory caps. Distinguishing the two very different approaches will assist in reconciling the future of caps in Idaho.

⁸⁹ *Id.* at 470.

⁹⁰ *Id.*

⁹¹ H.B. 92, 57th Leg., 1st Reg. Sess. (Idaho 2003).

⁹² *Id.*

A. *Jones v. Board of Medicine*: Equal Protection Challenge

The Idaho Supreme Court’s 1979 opinion in *Jones v. Board of Medicine* held statutory caps to be unconstitutional under the equal protection clauses of the State and U.S. Constitutions.⁹³

In *Jones*, the act in question was the *Hospital Liability Act* (HLA) as described in Part I of this Comment. The plaintiff-respondents, Mr. A. Curtis Jones Jr. M.D. alongside of other Idaho physicians, contended that the limitations found in HLA were in violation of the due process and equal protection clauses of the Fourteenth Amendment and Article I, Sections 2, 13, and 18 of the Idaho Constitution.⁹⁴ The plaintiff-respondents felt that the HLA compounded the medical malpractice insurance crisis by requiring excessive insurance costs and a reluctance of insurers to offer coverage.⁹⁵ The appellant-defendants in favor of the HLA were the State of Idaho Board of Medicine and the Idaho Department of Health and Welfare, who were charged with healthcare licensing and general healthcare regulation.⁹⁶

The district court below held “that the ability for citizens to seek redress for a breach of duty is a fundamental right preserved by Article I, section 18 of the Idaho Constitution, which the court said requires ‘a full and complete remedy for every injury of person.’”⁹⁷ The court reasoned that the Idaho Constitution “prohibits the limitation of liability for injuries otherwise recoverable under a right or cause of action” because “the clause provides relief for ‘every’ injury.”⁹⁸ The

⁹³ *Jones v. State Bd. of Med.*, 555 P.2d 399, 404, 97 Idaho 859, 864 (1976) (Idaho Supreme Court remanded with instruction on the constitutionality of the provision after which the district court held that the statute violated equal protection in *Jones v. State Bd. of Medicine*, No. 55586 (4th Dist. Ct. Ada County, Idaho, Nov. 3, 1980)); see also Edward W. Taylor & William G. Shields, *The Limitation on Recovery in Medical Negligence Cases*, 16 U. RICH. L. REV. 799 (1982) (“Perhaps the most exhaustive examination of the issue has been in Idaho in *Jones v. State Board of Medicine*, where, the supreme court, in a well-reasoned opinion, seriously questioned the constitutional validity of the 1976 Hospital Medical Liability.” (Internal citations omitted)).

⁹⁴ *Jones*, 555 P.2d at 402-3, 97 Idaho at 864.

⁹⁵ *Id.* at 403.

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.* (citing Idaho Const. art. I, § 18).

Medical Board appealed the district court's ruling arguing that the HLA did not violate due process and equal protection.⁹⁹ On appeal the Idaho Supreme Court reviewed, *inter alia*, the issues pertaining to due process and equal protection.¹⁰⁰

The Idaho Supreme Court explained how § 39-4210 contravened Article I, Section 18 of the Idaho Constitution.¹⁰¹ The court applied rational basis review,¹⁰² explaining that “[t]he ‘means scrutiny’ test enunciated in *Reed* has been followed by recent decisions of this Court in which statutes of a blatantly discriminatory nature have been held to be unconstitutional as a denial of equal protection.”¹⁰³ The Court found the facts in *Jones* did not support an appropriate substantive due process claim.¹⁰⁴ But the equal protection argument was considered by the court.¹⁰⁵

To begin the equal protection analysis, the *Jones* court defined the classification of persons who were affected by the Act as created by those portions of the Act that limited recovery in medical malpractice actions.¹⁰⁶ The court inquired whether that classification was discriminatory and in violation of the equal protection clauses of the Fourteenth Amendment and the Idaho Constitution.¹⁰⁷ The classification in this case was determined by the statutory limitation on recovery. The court explained:

The classification which is there created distinguishes between those who are damaged as a result of medical malpractice in amounts exceeding \$150,000 as contrasted with others likewise damaged by medical malpractice but whose damages are less than \$150,000. Thus, those who are damaged in excess of the statutory limitation are denied full recovery.¹⁰⁸

⁹⁹ *Id.* at 404.

¹⁰⁰ *Jones*, 555 P.2d at 404.

¹⁰¹ *Id.*

¹⁰² *Id.* at 407.

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 400.

¹⁰⁵ *Id.* at 411.

¹⁰⁶ *Jones*, 555 P.2d at 411.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 410.

So, those affected by the Act included any persons entitled to full recovery but were denied because their damages exceeded \$150,000.

The standard of review that *Jones* would apply depended on the invidiousness of the discrimination “so as to be prohibited by the guarantees of equal protection.”¹⁰⁹ Initially, the plaintiffs argued that “the limitations upon recovery for medical malpractice infringe upon a fundamental right, thus necessitating the application of the ‘strict scrutiny test’ standard.”¹¹⁰ But the court disagreed. The court explained that the classification of those who would not be entitled to full recovery under the Act were not a suspect class. The court stated:

We disagree and deem it clear that the challenged classification is not ‘suspect’ as that has been identified by the United States Supreme Court. *Newlan v. State*, supra. We also disagree with the assertion that such classification involves fundamental rights as contemplated by Art. I, s 18, of the Idaho Constitution.¹¹¹

The *Jones* court determined that the standard for testing the Act should be a lesser scrutiny.¹¹² Mr. Jones and the other appellants argued that the classification must be judged by the standard set forth in *McGowan v. Maryland*, which broadly states that “a statutory discrimination will not be set aside if any state of facts may be conceived to justify it.”¹¹³ Conversely, the classification must be tested under a different standard found in *Reed v. Reed*, as stated by the Idaho State Medical Board.¹¹⁴ The classification would have to be in accordance to whether it “rests on some ground of difference having a fair and substantial relation to the object of the legislation.”¹¹⁵ The court explained that:

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Jones*, 555 P.2d at 410.

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 410-11.

[W]hen the test set forth in *McGowan* has been utilized, the result has ordinarily been the removal of the court from any but the most cursory review of the challenged legislation. It invites courts to conceive purposes which would justify statutes. The validity or invalidity of discriminatory classifications may under that test depend solely upon the extent of the imagination of the reviewing court and/or its adherence to the theory of judicial restraint.¹¹⁶

However, while *Jones* recognized the concept of judicial restraint, the court did not find that as an excuse to allowing injustice per the Idaho Constitution. The court explained that:

While we recognize and agree with the concept of judicial restraint as it cautions against substituting ‘judicial opinion of expediency for the will of the legislature,’ nevertheless, blind adherence and over-indulgence results in abdication of judicial responsibility. It is appellant's position in the case at bar that since the legislature has declared the purpose of the subject Act and since that declaration is said and presumed to be founded on a rational factually based legislative determination, this Court is foreclosed from additional inquiry into the Act. We disagree.¹¹⁷

Jones looked beyond the minimal scrutiny test of *McGowan* in “classifications alleged to be violative of equal protection.”¹¹⁸ The court relied on a standard set forth in another case, *F.S. Royster Guano Co. v. Virginia*.¹¹⁹ Instead of punting to the legislature, “[t]hat test scrutinizes the means by which the challenged legislation is said to affect its articulated and otherwise legitimate purpose.”¹²⁰ In other words, the Court may look at whether the means justify the legislative end. The court reasoned that it is by this mean-ends analysis “where statutes have been overturned as violative of equal protection.”¹²¹

In explaining the means-ends analysis as applied in Idaho, the *Jones* court points out that when the classification is so invidious in its discrimination, a heightened scrutiny may apply. The court reasoned:

¹¹⁶ *Id.* at 411 (See, e.g., *Goesaert v. Cleary*, 335 U.S. 464 (1948); *Kotch v. Bd. of River Port Pilots Comm’rs*, 330 U.S. 552 (1947)).

¹¹⁷ *Jones*, 555 P.2d at 411.(quoting *Purity Extract & Tonic Co. v. Lynch*, 226 U.S. 192 (1912)).

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.*

In the usual and ordinary case where a statutory classification is to be tested in the context of equal protection, judicial policy has been, and continues to be, that the legislation should be upheld so long as its actions can reasonably be said to promote the health, safety and welfare of the public. Nevertheless, where the discriminatory character of a challenged statutory classification is apparent on its face and where there is also a patent indication of a lack of relationship between the classification and the declared purpose of the statute, then a more stringent judicial inquiry is required beyond that mandated by McGowen. That common thread runs through all the cases in which the Royster-Reed test has been applied by this Court.¹²²

Applying the mean-ends standard, the *Jones* court found the means of the Act too complex, requiring further inquiry as to answer whether it successfully effectuated its end goal. The court again reasoned:

Here it is apparent from the face of the Act that a discriminatory classification is created . . . [and] although the Act is said to be designed to insure continued health care to the citizens of Idaho it cannot do other than confer an advantage on doctors and hospitals *at the expense of the more seriously injured and damaged persons.*
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The *Jones* court posed the following question: “Does the statute reflect any reasonably conceived public purpose, and does the establishment of the classification have a fair and substantial relation to the achievement of the objective and purpose?”¹²⁴ The court reasoned that they were unable to “ascertain how the classification between victims of malpractice relate to the asserted purpose of assuring medical care to the people of Idaho, notwithstanding the declaration found in [the Act].”

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The State Board of Medicine stayed true to the healthcare crisis narrative, pointing to the “increasing number of medical malpractice claims premium rates for medical malpractice insurance” and the fact that Idaho's “principal medical malpractice insurance carrier has withdrawn

¹²² *Id.*

¹²³ *Jones*, 555 P.2d at 411. (emphasis added).

¹²⁴ *Id.*

¹²⁵ *Id.* at 412.

any coverage of 500 of the state's 900 doctors.”¹²⁶ The board argued limiting the amount of recovery generally would create “a more stable basis for prediction of malpractice losses and thereby encourage the entry into Idaho of new insurance carriers at lower, more reasonable and more competitive rates.”¹²⁷ The court found itself “unable to judge the accuracy or completeness of” the board’s assertions.¹²⁸

The *Jones* Court may have understood that resolving an alleged healthcare crisis was beyond the tort law system. The court referenced an affidavit by the Director of the State Department of Insurance,¹²⁹ which it found to be conclusory and unpersuasive.¹³⁰ The problem with the affidavit was that, aside from the conclusory statements, the healthcare crisis was substantially less severe than what had been eluded to. The Court pointed out that: “although two insurance carriers are withdrawing from the malpractice field in Idaho, seven remain, one of whom is offering to insure physicians left uninsured by the recent withdrawals.”¹³¹ Thus, the alleged crisis in supply of insurance carriers in the healthcare industry seemed to still be relatively stable. The Idaho Supreme Court was apparently not convinced that this perceived crisis was dire and doubted that litigation was the cause of the crisis.

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Jones*, 555 P.2d at 412.

¹³⁰ *Id.* (The court stated that the evidence was “[C]onclusory in stating that the Act was a ‘response to the medical malpractice insurance crisis’ which crisis is indicated by increased premium rates and unavailability of insurance carriers, and that the Act was designed to stabilize the medical malpractice insurance market by providing a predictable level of recovery, other matters are contained therein which cast doubt on the validity of these conclusions”).

¹³¹ *Id.*

B. *Kirkland v. Blaine*: Constitutionality of Caps

In *Kirkland v. Blaine*, the Idaho Supreme Court did not address the *Jones* equal protection argument. Instead, the court's holding centered on the petitioner's argument that damage caps contravened the Seventh Amendment. *Kirkland* arose from a medical malpractice case tried in federal district court under Idaho law.¹³² The plaintiffs, Sandy and Quinn Kirkland, brought the action on their own behalf, and on behalf of their son, Bryce Kirkland.¹³³ The Kirkland family brought their action against Wood River Medical Center (WRMC) and Dr. Ian Ross Donald,¹³⁴ including recovery for the injuries that Bryce sustained due to medical care provided to Sandy.¹³⁵

As discussed in Part I of this comment, section 6-1603 of the Idaho Code (the 1987 cap) limits noneconomic damages to \$400,000.¹³⁶ But in this case, the Kirklands argued that a specific provision of the statutory cap, section 6-1603(3), violates the right to jury trial as guaranteed by Article I, § 7 of the Idaho Constitution.¹³⁷ This is because it denies plaintiffs the right to have a jury determine the amount of noneconomic damages incurred by tort victims.¹³⁸ Section 3 of the cap reads: "If a case is tried to a jury, the jury shall not be informed of the limitation contained in subsection (1) of this section [i.e. the \$400,000 statutory cap]."¹³⁹

At trial, the *Kirkland* jury awarded damages to in the total amount of \$29,715,077, which broke down as \$11,215,077 in economic damages and \$15,000,000 in noneconomic damages in favor of Bryce.¹⁴⁰ The award also included another \$3,500,000 in noneconomic damages in favor

¹³² *Kirkland*, 4 P.3d at 1116-17.

¹³³ *Id.* at 1116.

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ IDAHO CODE ANN. § 6-1603(3) (West 1987).

¹³⁷ *Kirkland*, 4 P.3d at 1118 (citing IDAHO CONST. art. I, § 7).

¹³⁸ *Kirkland*, 4 P.3d at 1118.

¹³⁹ IDAHO CODE ANN. § 6-1603(3) (West 1987).

¹⁴⁰ *Kirkland*, 4 P.3d at 1117.

of Sandy and Quinn Kirkland.¹⁴¹ For Bryce’s injuries, the jury apportioned 25% of the liability to Wood River Medical Center and 75% of the liability to Dr. Donald.¹⁴² Because the jury found Dr. Donald to have acted recklessly, the statutory cap did not apply to Sandy and Quinn Kirkland’s award.¹⁴³ This is because section 6-1603(3)(1) does not apply the limitation of noneconomic damage awards to causes of action “arising out of willful or reckless misconduct.”¹⁴⁴ But, unbeknownst to the jury, section 6-1603 reduced Bryce’s noneconomic damages from \$3,750,000 to approximately \$573,000,¹⁴⁵ reducing the damage award by approximately 85%.¹⁴⁶

After trial, the Kirkland family filed a motion in the federal district court to declare section 6-1603 in violation of various provisions in the Idaho Constitution,¹⁴⁷ including the right to a jury trial.¹⁴⁸ Article 1, section 7 of the Idaho Constitution provides:

*The right of trial by jury shall remain inviolate; but in civil actions, three-fourths of the jury may render a verdict. . . In civil actions the jury may consist of twelve or any number less than twelve upon which the parties may agree in open court. Provided, that in cases of misdemeanor and in civil actions within the jurisdiction of any court inferior to the district court, whether such case or action be tried in such inferior court or in district court, the jury shall consist of not more than six.*¹⁴⁹

The *Kirkland* Court recognized that Idaho has ““long and often has stated that Article 1, [section] 7 preserves the right to jury trial as it existed at the common law and under the territorial statutes when the Idaho Constitution was adopted.””¹⁵⁰ The court also acknowledged that the right to a jury

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.* (citing IDAHO CODE ANN. § 6-1603(4)(a) (West 1987)).

¹⁴⁵ See IDAHO CODE ANN. § 72-409 (West 1971). The statutory cap starts at \$400,000 and is adjusted per the Idaho Industrial Commission’s annual determination of the average annual wage computed pursuant to section 72-409(2).

¹⁴⁶ *Kirkland*, 4 P.3d at 1117.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ IDAHO CONST. art. I, § 7 (West, Westlaw through Nov. 2018 amendments) (emphasis added).

¹⁵⁰ *Kirkland*, 4 P.3d at 1118 (quoting *State v. Bennion*, 730 P.2d 952, 957 (1986)).

trial “embodies the common sense notion that, by employing the phrase “shall remain inviolate,” the Framers must have intended to perpetuate the right as it existed in 1890.”¹⁵¹

The Kirklands argued section 6-1603 was unconstitutional “because it denied them the right to a jury trial as it had existed in 1890.”¹⁵² Citing the 1871 case, *Cox v. North-Western Stage Co.*,¹⁵³ the Kirklands pointed out that the Supreme Court of the Territory of Idaho had recognized a jury’s right to award compensatory damages.¹⁵⁴ The *Cox* court explained: “[t]he question is not whether this court would have found as the jury did, but whether or not there was such an abuse of discretion on the part of the jury as to demand an interference by this court. No one will contend but what the jury had a right to pass upon all of these questions.”¹⁵⁵ *Cox* ultimately rejected the disproportionate damage award argument.¹⁵⁶ In so holding, the *Cox* court reasoned:

[A] jury of twelve good and lawful men have said by their verdict, that this plaintiff has been damaged in the sum of fifteen thousand two hundred and eighty dollars, and we do not think that, under the law and facts, we would be justified in saying that they were not correct, as well as honest, in their judgment.¹⁵⁷

Since the right to have a jury assess and award noneconomic damages to plaintiffs in personal injury actions existed at the time of the adoption of the Idaho Constitution, the *Kirkland* court found a valid constitutional right at issue.¹⁵⁸ However, the *Kirkland’s* acceptance of a constitutional issue was not enough to strike down section 6-1603.¹⁵⁹

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *Cox v. Nw. Stage Co.*, 1 Idaho 376 (Idaho, 1871).

¹⁵⁴ *Kirkland*, 134 Idaho at 385.

¹⁵⁵ *Id.* at 383.

¹⁵⁶ *Id.* at 385.

¹⁵⁷ *Id.* at 386.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

Next, *Kirkland* examined whether the right to a jury trial had been violated by the statutory cap. The Court turned to *Olsen v. J.A. Freeman Co.*, which held that “the legislature clearly has the power to abolish or modify common law rights and remedies.”¹⁶⁰ WRMC argued that *Jones* supported their argument that the legislature is free to abolish or modify common law rights and remedies.¹⁶¹ Perhaps recognizing that *Jones* did not consider the right to a jury trial,¹⁶² and focused instead on equal protection and substantive due process, the Court pointed out that “the holding in *Jones* does not directly support WRMC’s argument that section 6-1603 does not violate the right to jury trial.”¹⁶³

Kirkland misrepresented *Jones* by erroneously stating that the *Jones* court held statutory caps “constitutional.”¹⁶⁴ This was only partly true. The *Jones* Court recognized the “inherent power of the legislature to modify the common law with few exceptions.”¹⁶⁵ But as this Comment has discussed, the ability of the legislature to modify or abolish common-law rights would not preclude an examination of whether the legislature’s means justified its stated goals.¹⁶⁶ And in turn, whether those goals were rationally related to exclusively furthering the statutory cap’s purpose.¹⁶⁷

¹⁶⁰ *Kirkland*, 4 P.3d at 1118, (quoting *Olsen v. J.A. Freeman Co.*, 791 P.2d 1285, 1296 (1990)).

¹⁶¹ *Kirkland* 4 P.3d at 1119, (citing *Jones*, *supra* note 70).

¹⁶² *Id.*

¹⁶³ *Kirkland* 4 P.3d at 1119.

¹⁶⁴ *Id.* at 1121.

¹⁶⁵ *Jones*, 555 P.2d at 404.

¹⁶⁶ *Id.* at 406 (citing *Nebbia v. New York*, 291 U.S. 502, 511 (1934)). See also *Reed*, 404 U.S. at 75-76 (citing *Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920)) (“The Equal Protection Clause of that amendment does, however, deny to the States the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of the statute. A classification ‘must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.’”).

¹⁶⁷ *Jones*, 555 P.2d at 406.

Here, the WRMC focused on only the part of *Jones* that supported the proposition the legislature could abolish or modify common law rights.¹⁶⁸ Reasoning that since the legislature can abolish common law rights it, therefore, has the power to limit the remedies available for a cause of action.¹⁶⁹ Both WRMC and the Court avoided the crucial part of *Jones* which states:

Nevertheless, it is argued, and we agree, that there is considerable doubt if the purpose of the limitations as declared in the [statutory cap are] in fact the true object of legislative concern. Also, there is doubt as to the relationship between the challenged limitations and the legitimate public purposes that [the statutory cap] may be said to serve.¹⁷⁰

Retreating from their manipulation of the *Jones* holding, WRMC reconsolidated its argument around the proposition that the legislature has the power to abolish or modify common law rights.¹⁷¹

In support of their argument, WRMC cited to two non-Idaho cases.¹⁷² In each of the cases, the courts reasoned that if the legislature has the authority to abolish a cause of action, it thus had the power to limit the damages recoverable for the cause of action.¹⁷³ Applying this logic, the *Kirkland* court agreed that the legislature was free to limit or abolish these remedies, thus making section 6-1603 constitutional.¹⁷⁴ The court cited examples of where the legislature has limited or eliminated the liability of defendants when involving governmental entities in support of its rationale.¹⁷⁵ The court pointed out that existing statutes of limitation and repose can

¹⁶⁸ *Kirkland*, 4 P.3d at 1119.

¹⁶⁹ *Id.*

¹⁷⁰ *Jones*, 555 P.2d at 410.

¹⁷¹ *Id.*

¹⁷² *Kirkland*, 4 P.3d at 1119, 134 Idaho at 468 (quoting *Franklin v. Mazda Motor Corp.*, 704 F.Supp. 1325 (D.Md.1989); *Boyd v. Bulala*, 877 F.2d 1191 (4th Cir.1989)).

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ *Kirkland*, 4 P.3d at 1119, 134 Idaho at 468. (“Consistent with this power, the legislature has limited, and/or eliminated, the liability of defendants in certain personal injury cases involving governmental entities, employment, ski and recreation activities, etc. See, e.g., I.C. § 6-904 (limitation on liability of governmental entities); I.C. § 6-

effectively also limit plaintiffs from recovering damages in personal injury cases.¹⁷⁶ The court explained that it could not logically reason as to why a statutory limitation on a plaintiff's remedy differs from these other permissible limitations placed on recovery in tort actions.¹⁷⁷

Lastly, the *Kirkland* court explained that section 6-1603 did not violate the right to a jury trial because the jury still decided the issue of liability.¹⁷⁸ The court found: "The jury is still allowed to act as the fact finder in personal injury cases. The statute simply limits the legal consequences of the jury's finding."¹⁷⁹ The court used the Virginia case *Etheridge v. Medical Center Hospitals*¹⁸⁰ to illustrate its reasoning.¹⁸¹

In *Etheridge*, the Virginia Supreme Court held a statute limiting damages awarded in medical malpractice actions constitutional.¹⁸² The Virginia Supreme Court reasoned that "although a party has the right to have a jury assess his damages, he has no right to have a jury dictate through an award the legal consequences of its assessment."¹⁸³

Drawing its reasoning from *Etheridge*, the *Kirkland* Court held section 6-1603 did not violate the right to a jury trial.¹⁸⁴ The Court stated:

Nothing in the statute prohibits a plaintiff from presenting his or her full case to the jury and having the jury determine the facts of the case based on the evidence presented at trial. The jury is not instructed about the cap, and is free to make all factual determinations relevant to the case. Once those factual

1101–1109 (limitation on liability of ski area operators); I.C. § 72–209 (providing the worker's compensation law provides the exclusive remedy against an employer).")

¹⁷⁶ *Id.*

¹⁷⁷ *Id.* ("We can discern no logical reason why a statutory limitation on a plaintiff's remedy is any different than other permissible limitations on the ability of plaintiffs to recover in tort actions.")

¹⁷⁸ *Kirkland*, 4 P.3d at 1120, 134 Idaho at 469.

¹⁷⁹ *Id.*

¹⁸⁰ *Etheridge v. Med. Ctr. Hosps.*, 376 S.E.2d 525 (Va. 1989).

¹⁸¹ *Kirkland*, 4 P.3d at 1120, 134 Idaho at 469.

¹⁸² *Etheridge*, 237 Va. at 529.

¹⁸³ *Id.*

¹⁸⁴ *Kirkland*, 4 P.3d at 1120, 134 Idaho at 469.

determinations have been made, it is then up to the judge to apply the law to the facts as found by the jury.¹⁸⁵

The court acknowledges that other courts have been critical of this nuanced approach to a jury trial right.¹⁸⁶ An Oregon court, for example, held that withholding the jury's right to determine damages simply "pays lip service to the form of the jury but robs the institution of its function."¹⁸⁷

Nevertheless, the *Kirkland* court found that the Kirkland family was entitled to present all of their claims and evidence to the jury and have that jury render a verdict.¹⁸⁸ *Kirkland* held section 6-1603 did not violate the right to jury trial as guaranteed by Article I, section 7 of the Idaho Constitution¹⁸⁹ and added that the fact-finding role of the jury ". . . is all to which the right to jury entitles them."¹⁹⁰

Next, this Comment will consider the prescient nature of *Jones* and whether an equal protection constitutional challenge should be brought against the present statutory cap in Idaho.

III. THE MERITS OF AN EQUAL PROTECTION CHALLENGE

It is generally thought by Idahoans that the Idaho Supreme Court has already spoken on the constitutionality of the current statutory cap.¹⁹¹ This Comment suggests that the statutory cap on personal injury and medical malpractice claims in Idaho should be re-challenged on equal protection grounds for two primary reasons. First, the *Kirkland* court failed to properly consider

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ *Lakin v. Senco Products, Inc.*, 329 Or. 62, 987 P.2d 463, 473 (1999) (quoting *Sofie v. Fibreboard Corp.*, 112 Wash.2d 636, 771 P.2d 711, 721 (1989), *overruled by* *Horton v. Or. Health & Sci. Univ.*, 359 Or. 168, 250, 376 P.3d 998, 1044 (2016)).

¹⁸⁸ *Kirkland*, 4 P.3d at 1120, 134 Idaho at 469.

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ D, CRAIG LEWIS, *IDAHO TRIAL HANDBOOK* § 25:5 (2d ed. 2005) ("The Idaho Supreme Court upheld the constitutionality of this cap in *Kirkland v. Blaine County Medical Center*, 134 Idaho 464, 4 P.3d 1115 (2000).").

the *Jones* holding, which struck down a previous cap as a violation of both the Fourteenth Amendment and the Idaho Constitution's equal protection clauses. *Jones* is currently more reflective of a national trend among states. Second, the cap at issue in *Kirkland* was \$400,000. Idaho's current cap of \$250,000 remains unchallenged.

A. The Prescient Nature of *Jones* and Similar State Challenges

Currently, the equal protection challenge in *Jones* is more reflective of national trends among states. In 2014, the Florida Supreme Court found that a statutory cap on personal injury and medical malpractice claims violated the equal protection clause of the Florida Constitution using a similar analysis as *Jones* from 1976.¹⁹²

In *Estate of McCall*, Michelle McCall died during child birth due to medical negligence.¹⁹³ Subsequently, Mrs. McCall's surviving husband and family brought an action on behalf of her estate.¹⁹⁴ The district court below determined that the petitioners' economic damages amounted to \$980,462.40, while her noneconomic damages totaled \$2 million.¹⁹⁵ This \$2 million verdict included \$500,000 for Mrs. McCall's infant son, who survived the child birth, and \$750,000 for each of her parents.¹⁹⁶

But, after applying Florida's statutory cap,¹⁹⁷ the McCall family's noneconomic damages were limited to \$1 million.¹⁹⁸ The district court denied a motion filed by the family that challenged the constitutionality of Florida's statutory cap under both the Florida and United

¹⁹² *Estate of McCall v. United States*, 134 So.3d 894 (Fla. 2014).

¹⁹³ *Id.* at 898.

¹⁹⁴ *Id.* at 899.

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ Compare Fla. Stat. Ann. § 766.118 (West), with Idaho Code Ann. § 6-1603 (West).

¹⁹⁸ *Id.*

States Constitutions.¹⁹⁹ After an appeal to the Eleventh Circuit Court, the Florida Supreme Court granted a motion to certify four questions regarding the constitutionality of Florida's statutory cap.²⁰⁰

The concept of Florida Statute 766.118(2) is similar to I.C. 1603 in that it focuses on capping noneconomic damages. The Florida statute limits noneconomic damages for personal injury or wrongful death actions arising from medical negligence.²⁰¹ The statute also limits the total noneconomic damages to \$500,000, regardless of the number of claimants.²⁰² The total noneconomic damages recoverable, regardless of the number of claimants, are limited to \$1 million.²⁰³ Similar to Idaho's section 6-1603, the Florida statute provides exceptions to the cap for special or severe circumstances.²⁰⁴

Similar to the *Jones* court, the Florida Supreme Court started its equal protection analysis by applying rational basis review.²⁰⁵ The rational basis test asks "whether individuals have been classified separately based on a difference which has a reasonable relationship to the applicable

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

²⁰¹ Compare Fla. Stat. Ann. § 766.118 (West), with Idaho Code Ann. § 6-1603 (West). The Florida statute states: "(a) With respect to a cause of action for personal injury or wrongful death arising from medical negligence of practitioners, regardless of the number of such practitioner defendants, noneconomic damages shall not exceed \$500,000 per claimant. No practitioner shall be liable for more than \$500,000 in noneconomic damages, regardless of the number of claimants." *Id.*

²⁰² *Id.*

²⁰³ *Id.*

²⁰⁴ Fla. Stat. Ann. § 766.118 (West). The Florida statute says: ". . . Notwithstanding paragraph (a), if the negligence resulted in a permanent vegetative state or death, the total noneconomic damages recoverable from all practitioners, regardless of the number of claimants, under this paragraph shall not exceed \$1 million. In cases that do not involve death or permanent vegetative state, the patient injured by medical negligence may recover noneconomic damages not to exceed \$1 million if: 1. The trial court determines that a manifest injustice would occur unless increased noneconomic damages are awarded, based on a finding that because of the special circumstances of the case, the noneconomic harm sustained by the injured patient was particularly severe; and 2. The trier of fact determines that the defendant's negligence caused a catastrophic injury to the patient. (c) The total noneconomic damages recoverable by all claimants from all practitioner defendants under this subsection shall not exceed \$1 million in the aggregate." *Id.* Cf. Idaho Code Ann. § 6-1603(3) (West).

²⁰⁵ *Estate of McCall*, 134 So.3d at 901.

statute.”²⁰⁶ In essence, the test determines whether there is an arbitrary distinction among persons without reasonable and rational basis for the distinction.²⁰⁷

Just like the *Jones* analysis, the Florida Court articulated the arbitrary distinction created by the statutory cap.²⁰⁸ The problem with the Florida statute was that it irrationally impacted multiple survivors far less favorably than circumstances where there was a single survivor.²⁰⁹ The court illustrated the equal protection problem with the following example:

[T]hree plaintiffs are injured as a result of the same tortfeasor's negligence. Plaintiff A is injured moderately, and suffers pain, disability, and disfigurement for a month. Plaintiff B is severely injured and suffers one year of pain and disability. Plaintiff C is drastically injured, and suffers permanent pain and disability . . . [I]t is further assumed that a jury awards plaintiffs A and B \$100,000 in compensatory damages for noneconomic injuries. Plaintiff C receives \$1 million for his permanent, lifelong pain and disability . . . *With respect to plaintiff C, [the challenged legislation] arbitrarily and automatically reduces the jury's award for a lifetime of pain and disability, without regard to whether or not the verdict, before reduction, was reasonable and fair.* ²¹⁰

Similarly, tortfeasors in this example are also treated differently without any justification.²¹¹ The court went on to explain this effect:

The tortfeasor who injures plaintiffs A and B is liable for the full amount of fairly assessed compensatory damages. In contrast, [the challenged legislation] *confers a benefit on the similarly situated tortfeasor who injures plaintiff C.* This tortfeasor pays only a portion of fairly assessed compensatory damages because of the limitation [on noneconomic damages]. Therefore, the statute discriminates between slightly and severely injured plaintiffs, and also between tortfeasors who cause severe and moderate or minor injuries.²¹²

²⁰⁶ *Id.*

²⁰⁷ *Id.*

²⁰⁸ *Id.*

²⁰⁹ *Id.* “The plain language of this statutory plan irrationally impacts circumstances which have multiple claimants/survivors differently and far less favorably than circumstances in which there is a single claimant/survivor and also exacts an irrational and unreasonable cost and impact when, as here, the victim of medical negligence has a large family, all of whom have been adversely impacted and affected by the death.” *Id.*

²¹⁰ *Id.* quoting *Best v. Taylor Mach. Works*, 689 N.E.2d 1057, 1078 (1997) (emphasis added).

²¹¹ *Id.*

²¹² *Best*, 689 N.E.2d 1057, 367 (emphasis added).

Summarizing the arbitrary distinction argument, the Florida Supreme Court stated that the statutory cap

*has the effect of saving a modest amount for many by imposing devastating costs on a few—those who are most grievously injured, those who sustain the greatest damage and loss, and multiple claimants for whom judicially determined noneconomic damages are subject to division and reduction simply based upon the existence of the cap.*²¹³

Other states have articulated the same argument. For example, the Supreme Court of New Hampshire condemned on equal protection grounds a \$250,000 cap on noneconomic damages in medical malpractice cases on equal protection grounds. The court concluded that it was “simply unfair and unreasonable to impose the burden of supporting the medical care industry solely upon those persons who are most severely injured and therefore most in need of compensation.”²¹⁴

Similarly, in 2005, the Supreme Court of Wisconsin held that a \$350,000 cap on noneconomic damages in medical malpractice claims also violated equal protection.²¹⁵ The Wisconsin court reasoned that “the statutory cap creates a class of fully compensated victims and partially compensated victims.” The court went on to explain, “*the cap’s greatest impact falls on the most severely injured victims*” and “that the \$350,000 ceiling adopted by the legislature is unreasonable and arbitrary because it is not rationally related to the legislative objective of lowering medical malpractice insurance premiums.”²¹⁶

Given the reasoning in *Jones* and several other state courts’ equal protection reasoning, the same argument should be considered again regarding the current statutory cap in Idaho.

²¹³ Estate of McCall v. United States, 134 So. 3d 894, 903 (Fla. 2014).

²¹⁴ Carson v. Maurer, 424 A.2d 825, 837 (N.H. 1980), *overruled on other grounds*, Cmty. Res. for Justice, Inc. v. City of Manchester, 917 A.2d 707, 721 (N.H. 2007).

²¹⁵ See Ferdon v. Wisconsin Patient Comp. Fund, 284 Wis. 2d 573, 617, 701 N.W.2d 440, 462.

²¹⁶ *Id.* at 468-69.

B. The Current Cap and the Pressing Idaho Questions

While it is true that *Kirkland* upheld the constitutionality of section 6-1603, the statute has since changed. In 2003, the Idaho Legislature again considered the rules for tort liability in Idaho.²¹⁷ The purpose was to modify the law in three ways: (1) modify joint and several liability by repealing exceptions associated with medical devices and pharmaceutical products; (2) reduce the cap on non-economic damages to \$250,000; and (3) impose limits on punitive damages.²¹⁸

Admitting that this issue was controversial, the Idaho Legislature proposed the legislation be “introduced and returned to the committee in bill form, so that all interested parties may have a chance to testify.”²¹⁹

Ken McClure, a representative of the Idaho Liability Reform Coalition, spoke in favor of the changes.²²⁰ A central theme of those speaking in support of the changes emerged: promote predictability for liability insurers and discourage litigation by injured persons.²²¹ This argument assumed that predictability and discouraging tort litigants would help alleviate consumer costs, which was the original stated purpose of the 1987 cap.²²² A representative from the Idaho Hospital Association assured the Idaho Legislature that the cap would “possibly, in the long run, mitigate against higher premiums.”²²³

²¹⁷ H.B. 92, 57th Leg., 1st Reg. Sess. (Id. 2003).

²¹⁸ *Id.*

²¹⁹ H.B. 92, 57th Leg., 1st Reg. Sess. (Id. 2003),

<https://legislature.idaho.gov/sessioninfo/2003/standingcommittees/hjudmin/#jan21> (last visited Mar. 1, 2018).

²²⁰ H.B. 92, 57th Leg., 1st Reg. Sess. on February 13, 2003, (Id. 2003),

<https://legislature.idaho.gov/sessioninfo/2003/standingcommittees/hjudmin/#feb13> (last visited Mar. 1, 2018).

²²¹ *Id.* (The meeting notes say: “Without a cap on damages, you have no way of knowing what the jury award will be. Without a cap, people are encouraged to litigate.”)

²²² *Id.*

²²³ *Id.*

Dave Kerrick, a representative for the Idaho Trial Lawyers Association, spoke against the changes.²²⁴ Mr. Kerrick said that tort reform had not cut insurance prices to date.²²⁵ For example, citing a comprehensive report, Mr. Kerrick said that “states with little or no tort law restrictions have experienced the same level of insurance rates as those states that enacted severe restrictions on victim’s rights.”²²⁶ Similarly, Kurt Holzer, an attorney in private practice in Idaho, recommended reform on the insurance industry to mitigate the rising premiums, not reform on tort liability.²²⁷

The legislative history did not specify how lowering the cap from \$400,000 to \$250,000 would further promote predictability and discourage litigation. Even with twelve years of the existing \$400,000 cap, there was no significant data presented by supporters on how health care costs or insurance rates had been alleviated.

Looking back, the alleviating health care costs and insurance rates narrative was the legislative gusto of statutory caps. The health care crisis was central to the stated purpose of the original cap in the 1970s, which legislatures justified with a “rapidly increasing frequency and size of malpractice claims and judgements [sic] against physicians and hospitals nationwide.”²²⁸ It was the “rational basis” upon which the defendant-appellants attempted to justify the constitutionality of caps in *Jones*.²²⁹ It was central to the 1980s cap, which implied that reforms would enable Idaho’s policy holders to have more control over the prices of liability insurance.²³⁰

²²⁴ *Id.*

²²⁵ *Id.* (Mr. Kerrick cited a comprehensive report on the impact of tort law changes on insurance and loss.)

²²⁶ H.B. 92.

²²⁷ *Id.*

²²⁸ S. Comm. Rep. No. 1186, at 1 (Id. 1975) (available at Idaho State Capital legislative library).

²²⁹ *Jones*, 555 P.2d at 404, 97 Idaho at 864.

²³⁰ S.B. 1223, 49th Leg., 1st Reg. Sess. (Id. 1987).

Yet, the 2003 legislative history is indicative of a shift in the justification for caps. Those who spoke in favor of modifications abandoned the original concern for consumers in support of promoting favorable business conditions in Idaho. For example, instead of insurance companies and health care providers exclusively speaking, several business owners spoke in favor of the modifications.²³¹ Frank Vander Sloot, president and CEO of Melaleuca, said that the changes would make Idaho a better place to do business.²³² Mr. Vander Sloot offered survey evidence that about 80% of large businesses look at the environment of potential litigation before locating.²³³ And it wasn't just Mr. Vander Sloot who extolled the pro-business flag. Numerous business-group representatives also spoke in favor of the cap: the National Federation of Independent Business, the Idaho Association of Commerce & Industry, Idaho Association of Realtors, Boise Chamber of Commerce, Idaho Building Contractors Association, Idaho Manufactured Housing, Idaho Mining, Associated Logging Contractors, and others.²³⁴ The pro-business rationale shift raises an important question: What are noneconomic caps really about? They started as a potential solution to a health care crisis, but have since morphed into a shield for businesses and liability insurance companies. The question is clear: Is an arbitrary distinction created by the statutory cap justified?²³⁵ Or as *Jones* put it: Is it unconstitutional to permit tilting the scales of justice in favor of one party "at the expense of more seriously injured and damaged persons"?²³⁶ If the statutory cap does create an arbitrary distinction, the next issue is whether the "legislative means substantially further some

²³¹ H.B. 92, 57th Leg., 1st Reg. Sess. on February 13, 2003, (Id. 2003), <https://legislature.idaho.gov/sessioninfo/2003/standingcommittees/hjudmin/#feb13> (last visited Mar. 1, 2018).

²³² *Id.*

²³³ *Id.*

²³⁴ *Id.*

²³⁵ See generally *Estate of McCall*, supra note 192.

²³⁶ *Jones*, 555 P.2d 399, 411, 97 Idaho at 871.

specifically identifiable legislative end.”²³⁷ As the saying goes: Do the means justify the ends?²³⁸ Applied to the most recent statutory cap, perhaps the question is whether making Idaho a better place to do business or lowering insurance rates justify substantially limiting the remedies available to catastrophically injured Idahoans?²³⁹

These questions are difficult to answer. The trade-off between business success and the well-being of people is not a new dilemma. The law should serve as an impartial intermediary between these competing interests. Perhaps the Idaho Framers recognized this vital role of the justice system in drafting the Idaho Constitution. Article I, section 18 is instructive: “Courts of Justice shall be opened to every person, and a speedy *remedy afforded for every injury of person, property or character, and right and justice shall be administered without sale, denial, delay, or prejudice.*”²⁴⁰

IV. CONCLUSION

Personal injury and medical malpractice cases have been accused of causing a health care crisis in America. This has fueled legislative fervor to impose noneconomic damage statutory caps in various states and even a national cap. The Idaho Legislature has been an active participant in imposing these caps on a state level for the last forty years. Idaho’s history includes three different provisions which have ultimately resulted in the current \$250,000 cap on noneconomic damages. Idaho courts have struck down caps in 1976, upheld caps in 2000, and have yet to rule on whether the current 2003 cap is constitutional. Given the past Idaho jurisprudence, the legislative history, and other state challenges, the Idaho noneconomic damage caps should be challenged again.

²³⁷ *Id.* at 407.

²³⁸ *See also* Jones v. State Bd. of Med., 555 P.2d 399, 408 97 Idaho 859, 868 (1976).

²³⁹ H.B. 92, 57th Leg., 1st Reg. Sess. on February 13, 2003, (Id. 2003), <https://legislature.idaho.gov/sessioninfo/2003/standingcommittees/hjudmin/#feb13> (last visited Mar. 1, 2018).

²⁴⁰ Idaho CONST. Art. I, § 18 (emphasis added).