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$500,000 Cap On Non-Economic Damages for Medical Malpractice Inconsistent with Open Courts Guarantee in Texas Constitution.

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CONSTITUTIONAL LAW—Open Courts—$500,000 Cap On Non-Economic Damages For Medical Malpractice Inconsistent With Open Courts Guarantee In Texas Constitution.

Lucas v. United States,
31 Tex. Sup. Ct. J. 423 (May 11, 1988).

Christopher Lucas became paralyzed at the age of fourteen months following an injection administered in an El Paso Army hospital.[1] His parents sued the United States under the Federal Tort Claims Act.[2] A federal district court subsequently found the method of injection negligent and ordered damages that included a $1,500,000 award to Christopher for pain and suffering.[3] From the pain and suffering damages, the court subtracted $400,000 to account for an out-of-court settlement made by a second defendant, Wyeth Laboratories.[4] At $1.1 million, the pain and suffering award still ex-

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1. *See* Lucas v. United States, 31 Tex. Sup. Ct. J. 423, 424 (May 11, 1988). Christopher's parents took him to William Beaumont Army Medical Center when the toddler developed a swollen neck and fever. *Id.* Diagnosing Christopher's problem as a thyroglossal cyst, an Army doctor ordered an injection of Bicillin LA, a penicillin product that almost immediately caused the boy's legs to become mottled. Doctors attributed the discoloration to an allergic reaction and gave injections to counteract the reaction. Hours later, however, Christopher's parents discovered their son's legs no longer moved when he cried. Hospital tests over the next few days indicated paralysis. A subsequent operation confirmed the paralysis and attributed it to the penicillin injection, which was made directly into an artery and thus deprived the nerves controlling Christopher's legs of necessary blood. *Id.*

2. *See* Federal Tort Claims Act, 28 U.S.C. § 1346(b) (1982). Subsection (b) of the Federal Tort Claims Act gives United States district courts original jurisdiction when citizens sue the federal government for money damages due to personal injuries, property loss or death caused by a government employee who, in the course of his job, acted negligently, wrongfully or failed to act. *Id.*

3. *See Lucas*, 31 Tex. Sup. Ct. J. at 424. Other damages awarded at trial included $498,628.72 to Christopher's parents for their son's past and future medical expenses until he is eighteen years old, $350,000 to Christopher as the present value of the medical expenses anticipated for his adulthood, and $600,000 to Christopher as the present value of his reduced adult earning capacity. *Id.* Christopher's parents also unsuccessfully claimed pain and suffering damages. *Id.*

4. *See id.* Wyeth Laboratories manufactured Bicillin LA, the drug Christopher received in his first injection, and packaged it in its own syringe. *Id.* As the United States Court of Appeals for the Fifth Circuit observed, the trial court's act of reducing the total damage award by the amount of Wyeth Laboratories' settlement was "consistent with the total-offset method of discounting." *Id.* When a plaintiff settles out-of-court with one of multiple tortfeasors and the settlement only partially satisfies the plaintiff's total damages, the settlement amount serves to reduce the damages recoverable against the remaining tortfeasors. *See* RESTATE-

ceeded the $500,000 ceiling imposed by Texas law on non-economic damages for medical malpractice,[5] but the court held the limit did not apply to federally operated hospitals.[6] The United States Court of Appeals for the Fifth Circuit reversed the lower court's finding on appeal[7] and held that the damage limit did not violate federal constitutional provisions for due process and equal protection.[8] When the Fifth Circuit panel considered the limit's constitutionality under the same clauses within the Texas Constitution, how-

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MENT (SECOND) OF TORTS § 885 comment e (1977)(payments by one tortfeasor before judgment credited to remaining tortfeasors); W. KEETON, D. DOBBS, R. KEETON & D. OWEN, PROSSER AND KEETON ON THE LAW OF TORTS § 49 at 333-35 (5th ed. 1984)(under release, amount paid by one tortfeasor diminishes amount other tortfeasors owe).

5. *See Lucas*, 31 Tex. Sup. Ct. J. at 424. Section 11.02 of the act, which was titled the Medical Liability and Insurance Improvement Act of Texas, capped civil liability for non-economic damages at $500,000 in medical malpractice cases against a physician or health care provider. *See* TEX. REV. CIV. STAT. ANN. art. 4590i, § 11.02(a), (b) (Vernon Supp. 1988). This amount was to be adjusted for increases or decreases in the federal Consumer Price Index. *Id.* § 11.04. The statute specifically exempted claims for past and future medical and custodial care from the limitation. *Id.* § 11.03. This is why it is called a non-medical damages cap, although that label may be too narrow. *See Lucas*, 31 Tex. Sup. Ct. J. at 424.

6. *See Lucas*, 31 Tex. Sup. Ct. J. at 424. The district court's decision rested on the fact that section 11.02 of the statute limits damages only for "physicians" or "health care providers." *See* Lucas v. United States, 807 F.2d 414, 416-17 (5th Cir. 1986)(citing TEX. REV. CIV. STAT. ANN. art. 4590i, § 11.02 (Vernon Supp. 1988)). Because United States government hospitals did not fall into the statutory definitions for either group, the district court held the limit did not apply to such hospitals. *Id.*; *see also* TEX. REV. CIV. STAT. ANN. art. 4590i, § 1.03(a)(5) (Vernon Supp. 1988)(hospital defined as any entity licensed or chartered by state of Texas).

7. *See Lucas*, 807 F.2d at 423. The Fifth Circuit reasoned that the damage limit applied to United States government hospitals because the Federal Tort Claims Act requires the federal government to have the same liability and privileges as private tortfeasors in Texas. *Id.* at 417. Because Texas law enforces the damage award limit for health care providers and physicians, the Fifth Circuit held that federally operated hospitals in Texas were entitled to the same limit. *Id. See generally* 28 U.S.C. § 2674 (1982)(United States liable in same manner as private individual); FEDERAL TORT CLAIMS ACT, 28 U.S.C. § 1346(b) (1982)(government liable as private person would be under laws of state where injury occurred).

8. *See Lucas*, 807 F.2d at 421-22 (damage limit accords with federal due process and equal protection). The Fifth Circuit found the Texas damage limit did not violate either the due process or equal protection clauses of the United States Constitution. *Id.* The court reasoned that the due process rights of Christopher Lucas had not been abrogated because the Constitution had never prevented legislatures from abolishing old common-law rights as long as the legislative purpose was permissible. In examining the equal protection issue, the Fifth Circuit applied the rational relationship test and determined that the Texas Legislature had both a rational basis for establishing the limit and a legitimate goal. *See id.* (legislative basis for law was scarceness and high cost of medical malpractice insurance and assurance that doctors of all specialties could practice in Texas); *see also* Duke Power Co. v. Carolina Envtl. Study Group, Inc., 438 U.S. 59, 88 n.32 (1978)(United States Constitution does not forbid abolition of old common-law rights); McGowan v. Maryland, 366 U.S. 420, 425-26 (1961) (statutory discrimination does not violate equal protection clause if basis for law relevant to state objective).

ever, the court found Texas case law unclear.[9] The court certified[10] two questions to the Texas Supreme Court: 1) whether Texas' cap on non-economic damages for medical malpractice was in accord with the Texas Constitution; and 2) whether the cap, if constitutional, limited each defendant's liability or each claimant's recovery.[11] Held - *Unconstitutional.* A $500,000 cap on non-economic damages for medical malpractice is inconsistent with

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9. *See Lucas*, 807 F.2d at 418 (court uncertain whether damage limit would accord with Texas Constitution). Although the damage limit had been declared unconstitutional by several Texas appellate courts and one United States district court in the Northern District of Texas, the Texas Supreme Court never had addressed the law's validity under the state constitution. *Id.*; *cf.* Waggoner v. Gibson, 647 F. Supp. 1102, 1108 (N.D. Tex. 1986)(cap unconstitutional on both state and federal equal protection grounds and on state open courts grounds); Brownsville Medical Center v. Gracia, 704 S.W.2d 68, 80 (Tex. App.—Corpus Christi 1985, writ ref'd n.r.e.)(cap violates equal protection and open courts guarantees); Detar Hosp. v. Estrada, 694 S.W.2d 359, 365-66 (Tex. App.—Corpus Christi 1985, no writ)(cap unconstitutional on equal protection and open courts grounds); Malone & Hyde, Inc. v. Hobrecht, 685 S.W.2d 739, 753 (Tex. App.—San Antonio 1985, writ dism'd by agr.)(cap does not apply to pharmacies and unconstitutional on equal protection grounds); Baptist Hosp. of Southeast Tex., Inc. v. Baber, 672 S.W.2d 296, 298 (Tex. App.—Beaumont 1984)(cap violates equal protection and does not apply to hospital defendants), *writ ref'd n.r.e. per curiam*, 714 S.W.2d 310 (Tex. 1986). The state constitutional question is important because state constitutions may expand the individual rights provided by the United States Constitution. *See* LeCroy v. Hanlon, 713 S.W.2d 335, 338 (Tex. 1986)(Texas Constitution gives more rights than federal constitution). Individuals may thus enjoy greater protections as citizens of a particular state than they would merely as United States citizens. *Id.*

10. *See* Lucas v. United States, 811 F.2d 270, 271 (5th Cir. 1987)(Texas Supreme Court asked to determine whether damage limit violated state constitution and whether it applied to claimants or defendants). The Fifth Circuit certified the questions under a relatively new procedure authorized by Texas voters in 1985 in the form of a constitutional amendment. *Id.* The amendment, now article V, section 3-c of the Texas Constitution, gave both the Texas Supreme Court and the Court of Criminal Appeals "jurisdiction to answer questions of state law certified from a federal appellate court." TEX. CONST. art. V, § 3-c(a). However, rule of appellate procedure 114 gives both courts the discretion to decline to answer certified questions. *See* TEX. R. APP. P. 114(a) (courts can refuse to answer certified question).

11. *See Lucas*, 811 F.2d at 271. The Fifth Circuit found the Texas case law confusing on the question of the limit's constitutionality, and, therefore, incorrectly predicted how the Texas Supreme Court would analyze the issue. *Compare Lucas*, 807 F.2d at 421 (projection that Texas Supreme Court would find Texas statute constitutional) *with* Lucas v. United States, 31 Tex. Sup. Ct. J. 421, 424 (May 11, 1988)(Texas Supreme Court holds statute unconstitutional). Observing that the court refused to grant a writ of error to review *Baber*, the Fifth Circuit surmised that the Texas high court would not join its state appellate courts in finding the damages limit unconstitutional. *See Lucas*, 807 F.2d at 419 (writ of error first granted, then dismissed, because Texas Supreme Court believed law constitutional). The Fifth Circuit reasoned that the Texas Supreme Court could find that the damage limit accorded with the due process requirement under the Texas Constitution because citizens do not have a vested right in the retention of common-law rules. *Id.* at 421-22. Concerning the equal protection challenge, the Fifth Circuit reasoned that the state legislature's broad power to make classifications meant the Texas Supreme Court was unlikely to find the legislative purpose for the damages cap unreasonable or arbitrary. *Id.* at 421.

the open courts guarantee in the Texas Constitution.[12]

Commonly known as Texas' open courts guarantee, article I, section 13 of the Texas Constitution declares: "All 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."[13] The provision emanates from England's Magna Charta,[14] which in 1215 delineated rights that the colonists later took to America and to Texas.[15] The United States Constitution never incorporated the open courts guarantee,[16] although today it is found in twenty-seven state constitutions.[17] Texans wrote the provision into the state's first constitution in 1836 and it has remained intact despite several

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12. *See Lucas*, 31 Tex. Sup. Ct. J. 423, 424 (May 11, 1988). Because it determined the subject of the first certified question was unconstitutional, the Texas Supreme Court determined it need not answer the second certified question, which asked whether the cap specifically limited liability or recovery. *Id.*

13. TEX. CONST. art. I, § 13; *cf.* J. JAMES & C. STEBBINGS, A DICTIONARY OF LEGAL QUOTATIONS 28 no. 12 (1987)(citing to T. FULLER, GNOMOLOGIA, no. 2,486 (n.p. 1732) ("Hell and Chancery are always open")).

14. See TEX. CONST. art. I, § 13, interp. commentary (Vernon 1984)(Magna Charta source of open courts guarantee). The applicable portion of the Magna Charta, Chapter 40, states: "To none will we sell, to none deny or delay, right or justice." *Id.*; *see also* 1 G. BRADEN, THE CONSTITUTION OF THE STATE OF TEXAS: AN ANNOTATED AND COMPARATIVE ANALYSIS 47 (1977)(open courts guarantee derived directly from Magna Charta); J. SAYLES, THE CONSTITUTIONS OF THE STATE OF TEXAS 10-16 (1888)(text of Magna Charta).

15. *See* 1 G. BRADEN, THE CONSTITUTION OF THE STATE OF TEXAS: AN ANNOTATED AND COMPARATIVE ANALYSIS 3 (1977)(Magna Charta ideals instilled in colonists who came to America and established open courts guarantee in Texas). Though the colonists brought to America the ideals voiced in the Magna Charta, the specific guarantee of open courts never was incorporated into the United States Constitution. *See id.*; *see also Lucas*, 31 Tex. Sup. Ct. J. at 426 (open courts guarantee brought from Magna Charta to America by colonists); LeCroy v. Hanlon, 713 S.W.2d 335, 339 (Tex. 1986)(Magna Charta guarantee of open courts came to America via colonists); J. SAYLES, THE CONSTITUTIONS OF THE STATE OF TEXAS 57-77 (1888)(comparison of United States Constitution and Texas Constitution shows no open courts clause in federal constitution).

16. *See* 1 G. BRADEN, THE CONSTITUTION OF THE STATE OF TEXAS: AN ANNOTATED AND COMPARATIVE ANALYSIS 51 (1977)(United States Constitution does not guarantee right to open courts).

17. *See* LEGISLATIVE DRAFTING RESEARCH FUND OF COLUMBIA UNIVERSITY, CONSTITUTIONS OF THE UNITED STATES, NATIONAL AND STATE, FUNDAMENTAL LIBERTIES AND RIGHTS, A 50-STATE INDEX 54 (Jan. 1980). Twenty-seven states included an open courts guarantee in their constitutions. *See* ALA. CONST. art. I, § 13; COLO. CONST. art. II, § 6; CONN. CONST. art. I, § 10; DEL. CONST. art. I, § 9; FLA. CONST. art. I, § 21; IDAHO CONST. art. I, § 18; IND. CONST. art. I, § 12; KY. CONST. amend. 14; LA. CONST. art. I, § 22; MISS. CONST. art. III, § 24; MO. CONST. art. I, § 14; MONT. CONST. art. II, § 16; NEB. CONST. art. I, § 13; N.C. CONST. art. I, § 18; N.D. CONST. art. I, § 22; OHIO CONST. art. I, § 16; OKLA. CONST. art. II, § 16; OR. CONST. art. I, § 10; PA. CONST. art. I, § 11; S.C. CONST. art. I, § 9; S.D. CONST. art. VI, § 20; TENN. CONST. art. I, § 17; TEX. CONST. art. I, § 13; UTAH CONST. art. I, § 11; VT. CONST. art. II, § 28; W. VA. CONST. art. III, § 17; WYO. CONST. art. I, § 8.

constitutional revisions.[18]

The importance of Texas' open courts provision lies not so much in its promise of open courts per se,[19] but in its guarantee of "remedy by due course of law,"[20] which Texas courts have interpreted as a due process guarantee broader than that in the federal constitution.[21] The Texas provision affords greater protection by applying a test that mirrors the substantive due process[22] analysis by inquiring whether the Texas Legislature: 1) possessed

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18. *See* 1 G. BRADEN, THE CONSTITUTION OF THE STATE OF TEXAS: AN ANNOTATED AND COMPARATIVE ANALYSIS 47 (1977). Section 13 entered the Texas Constitution in 1836 as Section 11, but in 1876 it was readopted as Section 13. *Id.* Despite the section change, the wording of both the open courts and the due process guarantees has not changed since their introduction into the constitution. *Id.*; *see also* W. HARRIS, CONSTITUTIONS OF THE STATE OF TEXAS 114 (1913)(open courts guarantee in Section 13 in 1876).

19. 1 G. BRADEN, THE CONSTITUTION OF THE STATE OF TEXAS: AN ANNOTATED AND COMPARATIVE ANALYSIS 50 (1977). The promise of open courts is viewed as substantially the same as the guarantee of redress of grievances simply because the latter cannot be obtained if the courts are closed. *Id.*; *see also* O'Shea v. Twohig, 9 Tex. 336, 341-42 (1852)(seminal open courts case holding that plaintiff entitled to redress when courts do not exist in newly created county).

20. TEX. CONST. art. I, § 13.

21. *See* Waggoner v. Gibson, 647 F. Supp. 1102, 1108 (N.D. Tex. 1986)(due process in Texas' open courts guarantee broader than federal guarantee of due process); *see also* LeCroy v. Hanlon, 713 S.W.2d 335, 340-41 (Tex. 1986)(open courts guarantee a due process provision); Sax v. Votteler, 648 S.W.2d 661, 664-66 (Tex. 1983)(open courts guarantee a due process guarantee); 1 G. BRADEN, THE CONSTITUTION OF THE STATE OF TEXAS: AN ANNOTATED AND COMPARATIVE ANALYSIS 50 (1977)(open courts guarantee of remedy by due course of law is due process guarantee). The Texas Constitution also guarantees due process in article I, section 19, but this guarantee of "due course of the law" is considered separate from section 13 in history, meaning and protection. *Id.* at 50-51, 69 (due process within open courts guarantee deals with access to courts and is different from article I, section 19 which is procedural in nature). Although both section 13 and section 19 are traceable to the Magna Charta, section 19 emanates directly from Chapter 39 of the charter and establishes what is commonly known as procedural due process. *Id.* at 13-19. Procedural due process means the state must observe due process of law when seizing an individual or his property. Thus, section 19 governs the relationship between the individual and the state, while section 13 regulates the individual's access to the courts. *Id.* at 50-51, 67-69.

22. *See* J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW § 11.4 at 357 (3rd ed. 1986)(substantive due process enables strict examination of legislative actions affecting fundamental liberties); *see also* Lebohm v. City of Galveston, 154 Tex. 192, 198, 275 S.W.2d 951, 953 (1955)(legislative acts that withdraw common-law rights of redress sustained only when reasonable alternative remedy is substituted and legislative act not unreasonable nor arbitrary); Hanks v. City of Port Arthur, 121 Tex. 202, 212, 48 S.W.2d 944, 948 (1932)(statute that unreasonably blocks justiciable right of redress violates due process under open courts guarantee). *Contra* 1 G. BRADEN, THE CONSTITUTION OF THE STATE OF TEXAS: AN ANNOTATED AND COMPARATIVE ANALYSIS 71 (1977)(substantive due process analysis rarely utilized by Texas courts). The United States Supreme Court first utilized substantive due process to review economic regulations. *See* Railroad Retirement Bd. v. Alton, 295 U.S. 330, 357-62 (1935)(when property taken by legislative act, due process requires that statute not be arbitrary nor deny reasonable substitute for property taken). Today, however, both the United States

unreasonable or arbitrary objectives in passing a statute that 2) abridged a "cognizable common-law cause of action."[23] The open courts guarantee enables the legislature to considerably restrict the right of redress as long as a reasonable alternative remedy or quid pro quo is provided [24]

The Texas equal protection clause, which has been in the state constitution as long as the open courts guarantee, provides an additional shield against unreasonable and arbitrary legislative action.[25] Like its federal counterpart,[26] Texas' equal protection clause subjects legislatively made, discrim-

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Supreme Court and the Texas Supreme Court seem inclined to review the violation of a fundamental right by using a test incorporating the essential elements of substantive due process. *See* Lucas v. United States, 31 Tex. Sup. Ct. J. 423, 426 (May 11, 1988)(when legislature partially blocks or eliminates right of redress, open courts guarantee demands that legislature not be arbitrary nor fail to provide adequate substitute); J. NOWAK, R. ROTUNDA, & J. YOUNG, CONSTITUTIONAL LAW § 11.7 at 367 (regulation of fundamental right subject to due process review); *see also* United States v. Carolene Prods., 304 U.S. 144, 152 n.4 (1938)(presumption of constitutionality may be narrower when legislation violates civil liberty); J. NOWAK, R. ROTUNDA, & J. YOUNG, CONSTITUTIONAL LAW § 11.7 at 367 (*Carolene Products* interpreted as enabling substantive due process to be used to protect individual rights).

23. *See Sax*, 648 S.W.2d at 665-66 (when justiciable right to remedy removed, open courts guarantee requires action be neither arbitrary nor unreasonable, and reasonable substitute be implemented); *see also Waggoner*, 647 F. Supp. at 1108 (open courts inquiry protects common-law right to remedy against unreasonable and arbitrary legislative action); 1 G. BRADEN, THE CONSTITUTION OF THE STATE OF TEXAS: AN ANNOTATED AND COMPARATIVE ANALYSIS 50 (1977)(open courts prompts query whether legislative removal of common-law right to remedy arbitrary, unreasonable and adequate substitute provided).

24. *See Sax*, 648 S.W.2d at 667 (statute that abridges right to redress can be neither unreasonable nor arbitrary and must offer adequate substitute remedy or leave one at common law); *see also* Nelson v. Krusen, 678 S.W.2d 918, 927 (Tex. 1984)(Robertson, J., concurring) (legislature cannot eliminate right to redress when no reasonable substitute established); Middleton v. Texas Power & Light Co., 108 Tex. 96, 109-10, 185 S.W. 556, 560 (1916)(legislature supersedes common law because substitute remedy created). Quid pro quo literally means "something for something." BLACK'S LAW DICTIONARY 1123 (5th ed. 1979). As a legal term, it stands for the concept of giving one valuable item for another. *Id.* Under the open courts guarantee, the quid pro quo concept requires the substitution of a reasonable alternative when a right to remedy is removed. *See Waggoner*, 647 F.Supp. at 1108 (reasonable substitute must be supplied when common-law right to remedy removed); *Lucas*, 31 Tex. Sup. Ct. J. at 426 (abrogation of right to remedy requires creation of reasonable substitute). Much debate remains over the sort of quid pro quo that must be provided. *Compare* Smith v. Department of Ins., 507 So. 2d 1080, 1089 (Fla. 1987)(substitute remedy must specifically affect those whose rights were limited by malpractice damage cap) *with* Fein v. Permanente Medical Group, 695 P.2d 665, 681-82 & n.18 (Cal. 1985)(quid pro quo acceptable if affects society generally).

25. *See* 1 G. BRADEN, THE CONSTITUTION OF THE STATE OF TEXAS: AN ANNOTATED AND COMPARATIVE ANALYSIS 13-14 (1977)(Texas equal protection clause in state constitution since 1836).

26. *Compare* U.S. CONST. amend. XIV (federal equal protection clause) *with* TEX. CONST. art. I, § 3 (Texas equal protection clause). The Texas equal protection clause establishes that "[a]ll free men, when they form a social compact, have equal rights, and no man, or set of men, is entitled to exclusive separate public emoluments, or privileges, but in considera-

inatory classifications to one of four levels of constitutional review.[27] The highest level, strict scrutiny, requires the legislature to show a compelling governmental interest when it restricts a fundamental right or burdens a suspect class.[28] A legislative enactment that classifies according to gender or legitimacy of birth falls into the intermediate level of scrutiny, which requires the classification to be substantially related to an important governmental goal.[29] When a fundamental right or suspect class is not involved, the legislature must merely meet the lowest level of scrutiny, known as the rational relationship test.[30] This test requires the government to demon-

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tion of public services." TEX. CONST. art I, § 3. The federal equal protection clause requires that a state not "deny to any person within its jurisdiction equal protection of the laws." U.S. CONST. amend. XIV.

27. *See* Whitworth v. Bynum, 699 S.W.2d 194, 197 (Tex. 1985)(Texas equal protection clause enables review of discriminatory classifications made by legislature); Comment, *Medical Liability and Insurance Improvement Act of Texas: The New Legislative Procedure for Amputation of Patients' Rights*, 30 BAYLOR L. REV. 481, 507-08 (1978)(equal protection clause measures constitutionality of legislative classifications). The Texas Supreme Court has followed the United States Supreme Court's lead in the levels of scrutiny applied to discriminatory classification. *See Lucas*, 31 Tex. Sup. Ct. J. 423, 429 (May 23, 1988)(Gonzalez, J., dissenting) (Texas Supreme Court follows United States Supreme Court's method of equal protection scrutiny). Accordingly, the Texas equal protection clause offers no more protection than its federal counterpart. *Id.*; *see also* 1 G. BRADEN, THE CONSTITUTION OF THE STATE OF TEXAS: AN ANNOTATED AND COMPARATIVE ANALYSIS 13-18 (1977)(Texas and federal equal protection clauses provide same protections). Conversely, the Texas open courts guarantee offers greater protection to Texas citizens because the federal constitution does not have a similar provision. *See* LeCroy v. Hanlon, 713 S.W.2d 335, 338, 340-41 (Tex. 1986)(open courts guarantee gives Texas citizens additional rights).

28. *See* Clements v. Fashing, 457 U.S. 957, 963 (1982)(strict scrutiny applies to classifications based on suspect classes or fundamental rights); *see also* City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 440 (1985)(tiers of equal protection test detailed). Whether a right is fundamental depends on whether the Constitution identifies it as such, implicitly or explicitly. *See* San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 33-34 (1973)(determination of fundamental right status hinges on how United States Constitution identifies it); *see also* Shapiro v. Thompson, 394 U.S. 618, 629 (1969)(fundamental right to travel infringed by statute requiring one year state residency prior to receiving welfare benefits). Today, a suspect classification is one that divides individuals according to race or alienage. *See Cleburne*, 473 U.S. at 440 (race, alienage or national origin classifications require strict scrutiny); *see also* Loving v. Virginia, 388 U.S. 1, 11 (1967)(statute forbidding interracial marriages impermissibly created discriminatory classification).

29. *See, e.g., Cleburne*, 473 U.S. at 440-41 (gender and legitimacy classifications must have substantial relation to important governmental interest); Craig v. Boren, 429 U.S. 190, 210 (1976)(statute forbidding males to buy beer under age 21 while allowing 18-21 year-old females to do so not substantially related to important governmental interest); Levy v. Louisiana, 391 U.S. 68, 71 (1968)(statute denying illegitimate children standing to bring wrongful death lawsuit not substantially related to important governmental interest).

30. *See, e.g., Cleburne*, 473 U.S. at 441-42 (rational relationship test used whenever statute does not classify by race, alienage, origin, gender or illegitimacy); *Fashing*, 457 U.S. at 963 (rational relationship distinction applies to state classifications outside of fundamental rights

strate a rational relationship between the classification and a legitimate state end.[31] In recent years, the United States Supreme Court and the Texas Supreme Court have put more "bite"[32] into the rational relationship inquiry by examining the arbitrariness of the state's purpose, particularly when a regulation protects an economic interest.[33]

The arbitrariness inquiry within the rational relationship-with-bite test resembles the second prong of the open courts test, which inquires whether the legislature abridged a recognized cause of action at common law.[34] How-

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and race); *Whitworth*, 699 S.W.2d at 197 (legislative classifications must be rationally related to statutory purpose); *see also* 1 G. BRADEN, THE CONSTITUTION OF THE STATE OF TEXAS: AN ANNOTATED AND COMPARATIVE ANALYSIS 17-18 (1977)(describes classifications that fall under rational relationship test); Comment, *Medical Liability and Insurance Improvement Act of Texas: The New Legislative Procedure for Amputation of Patients' Rights*, 30 BAYLOR L. REV. 481, 508-09 (1978)(details when rational relationship test applies).

31. *See* Lucas v. United States, 31 Tex. Sup. Ct. J. 423, 429 (May 11, 1988)(Gonzalez, J., dissenting) (legislative classification must be rationally related to legitimate governmental objective); *see also* Vance v. Bradley, 404 U.S. 93, 96-97 (1979)(unless legislative classification affects fundamental right or suspect class, must be rationally related to legitimate state interest). Texas courts follow the federal courts' lead in applying the rational relationship test to discriminatory classifications. *See* Spring Branch Indep. School Dist. v. Stamos, 695 S.W.2d 556, 559-60 (Tex. 1985)(rational relationship test for federal equal protection clause also applies to Texas Constitution article I, section 3); Brown v. State, 657 S.W.2d 797, 799 (Tex. Crim. App. 1983)(state standards of review for constitutionality under Texas Constitution must at least approximate federal standard of review).

32. *See* Note, *Rational Basis with Bite: Intermediate Scrutiny by any Other Name*, 62 IND. L.J. 779, 779-80 (1987)(heightened rational relationship scrutiny known as rational basis test with bite); *see also* Stewart, *A Growing Equal Protection Clause?*, 71 A.B.A. J. 108, 112-14 (1985)(quoting Victor Rosenblum of Northwestern University Law School who states stricter rational relationship inquiry has given the test "teeth").

33. *See* Williams v. Vermont, 472 U.S. 14, 22-23 (1985)(reasonableness of legislative action part of rational relationship scrutiny); Whitworth v. Bynum, 699 S.W.2d 194, 197 (Tex. 1985)(unreasonableness signalled when legislative classification overinclusive); *see also* Metropolitan Life Ins. Co. v. Ward, 470 U.S. 869, 881-82 (1985)(court may inquire into reasons behind legislative classification). Texas may have been ahead of the United States Supreme Court in putting "teeth" into the rational relationship test, particularly with regard to economic regulations. *Compare Ward*, 470 U.S. at 871-83 (among first economic cases to which Court applied "bite") *with* Houston & T.C. Ry. Co. v. City of Dallas, 98 Tex. 396, 397-420, 84 S.W. 648, 649-56 (1905)(early Texas case employing rational relationship with bite "test"). As early as 1905, the Texas Supreme Court was emphasizing whether a regulation's interference with the economic system was "unwarranted or arbitrary." *See Houston & T.C. Ry. Co.*, 84 S.W. at 654; 1 G. BRADEN, THE CONSTITUTION OF THE STATE OF TEXAS: AN ANNOTATED AND COMPARATIVE ANALYSIS 17-18 (1977)(Texas rational relationship inquiry has long had bite when economics cases reviewed); *see also* San Antonio Retail Grocers v. Lafferty, 156 Tex. 574, 579, 297 S.W.2d 813, 815-17 (1957)(law prohibiting grocery store loss leaders arbitrary and unreasonable classification); Humble Oil & Ref. Co. v. City of Georgetown, 428 S.W.2d 405, 407 (Tex. Civ. App.—Austin 1968, no writ)(ordinance regulating gasoline tank truck size subject to review for arbitrariness and unreasonableness).

34. *Compare* Sax v. Votteler, 648 S.W.2d 661, 665-66 (Tex. 1983)(when justiciable right

ever, the difference between the open courts and equal protection inquiries is that the open courts guarantee protects a clear right to a remedy, while the equal protection inquiry affects only discriminatory government classifications.[35] Because discriminatory classifications may involve the removal of a right to remedy, federal courts in Texas and the Texas Supreme Court have applied the equal protection and open courts tests in tandem.[36] These standards are important when analyzing the constitutionality of statutes that cap medical malpractice damages.[37]

When the Texas Legislature approved the non-economic damage limit in 1977, lawmakers believed they were responding to a malpractice insurance "crisis" that had reached Texas after sweeping the nation.[38] Health care

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to remedy removed open courts guarantee requires that action be neither arbitrary nor unreasonable and requires reasonable substitute) *with Williams*, 472 U.S. at 22-23 (reasonableness of legislative classification part of rational relationship inquiry).

35. *Compare* Plyler v. Doe, 457 U.S. 202, 216 (1982)(equal protection scrutinizes discriminatory classifications) *with* LeCroy v. Hanlon, 713 S.W.2d 335, 341 (Tex. 1986)(open courts provision scrutinizes whether litigants receive day in court). *See also* Jones v. State Bd. of Medicine, 555 P.2d 399, 406 (Idaho 1976)(equal protection tests legislative classifications, while substantive due process examines removal of common law rights); Comment, *Medical Liability and Insurance Improvement Act of Texas: The New Legislative Procedure for Amputation of Patients' Rights*, 30 BAYLOR L. REV. 481, 508 (1978)(explaining difference between due process and equal protection inquiries); *cf.* J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW § 14.3 n.33 at 536-37 (3rd ed. 1986)(explaining that procedural due process and equal protection inquiries often confused).

36. *See* Waggoner v. Gibson, 647 F. Supp. 1102, 1105-08 (N.D. Tex. 1986)(Texas non-economic damages limit struck down on both state equal protection and open courts grounds); LeCroy v. Hanlon, 713 S.W.2d 335, 338-41 (Tex. 1986)(increased lawsuit filing fee violated state equal protection and open courts guarantees).

37. *See, e.g.*, *Waggoner*, 647 F. Supp. at 1103-08 (1986)(constitutionality of Texas medical malpractice damages cap measured against standards for state and federal equal protection and state open courts guarantee); Detar Hosp., Inc. v. Estrada, 694 S.W.2d 359, 365-66 (Tex. App.—Corpus Christi 1985, writ ref'd n.r.e.)(Texas damages cap found unconstitutional on equal protection and open courts grounds); *see also* Johnson v. St. Vincent Hosp., 404 N.E.2d 585, 594-600 (Ind. 1980)(damages cap valid according to open courts and equal protection inquiries). *See generally* Comment, *Medical Liability and Insurance Improvement Act of Texas: The New Legislative Procedure for Amputation of Patients' Rights*, 30 BAYLOR L. REV. 481, 502-05, 507-11 (1978)(non-economic damages cap analyzed according to due process and equal protection inquiries).

38. *See* TEX. REV. CIV. STAT. ANN. art. 4590i, § 1.02(a)(1), (3) (Vernon Supp. 1988) (findings and purposes of law indicate that medical malpractice lawsuits and settlements had increased in frequency and severity from 1972-77); Keith, *The Texas Medical Liability and Insurance Improvement Act - A Survey and Analysis of its History, Construction and Constitutionality*, 36 BAYLOR L. REV. 265, 266-67 (1984)(Texas legislature responding to national medical malpractice insurance crisis); Witherspoon, *Constitutionality of the Texas Statute Limiting Liability for Medical Malpractice*, 10 TEX. TECH L. REV. 419, 445-52 (1979)(nationwide medical malpractice insurance crisis had not yet reached state when legislature acted); *see also* Note, *Are The Damages of Medical Malpractice Victims Limited to $500,000 in Texas?*, 28 S. TEX. L.J. 161, 161 (1987)(law in reaction to statewide medical malpractice crisis).

lobbyists reinforced this belief,[39] as did the legislatively appointed Texas Medical Professional Liability Study Commission.[40] In a statement of conclusions and objectives subsequently adopted by the legislature,[41] the study commission linked the frequency and severity of legitimate medical malpractice lawsuits to skyrocketing malpractice insurance premiums and the decision by some doctors to practice without insurance.[42] Both Texas and

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39. *See* Keith, *The Texas Medical Liability and Insurance Improvement Act - A Survey and Analysis of its History, Construction and Constitutionality*, 36 BAYLOR L. REV. 265, 266-67 (1984)(lobbyists, doctors and hospitals led legislature to believe that statewide medical malpractice insurance crisis existed).

40. *See* FINAL REPORT OF THE TEXAS MEDICAL PROFESSIONAL LIABILITY STUDY COMMISSION TO THE 65TH TEXAS LEGISLATURE 2-8 (December 1976)(available in Texas Legislative Reference Library in Austin) (medical malpractice insurance crisis exists due to several factors including litigiousness of society).

41. *Compare* FINAL REPORT OF THE TEXAS MEDICAL PROFESSIONAL LIABILITY STUDY COMMISSION TO THE 65TH TEXAS LEGISLATURE 2-8 (December 1976)(available in Texas Legislative Reference Library in Austin) (causes of increased health care insurance costs and effect on health care delivery system) *with* TEX. REV. CIV. STAT. ANN. art. 4590i, § 1.02 (Vernon Supp. 1988)(conditions and objectives leading to statute).

42. *See* TEX. REV. CIV. STAT. ANN. art. 4590i, § 1.02 (Vernon Supp. 1988)(findings and purposes of statute); Detar Hosp., Inc. v. Estrada, 694 S.W.2d 359, 366 (Tex. App.—Corpus Christi 1985, writ ref'd n.r.e.)(accepting purposes of statute as stated in section 1.02); FINAL REPORT OF THE TEXAS MEDICAL PROFESSIONAL LIABILITY STUDY COMMISSION TO THE 65TH TEXAS LEGISLATURE 3-8 (December 1976)(available in Texas Legislative Reference Library in Austin) (stating reasons for and goals of proposed statute); Keith, *The Texas Medical Liability and Insurance Improvement Act - A Survey and Analysis of its History, Construction and Constitutionality*, 36 BAYLOR L. REV. 265, 266-68 (1984)(soaring malpractice insurance rates blamed on litigation increase and large damage awards); Witherspoon, *Constitutionality of the Texas Statute Limiting Liability for Medical Malpractice*, 10 TEX. TECH L. REV. 419, 445-46 (1979)(insurance rate increase blamed on increased litigation and higher damage awards). The Texas Legislature believed the medical malpractice insurance "crisis" existed in 1975, when lawmakers enacted article 5.82 of the Insurance Code in order to eliminate the "discovery rule" that extended the statute of limitations for medical malpractice claims against insured doctors. *See* Keith, *The Texas Medical Liability and Insurance Improvement Act - A Survey and Analysis of its History, Construction and Constitutionality*, 36 BAYLOR L. REV. 265, 266-68 (1984)(article 5.82 response to pressure from health care profession over medical malpractice crisis). Never before had the legislature used special legislation to limit the rights of medical malpractice victims. *Id.* Thus, article 5.82 was an outgrowth of the legislature's belief that some sort of tort "reform" was the key to ending the crisis. However, the legislature wanted more substantive "reform" than article 5.82 provided and, in that same legislative session, appointed the Texas Medical Professional Liability Study Commission to study the accepted-as-fact malpractice insurance "crisis" to recommend solutions. It also has been suggested that the legislature realized it was acting too quickly and believed a study commission would add legitimacy to its actions. *Id.*; *see also* Witherspoon, *Constitutionality of the Texas Statute Limiting Liability for Medical Malpractice*, 10 TEX. TECH L. REV. 419, 447-48 n.126.1 (1979)(legislature based actions on study commission's findings of crisis that did not in fact exist). The resulting article 4590i incorporated the provisions of article 5.82 and repealed it. *Id.* at 425; *see also* Professional Liability Insurance for Physicians, Podiatrists and Hospitals Act, ch. 330, § 1, 1975 Tex. Gen. Laws 864, 864, *repealed by* Medical Liability and Insurance

federal courts soon began applying the open courts guarantee to invalidate parts of the statute that enacted the damage cap.[43] These decisions attacked section 10.01 of the statute, which imposed a blanket two-year statute of limitations and eliminated the "discovery rule."[44] Scrutiny soon shifted to the damage cap, which three state appellate courts and one federal district court declared unconstitutional in a total of five cases.[45] These courts held

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Improvement Act, ch. 817, § 41.03, 1977 Tex. Gen. Laws 2039, 2064. The effects of article 5.82 were still being felt in 1984, when the Texas Supreme Court in *Nelson v. Krusen* declared the statute's elimination of the "discovery rule" violative of the open courts guarantee. *See* Nelson v. Krusen, 678 S.W.2d 918, 921-23 (Tex. 1984)(two-year statute of limitations cuts off cause of action before malpractice victim could reasonably know of injury). The constitutionality of article 5.82 was an issue on appeal because the plaintiff's cause of action accrued between June 7, 1975 and August 29, 1977, the statutory "lifespan" of article 5.82. *Id.*; Keith, *The Texas Medical Liability and Insurance Improvement Act - A Survey and Analysis of its History, Construction and Constitutionality*, 36 BAYLOR L. REV. 265, 267 n.16 (1984)(article 5.82 enacted June 7, 1975 and repealed Aug. 29, 1977). The court found article 5.82 unconstitutional under the open courts guarantee because the statute totally foreclosed some malpractice victims' right to a remedy without offering them a quid pro quo or reasonable substitute. *See Nelson*, 678 S.W.2d at 923 (article 5.82 unconstitutionally removed common-law right to remedy). A year earlier in *Sax v. Votteler*, the court had used similar reasoning in determining that article 5.82 unconstitutionally removed the tolling of the two-year period of limitations in medical malpractice actions by minors after reaching age six. *Compare Nelson*, 678 S.W.2d at 922 (removal of common-law right to remedy without providing reasonable substitute violates open courts guarantee) *with* Sax v. Votteler, 648 S.W.2d 661, 665 (Tex. 1983)(legislative removal of tolling provisions removes justiciable right to redress and requires substitution of adequate alternative).

43. *See, e.g.*, Neagle v. Nelson, 685 S.W.2d 11, 12 (Tex. 1985)(two-year limitation period in section 10.01 of article 4590i violated open courts guarantee by removing ability to sue within two-year statute of limitations); *Nelson*, 678 S.W.2d at 920-23 (section 10.01 removes common-law right to remedy because birth defect that would have been predicted by diagnostic test that was not made could not have been discovered in two years); *Sax*, 648 S.W.2d at 664 (section 10.01's removal of tolling of discovery rule for minors violates open courts provision by eliminating common-law right to remedy); Melendez v. Beal, 683 S.W.2d 869, 873 (Tex. Civ. App.—Houston [1st Dist.] 1985, no writ)(elimination of discovery rule violates open courts provision when patient could not have discovered cause of action in two years). *But see* Morrison v. Chan, 699 S.W.2d 205, 207 (Tex. 1985)(two-year statute of limitations constitutional when injury discoverable within two years); Reed v. Wershba, 698 S.W.2d 369, 371 (Tex. Civ. App.—Houston [14th Dist.] 1985, no writ)(two-year limit constitutional when plaintiff has reasonable opportunity to sue).

44. *See* TEX. REV. CIV. STAT. ANN. art. 4590i, § 10.01 (Vernon Supp. 1988)(two-year statute of limitations enacted in place of discovery rule).

45. *See, e.g.*, Waggoner v. Gibson, 647 F. Supp. 1102, 1104-08 (N.D. Tex. 1986)(damages cap violates state and federal equal protection clauses and state open courts guarantee); Baptist Hosp. of Southeast Tex., Inc. v. Baber, 672 S.W.2d 296, 298 (Tex. App.—Beaumont 1984) (damages cap violates equal protection clause), *writ ref'd n.r.e. per curiam*, 714 S.W.2d 310 (Tex. 1986); Brownsville Medical Center v. Gracia, 704 S.W.2d 68, 80 (Tex. App.—Corpus Christi 1985, writ ref'd n.r.e.)(non-economic damages cap violates state open courts and equal protection guarantees); Detar Hosp., Inc. v. Estrada, 694 S.W.2d 359, 365-66 (Tex. App.—Corpus Christi 1985, no writ)(equal protection and open courts doctrines violated by damages

the damage limit violated the federal equal protection clause in all five cases.[46] In three decisions, the courts held the limit also violated the Texas equal protection clause.[47] Only in *Waggoner v. Gibson*[48] did the court find the cap violated the Texas open courts guarantee.[49]

Texas has been joined by thirteen other states that enacted damage limits in the wake of the medical malpractice insurance "crisis" in the mid-1970's.[50] In the mid-1980's, yet another malpractice insurance "crisis" arose, prompting fourteen more states to adopt damage limits.[51] Though

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cap); Malone & Hyde, Inc. v. Hobrecht, 685 S.W.2d 739, 753 (Tex. App.—San Antonio 1985, writ dism'd by agr.)(damages cap offends equal protection clause). *Contra* Rose v. Doctors Hosp. Facilities, 735 S.W.2d 244, 248-51 (Tex. App.—Dallas 1987, no writ)(damages cap does not offend open courts, procedural due process nor equal protection guarantees).

46. *See Waggoner*, 647 F. Supp. at 1104-05 (no rational relation between malpractice insurance crisis and non-economic damages cap); *Baber*, 672 S.W.2d at 29 (no rational basis for legislature to implement damages cap); *Gracia*, 704 S.W.2d at 80 (adopts *Detar* holding that damage cap violates equal protection); *Detar*, 694 S.W.2d at 365 (equal protection violated by damages cap); *Malone*, 685 S.W.2d at 753 (damages cap offends equal protection clause because no evidence of malpractice insurance crisis). *Contra Rose*, 735 S.W.2d at 249-51 (damages cap does not violate equal protection guarantee).

47. *See Waggoner*, 647 F. Supp. at 1106 (unconstitutional under United States and Texas equal protection clauses); *Gracia*, 704 S.W.2d at 80 (unconstitutional under United States and Texas equal protection clauses); *Detar*, 694 S.W.2d at 365 (unconstitutional under United States and Texas equal protection clauses).

48. 647 F. Supp. 1102 (N.D. Tex. 1986).

49. *See Waggoner*, 647 F. Supp. at 1108 (open courts guarantee violated because common-law cause of action displaced and no reasonable substitute provided).

50. *See* Farrell, *Virginia's Medical Malpractice Cap and the Doctrine of Substantive Due Process*, 23 TORT & INS. L.J. 684, 684-85 (1988)(damages caps proposed as solution to medical malpractice insurance crisis); Appendix, Table I. Barely a decade after the mid-70's "crisis," which generated at least 11 statutes capping medical malpractice damages, state legislatures found that yet another malpractice insurance "crisis" existed. *See* Farrell, *Virginia's Medical Malpractice Cap and the Doctrine of Substantive Due Process*, 23 TORT & INS. L.J. 684, 687-88 (1988)(cap concept resurrected when malpractice insurance crisis occurred again).

51. *See* Farrell, *Virginia's Medical Malpractice Cap and the Doctrine of Substantive Due Process*, 23 TORT & INS. L.J. 684, 687-88 (1988)(cap concept new solution to old problem of skyrocketing medical malpractice insurance premiums); Appendix, Table I. The movement to enact limits on damage awards spawned the tort "reform" movement, which caused state legislatures to revise common-law rules for personal injury causes of action. *See* Farrell, *Virginia's Medical Malpractice Cap and the Doctrine of Substantive Due Process*, 23 TORT & INS. L.J. 684, 698-99 (1988)(tort reform was American Medical Association's first priority in 1986); *cf.* Keith, *The Texas Medical Liability and Insurance Improvement Act - A Survey and Analysis of its History, Construction and Constitutionality*, 36 BAYLOR L. REV. 265, 266-67 (1984)(section 5.82 of Insurance Code meant to be replaced by more comprehensive tort reform). The tort reform movement also has led to a whole new wave of damage limitations in 15 states. *See* Farrell, *Virginia's Medical Malpractice Cap and the Doctrine of Substantive Due Process*, 23 TORT & INS. L.J. 684, 688-89, table I (1988)(malpractice damage caps revived in 1987); Appendix, Table I. Twenty-seven states have capped medical malpractice liability to some extent. *See* Appendix, Table II. The states that have limited liability are Alaska, California, Colorado,

numerous, the statutes are distinguishable by virtue of what they cap: overall damages,[52] non-economic damages,[53] economic damages,[54] general damages,[55] and punitive damages.[56] Six of these statutes apply to all civil damages.[57] While eight states besides Texas have invalidated their malpractice damage caps,[58] only Florida struck down its cap on open courts grounds.[59] Analogously, the Kansas Supreme Court nullified that state's

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Florida, Idaho, Illinois, Indiana, Kansas, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nebraska, New Hampshire, New Mexico, North Dakota, Ohio, South Dakota, Texas, Utah, Virginia, Washington, West Virginia, and Wisconsin. *See id.* A total of 14 state caps have been litigated on constitutional grounds. *See* Appendix, Table I.

52. *See* Appendix, Table II.

53. *Id.*

54. *Id.*

55. *See* Appendix, Tables I and II. General damages cover "loss of reputation, shame, mortification and hurt feelings." *See* Fein v. Permanente Medical Group, 665 P.2d 655, 680 n.15 (Cal. 1985).

56. *See* Appendix, Table II.

57. *Id.*

58. *See, e.g.*, Boyd v. Bulala, 647 F. Supp. 781, 789 (W.D. Va. 1986)(overall cap violates federal and state right to trial by jury), *on reh'g*, 672 F. Supp. 915 (W.D. Va. 1987); Smith v. Department of Ins., 507 So. 2d 1080, 1087-89 (Fla. 1987)($450,000 non-economic damages cap invalidated on state open courts grounds); Wright v. Central Du Page Hosp. Ass'n, 347 N.E.2d 736, 743-44 (Ill. 1976)($500,000 overall damages cap held unconstitutional under equal protection scrutiny); Kansas Malpractice Victims Coalition v. Bell, 757 P.2d 251, 263-64 (Kan. 1988)($250,000 non-economic and $1 million overall damage caps invalidated on due process and right to jury trial grounds); Carson v. Maurer, 424 A.2d 825, 837 (N.H. 1980) ($250,000 non-economic cap invalid under equal protection clause); Arneson v. Olson, 270 N.W.2d 125, 135-36 (N.D. 1978)($300,000 economic cap cannot pass equal protection scrutiny); White v. State, 661 P.2d 1272, 1274 (Mont. 1983)($300,000 economic damages cap unconstitutional according to equal protection guarantee); Duren v. Suburban Community Hosp., 482 N.E.2d 1358, 1362-63 (Ohio Com. Pl. 1985)($200,000 general damages cap violates equal protection requirements).

59. *See* Smith v. Department of Ins., 507 So. 2d 1080, 1089 (Fla. 1987)(damages cap violates Florida Constitution's open courts guarantee because right to remedy abolished without showing overpowering public necessity and alternative remedy). In addition to the open courts inquiry, federal and state guarantees of equal protection, due process and the right to trial by jury are the ammunition most commonly used against damage caps. *See Kansas Malpractice Victims Coalition*, 757 P.2d at 258, 264 ($1,000,000 overall and $250,000 non-economic damages caps violate state right to jury trial and state right to due process); *see also Smith*, 507 So. 2d at 1089 ($450,000 non-economic damages cap violates state open courts guarantee). *Contra* Fein v. Permanente Medical Group, 695 P.2d 665, 682-83 (Cal. 1985) ($250,000 non-economic damages cap violates neither federal equal protection nor federal due process rights); *Strykowski*, 261 N.W.2d at 442-44, 447 ($200,000 overall damages cap consistent with federal and state equal protection guarantees, federal due process and state open courts guarantee). Few courts perceive these statutes as eliminating fundamental rights or discriminating against suspect classes. *See Fein*, 695 P.2d at 682 (damages limit bears rational relationship under equal protection clause to legislative end); *Johnson*, 404 N.E.2d at 601 (damages limit rationally related to legislative objective); *Arneson*, 270 N.W.2d at 136 (dam-

damage cap using a substantive due process inquiry strikingly similar to the open courts analysis.[60] The Kansas court determined that the state constitution conferred due process rights on its citizens by the constitutional promise of "remedy by due course of law."[61] Using a test similar to that used by the Texas Supreme Court,[62] the Kansas court determined that the damage limit was unconstitutional because it removed a medical malpractice victim's remedy without offering a reasonable substitute.[63] The open courts guarantee and substantive due process are among the wide variety of tools available to

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ages cap arbitrarily imposed and therefore not rationally related to reasonable legislative end). Thus, equal protection scrutiny usually occurs at the lowest level — that of the rational relationship test. *See id.* (damages cap arbitrary and not rationally related to reasonable legislative end). This is particularly true when a court intends to uphold a damage limitation. *See Johnson*, 404 N.E.2d at 601 (damages limit rationally related to legislative objective). Another reason the rational relationship test is preferred by courts intending to uphold damages limitations is because the test presumes the law to be constitutional. *Prendergast*, 256 N.W.2d at 669 (statute believed valid); *Arneson*, 270 N.W.2d at 135 (statute presumed valid). This presumption is not only difficult to overcome, but it places the burden of proving the statute's unconstitutionality on the challenger. *See Prendergast*, 256 N.W.2d at 669 (burden of proof on challenger). Several courts, however, have struck down damage caps by concentrating on the arbitrariness of the legislature's action when using the rational relationship-with-a-bite test. *See Wright*, 347 N.E.2d at 743 (right to remedy denied on arbitrary basis); *Arneson*, 270 N.W.2d at 135 (restricting recovery of seriously injured victims not rationally related to reducing medical malpractice insurance premiums). Three other courts have employed mid-level and strict scrutiny to defeat the damage caps' constitutionality. *See Duren*, 482 N.E.2d at 1363 (legislative scheme must be substantially related to legitimate state purpose); *White*, 661 P.2d at 1274-75 (right to sue for personal injuries is fundamental right meriting strict scrutiny); *Carson*, 424 A.2d at 830-31 (right to remedy so important that damage cap must be fair and substantially related to legitimate legislative purpose).

60. *Compare* Kansas Malpractice Victims Coalition v. Bell, 757 P.2d 251, 260-63 (Kan. 1988)(Kansas constitutional guarantee of remedy by due course of law requires that when common-law remedy modified or abolished, must offer adequate substitute remedy and prove real and substantial relation to legislative objective) *with* Lucas v. United States, 30 Tex. Sup. Ct. J. 423, 426 (May 11, 1988)(justiciable right to redress may not be abrogated on unreasonable or arbitrary basis without providing reasonable substitute remedy).

61. *See Kansas Malpractice Victims Coalition*, 757 P.2d at 260. Article I, section 18 of the Kansas Constitution guarantees that "[a]ll persons, for injuries suffered in person, reputation or property, shall have remedy by due course of law, and justice administered without delay." KAN. CONST. Bill of Rights § 18. Using much the same language, the article I, section 13 of the Texas Constitution promises that "[a]ll courts shall be open, and every person for an injury done him, in his land, goods, person or reputation, shall have remedy by due course of law." TEX. CONST. art I, § 13.

62. Lucas v. United States, 30 Tex. Sup. Ct. J. 423, 426 (May 11, 1988)(open courts guarantee violated when litigant shows common-law right to remedy restricted for unreasonable and arbitrary purposes when compared to reasons for statute).

63. *See* Kansas Medical Malpractice Victims Coalition v. Bell, 757 P.2d 251, 259-60 (Kan. 1988)(health care savings for state citizens not reasonable alternative remedy for seriously injured victims).

courts considering statutes that limit medical malpractice damages.[64] The tool itself plays a great role in determining the outcome of the analysis.[65]

In *Lucas v. United States*,[66] the Texas Supreme Court used the open courts guarantee to determine that the $500,000 cap on non-economic damages for medical malpractice was inconsistent with the Texas Constitution.[67] The court recognized that the right to bring a personal injury lawsuit for medical malpractice damages is a "well-defined common-law cause of action"[68] protected by the right to redress specified in article I, section 13 of the Texas Constitution.[69] The court gave the damage limitation a presumption of validity in its review,[70] but held the statute violated the constitutional right of redress by arbitrarily and unreasonably restricting access to the courts.[71] Although the limit did not totally block access to the courts,[72] the

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64. *See, e.g.*, Boyd v. Bulala, 647 F. Supp. 781, 789 (W.D. Va. 1986), *reh'g denied*, 672 F. Supp. 915 (W.D. Va. 1987)(blanket cap violates federal and state right to trial by jury); Smith v. Department of Ins., 507 So. 2d 1080, 1087-89 (Fla. 1987)(damage cap invalidated on state open courts grounds); *Kansas Malpractice Victims Coalition*, 757 P.2d at 263-64 (malpractice cap invalidated on due process and right to jury trial grounds); Duren v. Suburban Community Hosp., 482 N.E.2d 1358, 1362-63 (Ohio Com. Pl. 1985)(damage cap violates equal protection requirements); *see also* Keith, *The Texas Medical Liability and Insurance Improvement Act - A Survey and Analysis of its History, Construction and Constitutionality*, 36 BAYLOR L. REV. 265, 327-31 (1984)(Texas damage limit subject to equal protection and substantive due process scrutiny); Witherspoon, *Constitutionality of the Texas Statute Limiting Liability for Medical Malpractice*, 10 TEX. TECH L. REV. 419, 439-42, 452-56 (1979)(Texas damage limit subject to invalidation on procedural due process, substantive due process and equal protection grounds). Damage caps also have been struck down on equal protection, due process and open courts grounds. *See* Johnson v. St. Vincent Hosp., Inc., 404 N.E.2d 585, 594-600 (Ind. 1980) ($500,000 overall damages cap consistent with due process, equal protection and open courts requirements); Sibley v. Board of Supervisors, 477 So. 2d 1094, 1109 (La. 1985)($500,000 overall damage cap meets equal protection scrutiny).

65. *Compare Kansas Malpractice Victims Coalition*, 757 P.2d at 258, 264 (damage caps abrogate due process by arbitrarily removing common-law right of redress and by not providing reasonable alternative remedy) *with Sibley*, 462 So. 2d at 157 (damage cap meets state and federal procedural due process because rationally related to legitimate governmental end). *Cf.* Redish, *Legislative Response to the Medical Malpractice Insurance Crisis: Constitutional Implications*, 55 TEX. L. REV. 759, 769-70 (1977)(tier of equal protection test will determine law's constitutionality).

66. 31 Tex. Sup. Ct. J. 423 (May 11, 1988).

67. *Id.* at 424.

68. *Id.* at 426.

69. *Id.*

70. *See* Lucas v. United States, 31 Tex. Sup. Ct. J. 423, 426 (May 11, 1985)(article 4590i presumed valid). The court indicated it considered the damage limitations' constitutionality "[w]ith all respect due a legislative enactment." *Id.* Traditionally, such respect translates into a presumption of validity for the legislature's reasons behind the law. *See* Prendergast v. Nelson, 256 N.W.2d 657, 669 (Neb. 1977)(law presumed valid). This presumption, in turn, places the burden of proving invalidity on the law's challenger. *Id.*

71. *Lucas*, 30 Tex. Sup. Ct. J. at 426.

72. *Id.*

court implied that the Texas Constitution's greater store of individual rights necessitates the invalidation of laws that even partially obstruct an individual's right to a remedy.[73] The court determined that the legislature acted arbitrarily when it decided to cap damages only for medical malpractice lawsuits[74] and unreasonably by not offering medical malpractice victims a suitable alternative means of redress.[75]

Justice Culver concurred in the result but emphasized that damage caps can be constitutional if they also establish an alternative means of redress.[76] In fact, Justice Culver concluded that the Texas malpractice damage limit would have been constitutional had an adequate quid pro quo existed.[77] Justice Culver based her conclusion on the majority's findings that damage limits in other states were declared valid when compensation funds existed and that creation of a compensation fund had been recommended to the Texas

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73. *Id.* The court also analogized the partial restriction of redress in *Lucas* to *LeCroy v. Hanlon*, 713 S.W.2d 335, 338-42 (Tex. 1986), which involved a lawsuit filing fee increase that the court found invalid under article I, section 13 of the Texas Constitution. *Id.* at 427. The court reasoned that because most of the fee increase proceeds did not go to the court system, the increase partially obstructed the right of redress. *See LeCroy*, 713 S.W.2d at 338-42. The Texas Constitution protects against the partial obstruction of rights because it gives individuals greater rights than the United States Constitution. *Id.* at 338-39.

74. *See* Lucas v. United States, 31 Tex. Sup. Ct. J. 423, 426 (May 11, 1988). The court buttressed its conclusion that the legislature had acted arbitrarily by citing *Wright v. Central Du Page Hospital Association*, which held that statutes limiting recovery are arbitrary when only medical malpractice victims are affected. *Id.*; *see also* Wright v. Central Du Page Hosp. Ass'n, 347 N.E.2d 736, 742 (Ill. 1976)(limitation of recovery arbitrary when applied only to medical malpractice damages).

75. *See Lucas*, 31 Tex. Sup. Ct. J. at 426. The Texas Supreme Court emphasized that damage caps in other states had been upheld when the statutory limitation also included the creation of an alternative remedy. *Id.*; *see also* Johnson v. St. Vincent Hosp., Inc., 404 N.E.2d 585, 601 (Ind. 1980)(damage cap upheld because legislature created compensation fund); Sibley v. Board of Supervisors, 462 So. 2d 149, 156 (La. 1985)(damage cap incorporating alternative remedy modeled on Indiana's upheld). Although the Texas legislature projected that the damage limit would benefit society, the court reasoned that the effect was too general to pose an adequate alternative remedy for the injured victim. *Lucas*, 31 Tex. Sup. Ct. J. at 426. The court also noted that the legislature had decided against providing a more specific alternative remedy, even though the Texas Medical Professional Liability Study Commission had proposed establishing a medical malpractice victim's compensation fund. *Id.* Weighing the cap against the legislature's reasons for enacting it, the court further determined that the cap was unreasonable and arbitrary because the legislature itself had been uncertain that a damages cap would reduce insurance rates and because the legislature's goal of relating actual damages to the amounts awarded was more properly within the judiciary's province. *Id.* at 426-27.

76. *See* Lucas v. United States, 31 Tex. Sup. Ct. J. 466, 466 (May 25, 1988)(Culver, J., concurring). Justice Culver suggested that the requirements of an adequate alternative remedy would be met if the legislature created a compensation fund for those who sustained catastrophic injuries. *Id.*

77. *See id.* The majority opinion lists the lack of a substitute remedy as but one of several problems with the statute. Lucas v. United States, 31 Tex. Sup. Ct. J. 423, 426 (May 11, 1988).

Legislature.[78]

Justice Gonzalez dissented from the majority's inquiry into the nature of the legislature's action,[79] suggesting that the proper test was whether the damage limit was reasonably related to a legitimate legislative purpose.[80] Because he contended the legislature's purpose was legitimate, Justice Gonzalez would have held the limit valid under the equal protection,[81] due process,[82] and open courts[83] provisions of the Texas Constitution.[84] Because of the presumptive validity accorded legislative acts,[85] Justice Gonzalez applied the rational basis test and argued that the damage limit should be valid on equal protection grounds.[86] Justice Gonzalez also criticized the majority for not first giving the legislature the proper presumption of validity and erroneously beginning its inquiry into the reasonableness of the legislature's action.[87] Justice Gonzalez held that the damage limit met the due process clause's reasonable relation test because the legislature's purpose in fixing the limit was proper.[88] Finally, in addressing the statute's challenge under the open courts guarantee, Justice Gonzalez agreed with the majority's standard of review,[89] but objected to the court's conclusion that a reasonable quid pro

78. *See Lucas*, 31 Tex. Sup. Ct. J. at 466 (patient compensation funds concurrently established with damage limits in two states). Justice Culver stated she shared the majority's "concern" that the damages limit was unreasonable and arbitrary when weighed against the purposes for creating the statute, but did not specifically endorse this conclusion. *Id.*

79. Lucas v. United States, 31 Tex. Sup. Ct. J. 423, 428 (May 11, 1988)(Gonzalez, J., dissenting).

80. *Id.*

81. *See id.* at 429-30 (damage limit accords with rational relationship test); *see also* TEX. CONST. art. I, § 3 (Texas equal protection clause).

82. *See* Lucas v. United States, 31 Tex. Sup. Ct. J. 423, 430 (May 11, 1988)(Gonzalez, J., dissenting) (damage cap bears reasonable relation to proper legislative purpose); *see also* TEX. CONST. art. I, § 19 (Texas due process clause).

83. *See Lucas*, 31 Tex. Sup. Ct. J. at 430-31 (legislative reason for damage cap outweighs restricted right of redress); *see also* TEX. CONST. art. I, § 13 (Texas open courts guarantee).

84. *See Lucas*, 31 Tex. Sup. Ct. J. at 428 (damage cap accords with Texas equal protection and due process guarantees).

85. *See id.* at 429 (legislative acts presumed valid).

86. *Id.* at 430. Justice Gonzalez would have found article 4590i valid under the rational relationship test. *Id.*; *see also* Whitworth v. Bynum, 699 S.W.2d 194, 197 (Tex. 1985)(law must be rationally related to legitimate state purpose to meet equal protection requirements).

87. *See* Lucas v. United States, 31 Tex. Sup. Ct. J. 423, 430 (May 11, 1988)(Gonzalez, J., dissenting) (rational basis test asks whether legislature's decision rational, not whether law will meet legislative goal). Justice Gonzalez indicated that the majority incorrectly assumed the role of a "super-legislature" when it failed to defer to the legislature's reasons for approving the non-economic damage cap. *Id.*; *see also* New Orleans v. Dukes, 427 U.S. 297, 303-04 (1975)(judiciary may not act as super-legislature over reasonableness of legislative policy decisions). Justice Gonzalez suggested that the reasonableness inquiry improperly rested on case law from out-of-state courts. *Lucas*, 31 Tex. Sup. Ct. J. at 432.

88. *Lucas*, 31 Tex. Sup. Ct. J. at 430.

89. *Id.* at 430-31. Justice Gonzalez agreed that the standard for reviewing article 4590i

quo would have to exist before a damage limit could be valid.[90] Justice Gonzalez contended that the Texas Supreme Court never before had expressly required an individual quid pro quo when a plaintiff's right to a jury trial was partially limited.[91]

Chief Justice Phillips also dissented in an opinion that concurred with Justice Gonzalez's dissent in all but the latter's method of open courts analysis.[92] Chief Justice Phillips asserted that the court first should have decided whether a reasonable alternative remedy existed when the legislature created the damage cap[93] and then should have weighed whether the limit bore a reasonable relationship to the legislature's goal of eliminating a societal evil.[94] Because Chief Justice Phillips would have found the damage limit constitutional, he addressed the second certified question and stated that he would have found that the damage cap limited each defendant's liability and not each claimant's recovery.[95]

The majority in *Lucas*[96] correctly followed more than 130 years of Texas Supreme Court decisions construing the open courts guarantee as barring even partial foreclosure of the right to redress in striking down the legislature's $500,000 limitation on non-economic medical malpractice damages.[97] By deciding *Lucas* solely on open courts grounds, the court

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under the open courts guarantee involved questioning whether the legislature had unreasonable or arbitrary objectives in approving a statute that restricted a cause of action found in the common law. *Id.*

90. *Id.* at 430.

91. Lucas v. United States, 31 Tex. Sup. Ct. J. 423, 430-31 (May 11, 1988).

92. *See* Lucas v. United States, 31 Tex. Sup. Ct. J. 666, 666-76 (Sept. 21, 1988)(Phillips, C.J., dissenting) (cap constitutional under Texas constitutional guarantees of equal protection, open courts, right to trial by jury, due course of law and prohibition against special laws).

93. *Id.* at 677-78.

94. *Id.* at 678. Addressing the first prong of the test, Chief Justice Phillips stated he would have found that the legislature did not provide a reasonable quid pro quo when it created the damage cap. *Id.* at 679. In fact, Chief Justice Phillips found it apparent that the damage limit could not adequately compensate severely injured plaintiffs such as Christopher Lucas. However, Chief Justice Phillips would have found the limit constitutional under the second prong of his open courts analysis. Chief Justice Phillips reasoned that because a legislative committee had found a causal relationship between medical malpractice damage awards and the malpractice insurance "crisis," the damage limit was rationally related to the legislative purpose of ending the "crisis." *Id.* at 679-80.

95. *Id.* at 680.

96. 31 Tex. Sup. Ct. J. 423, 426 (May 11, 1988).

97. *See* O'Shea v. Twohig, 9 Tex. 336, 341-42 (1852)(seminal decision holding each citi-

remained consistent with its history of protecting the additional rights given Texas citizens by the state constitution.[98] The court's apparent unwil-

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zen has right of access to court); *see also* LeCroy v. Hanlon, 713 S.W.2d 335, 343 (Tex. 1986) (law raising district court filing fees without funding judicial system with proceeds violates open courts guarantee by interfering with citizen's right to redress); Lebohm v. City of Galveston, 154 Tex. 192, 196, 275 S.W.2d 951, 953 (1955)(open courts guarantee prohibits unreasonable partial restriction on right to redress); Hanks v. City of Port Arthur, 121 Tex. 202, 212, 48 S.W.2d 944, 947 (1932)(city ordinance requiring notice of defect before citizen can sue for injuries arising from defect violates open courts provision by blocking right to redress). *O'Shea v. Twohig* marked the first time the Texas Supreme Court had enforced the open courts guarantee. *See LeCroy*, 713 S.W.2d at 340 (*O'Shea* was Texas' first open courts case). The case involved a citizen who sought to sue several defendants, but could not because the county with proper jurisdiction had no courts. *O'Shea*, 9 Tex. at 341-42. Reasoning that this condition abrogated the plaintiff's ability to sue in the proper court, the Texas Supreme Court held that the constitutional right to redress would enable the plaintiff to sue in the county where the defendants had last resided. *Id.* While *O'Shea* confirmed the right to redress in the face of a total blockage of court access, the Texas Supreme Court soon applied the protection of the open courts guarantee when redress was only partially blocked. *See* Teas v. Robinson, 11 Tex. 774, 777 (1854)(right to appeal may not be denied because of defective statute); *see also* Eustis v. City of Henrietta, 90 Tex. 468, 473-74, 39 S.W. 567, 569 (1897)(statute requiring payment of property taxes prior to making defense to tax sale violates right to redress); Dillingham v. Putnam, 109 Tex. 1, 4, 14 S.W. 303, 304 (1890)(right to appeal not contingent on ability to put up bond); Lumpkin v. Muncey, 66 Tex. 311, 313, 17 S.W. 732, 733 (1886)(open courts guarantee gives citizens of newly organized county benefits of courts even when courts do not exist in new county).

98. *See* Sax v. Votteler, 648 S.W.2d 661, 664 (Tex. 1983)(additional rights provided by open courts provision does not require court's decision to incorporate Texas or federal equal protection clause); *see also* Waggoner v. Gibson, 647 F. Supp. 1102, 1108 (N.D. Tex. 1986) (open courts guarantee exceeds rights given in federal due process clause by using less strict test for deciding law's validity); LeCroy v. Hanlon, 713 S.W.2d 335, 339 (Tex. 1986)(enforcing additional rights in Texas Constitution strengthens federalism); Nelson v. Krusen, 678 S.W.2d 918, 923 (Tex. 1984)(Texas Supreme Court required to protect additional rights guaranteed by state constitution). Conversely, the Texas equal protection clause provides no rights in addition to those provided by its federal counterpart. *See* 1 G. BRADEN, THE CONSTITUTION OF THE STATE OF TEXAS: AN ANNOTATED AND COMPARATIVE ANALYSIS 13-14 (1977)(Texas equal protection clause does not provide greater protection than federal equal protection clause). Since the open courts guarantee is not found in the United States Constitution, the court's action in deciding cases solely on open courts grounds affirms the guarantee's validity and power. *See LeCroy*, 713 S.W.2d at 338, 340-41 (Texas Supreme Court in mainstream of movement to protect state-given rights such as the open courts guarantee). Because Texas' open courts guarantee also bears strong resemblance to substantive due process, the court's decision to base the *Lucas* holding solely on the open courts provision is consistent with the United States Supreme Court's use of substantive due process to strike down economic regulations in the early 1900's. *See* J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW § 11.4 at 352 (3rd ed. 1986)(no need to address equal protection issues once violation of substantive due process determined). The damages cap bears strong resemblance to an economic regulation since one of its primary purposes was to cause medical malpractice insurance rates to decrease. *See* TEX. REV. CIV. STAT. ANN. § 11.02(b)(1),(2),(5),(6) (Vernon Supp. 1988) (legislature's purpose to reduce cost and number of malpractice claims so that insurance premiums would drop); *see also* Farrell, *Virginia's Medical Malpractice Cap and the Doctrine of*

lingness to presume the constitutionality of the statute to the exclusion of the arbitrariness and unreasonableness inquiries also is consistent with Texas open courts precedent.[99] Further, the court did not break new ground

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Substantive Due Process, 23 TORT & INS. L.J. 684, 702 (1988)(damage caps an economic regulation). While substantive due process as an economic regulator is largely discredited on the federal level, many states have not renounced it. *See* J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW § 11.4 at 352 (3rd ed. 1986)(United States Supreme Court no longer uses substantive due process to strike down government economic regulations); B. SIEGAN, ECONOMIC LIBERTIES AND THE CONSTITUTION 23 (1980)(states still employ substantive due process); *see also* Arneson v. Olson, 270 N.W.2d 125, 132 (N.D. 1978)(North Dakota never has renounced substantive due process). In Texas, the state supreme court continues to subject economic regulations to the substantive due process-like open courts test. *See* Neagle v. Nelson, 685 S.W.2d 11, 11-12 (Tex. 1985)(desire to decrease medical malpractice insurance rates unreasonable goal of statute abolishing discovery rule); *Nelson*, 678 S.W.2d at 921-23 (reducing medical malpractice insurance rates not rationally related to elimination of discovery rule in medical malpractice cases); *Sax*, 648 S.W.2d at 667 (reducing medical malpractice insurance rates unreasonable objective of law preventing tolling of statute of limitations for minors); *see also* Keith, *The Texas Medical Liability and Insurance Improvement Act - A Survey and Analysis of its History, Construction and Constitutionality*, 36 BAYLOR L. REV. 265, 326 (1984)(Texas Supreme Court used substantive due process test in *Sax v. Votteler*); *cf.* B. SIEGAN, ECONOMIC LIBERTIES AND THE CONSTITUTION 16 (1980)(substantive due process a valuable United States Supreme Court doctrine). Substantive due process also applies when a statute results in a "taking," which can include the removal of a common-law right. *See Arneson*, 270 N.W.2d at 133-34 (substantive due process review prompted when legislature uses police power to remove right); Keith, *The Texas Medical Liability and Insurance Improvement Act - A Survey and Analysis of its History, Construction and Constitutionality*, 36 BAYLOR L. REV. 265, 327 (1984)(taking triggers substantive due process review). Since the right to redress is a common-law right that is blocked when a damages cap does not provide an alternative means of redress, Texas' damage limit could be considered a taking. *See* Keith, *The Texas Medical Liability and Insurance Improvement Act - A Survey and Analysis of its History, Construction and Constitutionality*, 36 BAYLOR L. REV. 265, 328 (1984)(Texas damage cap categorized as taking because it provides no reasonable substitute remedy); *see also* Witherspoon, *Constitutionality of the Texas Statute Limiting Liability for Medical Malpractice*, 10 TEX. TECH L. REV. 419, 452-53 (1979)(Texas's damage cap violates substantive due process by invidiously discriminating against seriously injured in favor of health care providers). Because the Texas damage limit could be considered a taking, substantive due process review would apply. *See* Keith, *The Texas Medical Liability and Insurance Improvement Act - A Survey and Analysis of its History, Construction and Constitutionality*, 36 BAYLOR L. REV. 265, 328 (1984) (Texas' medical malpractice damages limit violates substantive due process); Witherspoon, *Constitutionality of the Texas Statute Limiting Liability for Medical Malpractice*, 10 TEX. TECH L. REV. 419, 452-53 (1979)(invidious discrimination and failure to provide reasonable substitute marks Texas damages limit violative of substantive due process).

99. *See, e.g.*, Nelson v. Krusen, 678 S.W.2d 918, 923 (Tex. 1984)(when constitutional right affected by unreasonable legislative condition court has no duty to defer to it); Sax v. Votteler, 648 S.W.2d 661, 665-66 (Tex. 1983)(despite presumption of validity statute not immune from scrutiny of underlying purposes when right to redress abrogated); Waites v. Sondock, 561 S.W.2d 772, 775 (Tex. 1977)(legislature cannot arbitrarily or unreasonably withdraw right to remedy); Hanks v. City of Port Arthur, 121 Tex. 202, 210, 48 S.W.2d 944, 949

(1932)(ordinance not given presumption of validity when determined unreasonable for denying justice); *see also* Keith, *The Texas Medical Liability and Insurance Improvement Act - A Survey and Analysis of its History, Construction & Constitutionality*, 36 BAYLOR L. REV. 265, 329 (1984)(right to redress should be shielded from arbitrary and unreasonable legislative action); Taylor & Shields, *The Limitation on Recovery in Medical Negligence Cases in Virginia*, 16 U. RICH. L. REV. 799, 844 (1987)(presumption of validity in rational relationship test does not prevent court from scrutinizing statute for constitutionality); *cf.* Farrell, *Virginia's Medical Malpractice Cap and the Doctrine of Substantive Due Process*, 23 TORT & INS. L.J. 684, 702 (1988)(problem with deferring to legislature is vulnerability to intense political pressure from health care lobbying groups). While the Texas Supreme Court has a record of presuming the validity of legislative enactments under equal protection and open courts review, the court in recent years has seemed to give the presumption short shrift when faced with a statute it deems unusually arbitrary or capricious. *Compare* Smith v. Davis, 426 S.W.2d 827, 831 (Tex. 1968) (statute presumed valid and difference of opinion by court insufficient to rule statute arbitrary or unreasonable) *with Sax*, 648 S.W.2d at 664 (despite presumption, court may inquire into reasonableness of statutes that deny right of redress). Only recently has the court sharpened the reasons for giving the presumption of constitutionality little weight. *See Nelson*, 678 S.W.2d at 926 (Robertson, J., concurring) (tradition of giving wide deference to legislature has limits when constitutional right affected); *Sax*, 648 S.W.2d at 665-66 (legislative action scrutinized when justiciable right of redress abrogated); *see also* Neagle v. Nelson, 685 S.W.2d 11, 12 (Tex. 1985)(adopting reasoning of *Nelson* and *Sax* in holding section 10.01 of article 4590i unconstitutional). The Texas Supreme Court's erosion of deference for particular legislative enactments is similar to the lack of deference the United States Supreme Court displayed in the early 1900's, when the Court struck down economic regulations using substantive due process. *See* J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW § 11.4 at 352 (3rd ed. 1986)(economic laws upheld only if court majority believed means used were reasonable). Commentators criticize the federal substantive due process era as one in which the Court exercised personal prejudice by improperly examining the reasons behind and goals of economic laws. *See id. But see* B. SIEGAN, ECONOMIC LIBERTIES AND THE CONSTITUTION 22-23 (1980)(substantive due process has solid constitutional basis). The primary criticism of substantive due process is that inquiries into the arbitrariness and unreasonableness of legislative action elevate the courts into super-legislatures that know no bounds. *See* Griswold v. Connecticut, 381 U.S. 479, 511-13 (1965)(Black, J., dissenting) (substantive due process evaluation depends on justices' own value judgments and transforms court into super-legislature); J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW § 11.4 at 352 (3rd ed. 1986) (substantive due process gave United States Supreme Court great discretion). Conversely, the Texas Supreme Court appears long ago to have established the boundaries of the substantive due process inquiry through its consideration of the constitutionality of the state's worker's compensation law. *See* Middleton v. Texas Power & Light Co., 108 Tex. 96, 108-10, 185 S.W. 556, 561 (1916)(worker's compensation law neither arbitrary nor unreasonable). Applying the standard open courts test, the *Middleton* court held that the worker's compensation law was not unreasonable because the legislature had given injured employees guaranteed compensation for injuries incurred on the job in exchange for the removal of the employee's common-law right to sue the employer for negligence. *See id.* at 560. The court also found the law was not arbitrary because the legislature had found that a statutory response was demanded for the problem of employees who were injured on the job. *See id.* at 561 (legislature had known problem of compensating injured workers); *cf.* Wright v. Central Du Page Hosp. Ass'n, 347 N.E.2d 736, 742 (Ill. 1976)(court's use of constitutional worker's compensation law illustrated why damages cap was unconstitutional under equal protection scrutiny). The

by using open courts analysis to hold that the right to redress could only have been replaced by a quid pro quo that specifically accommodates malpractice victims.[100] Therefore, the court used the proper standard for

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arbitrariness and unreasonableness standards as articulated in *Middleton* seem to have been applied to the Texas medical malpractice damage limit. *Compare* Lucas v. United States, 31 Tex. Sup. Ct. J. 423, 426 (May 11, 1988)(damages limit unreasonable for not providing specific quid pro quo and arbitrary because legislature not certain cap would decrease malpractice insurance rates) *with Middleton*, 185 S.W. at 560-61 (worker's compensation law not unreasonable because adequate substitute remedy provided and not arbitrary because legislative action based on known problem with employee negligence lawsuits). If doubt remains as to the boundaries of the arbitrary and unreasonable prongs of the open courts test used by the Texas Supreme Court, the matter may be clarified when the court considers an action challenging the legislature's abolition of the common-law cause of action for the alienation of affection. *See* TEX. FAM. CODE ANN. § 4.06 (Vernon Supp. 1988)(abolishing cause of action for alienation of affection). Alienation of affection actions in Texas have been founded on the loss of a spouse's consortium and are proved by showing that the "other" woman or man intentionally breached a duty not to intrude on a marriage and that the interloper caused damages. *See* Smith v. Smith, 225 S.W.2d 1001, 1006 (Tex. Civ. App.—Amarillo 1949, no writ)(when spouse's affections intentionally or purposefully alienated, action for loss of consortium lies); Collier v. Perry, 149 S.W.2d 292, 294 (Tex. Civ. App.—El Paso 1949, writ dism'd)(alienation of affection actions lie for loss of consortium when intentional breach of duty and damages).

100. *See, e.g.*, LeCroy v. Hanlon, 713 S.W.2d 335, 342 (Tex. 1986)(quid pro quo for removed right reasonable only if it affects individual); Sax v. Votteler, 648 S.W.2d 661, 667 (Tex. 1983)(when removing means of redress legislature must provide reasonable substitute); Lebohm v. City of Galveston, 154 Tex. 192, 199, 275 S.W.2d 951, 954-55 (1955)(substitute remedy must accompany legislature's elimination of common-law remedy); Middleton v. Texas Power & Light Co., 108 Tex. 96, 109-10, 185 S.W. 556, 560-61 (1916)(legislature's abolition of employees' action of negligence against employers not unreasonable when guaranteed compensation substituted); *see also* Redish, *Legislative Response to the Medical Malpractice Insurance Crisis: Constitutional Implications*, 55 TEX. L. REV. 759, 789-91 (1977)(courts more likely to uphold damages caps when quid pro quo tangible, not general). The Texas Supreme Court's requirement of a specific quid pro quo is consistent with decisions by supreme courts in other states. *See, e.g.*, Smith v. Department of Ins., 507 So. 2d 1080, 1089 (Fla. 1987)(abrogation of right to remedy reasonable only if specific quid pro quo exists); Wright v. Central Du Page Hosp. Ass'n, 347 N.E.2d 736, 742 (Ill. 1976)(requiring specific quid pro quo where right to redress removed); Carson v. Maurer, 424 A.2d 825, 837-38 (N.H. 1980)(societal quid pro quo insufficient to pose reasonable substitute). *But see* Fein v. Permanente Medical Group, 695 P.2d 665, 681-82 n.18 (Cal. 1985)(general quid pro quo of seeking healthy insurance industry is sufficient); *cf.* Arneson v. Olson, 270 N.W.2d 125, 134-35 (N.D. 1978)(North Dakota does not require quid pro quo every time legislature removes common-law right); Strykowski v. Wilkie, 261 N.W.2d 434, 447-48 (Wisc. 1978)(Wisconsin does not require quid pro quo when common-law right abrogated). One commentator has suggested that the question facing legislatures that change common-law rights is whether the quid pro quo must pose "duplicate recovery at common law or a reasonable substitute." Farrell, *Virginia's Medical Malpractice Cap and the Doctrine of Substantive Due Process*, 23 TORT & INS. L.J. 684, 691 (1988). The United States Supreme Court has never answered this question, though it raised it in *Duke Power Co. v. Carolina Environmental Study Group. See id.*; *see also* Duke Power Co. v. Carolina Envtl. Study Group, 438 U.S. 59, 88 (1978)(questioning whether quid pro quo

reviewing the medical malpractice damage cap, while insisting on a reasonable substitute remedy for those whose redress the cap partially removed.[101]

The majority's determination that the legislature was unreasonable for not providing a specific substitute remedy[102] leads to the possibility that the legislature would be encouraged to include a quid pro quo when devising another damage cap.[103] However, the Texas Supreme Court historically has

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should be provided for nuclear accident victims in return for federal law limiting nuclear power plants' liability). In Texas, however, the courts clearly have mandated that reasonable substitutes must be made available when common-law rights of redress are restricted, either in whole or in part. *See Sax*, 648 S.W.2d at 667 (unreasonable to expect third party to seek redress on behalf of individual whose rights have been statutorily eliminated); *Lebohm*, 154 Tex. at 199, 275 S.W.2d at 954-55 (reasonable substitute must follow legislative abolition of common-law remedy). The Texas Supreme Court views a reasonable substitute as approximating the right of redress removed by the legislature. *See LeCroy*, 713 S.W.2d at 342 (individual quid pro quo required when individual right removed). Judicial support for reasonable substitutes, Farrell states, could lead to the creation of damages caps with quid pro quos comparable to the compensation funds created by worker's compensation statutes. *See* Farrell, *Virginia's Medical Malpractice Cap and the Doctrine of Substantive Due Process*, 23 TORT & INS. L.J. 684, 693 (1988)(support of reasonable substitute leads to creation of workman's compensation-like funds). This seems likely in Texas given that the Texas Supreme Court first supported the concept of a reasonable substitute remedy when deciding the constitutionality of the state's worker's compensation statute. *See Middleton*, 108 Tex. at 108, 185 S.W. at 560 (by substituting guaranteed compensation, legislature constitutionally abolished employees' common-law cause of action against employer for negligence).

101. *See, e.g.*, LeCroy v. Hanlon, 713 S.W.2d 335, 342 (Tex. 1986)(right of redress cannot be unreasonably abridged for society's general benefit); Nelson v. Krusen, 678 S.W.2d 918, 923 (Tex. 1984)(when constitutional right affected by unreasonable legislative condition court has duty not to defer to it); Sax v. Votteler, 648 S.W.2d 661, 665-67 (Tex. 1983)(statute cannot be unreasonable nor arbitrary nor fail to provide reasonable substitute means of redress). *See generally* Keith, *The Texas Medical Liability and Insurance Improvement Act - A Survey and Analysis of its History, Construction & Constitutionality*, 36 BAYLOR L. REV. 265, 329 (right to redress sufficiently important to be shielded from arbitrary and unreasonable legislative action).

102. *See* Lucas v. United States, 31 Tex. Sup. Ct. J. 423, 426 (May 11, 1988)(damage cap unreasonable when alternative remedy not provided); *see also id.* at 466 (Culver, J., concurring) (specifically stating damage limits would survive constitutional scrutiny if adequate substitute tendered). Justice Culver specifically used the example of a patient compensation fund as an adequate substitute. *See id.*

103. *See Malpractice Cap Held to Be Invalid*, The Tex. Lawyer, May 16, 1988, at 12, col. 3 (quoting State Rep. Brad Wright, R-Houston, who said *Lucas* decision may encourage legislature to establish victim compensation fund as quid pro quo). A minority report of the Texas Medical Professional Liability Study Commission encouraged the 1977 legislature to enact a patients' compensation fund along with the limit on non-medical damages. *See* FINAL REPORT OF THE TEXAS MEDICAL PROFESSIONAL LIABILITY STUDY COMMISSION TO THE 65TH TEXAS LEGISLATURE 50-62 (December 1976)(available at Texas Legislative Reference Library in Austin) (minority report by W. Page Keeton proposing patients' compensation fund). As proposed by Keeton, the Texas fund would have required doctors to obtain malpractice insurance for a certain monetary amount of liability and to annually contribute a percentage of the premium to the fund. *Id.* When judgments exceeded the amount of the doctor's insurance, the

required that statutes be neither arbitrary nor unreasonable to withstand open courts scrutiny.[104] The court traditionally has considered the arbitrary and unreasonableness standards separate requirements that must be met and supported independently.[105] Due to the court's finding that the legislature acted arbitrarily in limiting only medical malpractice damages,[106] a future damage limit that included a quid pro quo still could be required not to be arbitrary under traditional open courts review.[107]

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fund would have paid the uncovered amount of the claim up to a set limit. Patients' compensation funds benefit doctors by providing an additional layer of insurance, assuring that state malpractice insurance premiums reflect the state's experience in paying claims from the fund, and by easing the difficulty of pricing malpractice insurance. *Id.*; *see also* Comment, *Patients' Compensation Fund and the Bad Faith Cause of Action: Two Proposed Amendments to the Texas Medical Liability and Insurance Improvement Act of Texas*, 17 TEX. TECH L. REV. 1603, 1612-13 (1986)(funds created to address insurance aspect of medical malpractice crisis). Some courts view patient compensation funds as fulfilling the requirement of providing a specific quid pro quo in exchange for the abrogation of the right to redress through malpractice damage limits. *See, e.g.*, Smith v. Department of Ins., 507 So. 2d 1080, 1089 (Fla. 1987)(legislature must provide specific quid pro quo that relates to abrogated right to remedy); Johnson v. St. Vincent Hosp., Inc., 404 N.E.2d 585, 601 (Ind. 1975)(availability of patient compensation fund fulfills requirement for quid pro quo, thus damage limit constitutional); Prendergast v. Nelson, 256 N.W.2d 657, 669 (Neb. 1977)(voluntary compensation fund fulfills quid pro quo requirement).

104. *See, e.g.*, LeCroy v. Hanlon, 713 S.W.2d 335, 341 (Tex. 1986)(substantive right of open courts cannot be arbitrarily or unreasonably abrogated); Lebohm v. City of Galveston, 154 Tex. 192, 199, 275 S.W.2d 951, 955 (1955)(removal of common-law remedy cannot be arbitrary and unreasonable); Hanks v. City of Port Arthur, 121 Tex. 202, 212, 48 S.W.2d 944, 948 (1932)(when cause of action withdrawn, due process denied if action arbitrary and unreasonable). *See generally* Taylor & Shields, *The Limitation on Recovery in Medical Negligence Cases in Virginia*, 16 U. RICH. L. REV. 799, 847 (1982)(legislation capping medical malpractice damages cannot be arbitrary nor unreasonable if it is to meet substantive due process requirements).

105. *See, e.g.*, Neagle v. Nelson, 685 S.W.2d 11, 13 (Tex. 1985)(Robertson, J., concurring) (statute can be neither arbitrary nor unreasonable to meet open courts requirements); Nelson v. Krusen, 678 S.W.2d 918, 923 (Tex. 1984)(unreasonable condition imposed arbitrarily by legislature violates open courts guarantee); Sax v. Votteler, 648 S.W.2d 661, 665-66 (Tex. 1983)(statute cannot arbitrarily or unreasonably abridge right of redress); Waites v. Sondock, 561 S.W.2d 772, 775 (Tex. 1977)(legislature cannot arbitrarily or unreasonably withdraw right to remedy).

106. *See* Lucas v. United States, 31 Tex. Sup. Ct. J. 423, 426 (May 11, 1988)(damage limit arbitrary when only medical malpractice victims affected); *see also* Taylor & Shields, *The Limitation on Recovery in Medical Negligence Cases in Virginia*, 16 U. RICH. L. REV. 799, 846-47 (1982)(commentators believe any medical malpractice damages limit chosen by legislature necessarily is arbitrary). *Contra* Redish, *Legislative Response to the Medical Malpractice Insurance Crisis: Constitutional Implications*, 55 TEX. L. REV. 759, 784 (1977)(broad discretion of substantive due process review makes it unlikely legislature will be found to be arbitrary in determining damages limit); *cf.* Weinberger v. Weisenfeld, 420 U.S. 636, 648 (1975)(Supreme Court need not accept legislative purpose without investigation when review shows claimed purpose not legislature's goal).

107. *See* LeCroy v. Hanlon, 713 S.W.2d 335, 342 (Tex. 1986)(lawmakers forbidden to

Appropriately, the court did not consider whether the damage limit violated the Texas Constitution's equal protection guarantee.[108] Had the court utilized an equal protection analysis, the damage limit would not likely have survived.[109] Due to the purposes for enacting the legislation,[110] the cap

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arbitrarily or unreasonably impede right of access guaranteed by open courts provision); Lebohm v. City of Galveston, 154 Tex. 192, 199, 275 S.W.2d 951, 955 (1955)(removal of common-law remedy allowed only when not arbitrary and unreasonable, and when reasonable remedy substituted); Keith, *The Texas Medical Malpractice Liability and Insurance Improvement Act - A Survey and Analysis of its History, Construction and Constitutionality*, 36 BAYLOR L. REV. 265, 328-29 (1984)(right to redress deserves protection from arbitrary takings); Taylor & Shields, *The Limitation on Recovery in Medical Negligence Cases in Virginia*, 16 U. RICH. L. REV. 799, 847 (1982)(legislation capping medical malpractice damages cannot be arbitrary to meet substantive due process requirements).

108. *Compare* Lucas v. United States, 31 Tex. Sup. Ct. J. 423, 424 (May 11, 1988)(damages limit unconstitutional under open courts analysis) *with* Lucas v. United States, 807 F.2d 414, 421-22 (5th Cir. 1986)(damages limit reviewed and found constitutional under both federal due process and equal protection standards). *See also* Waggoner v. Gibson, 647 F. Supp. 1102, 1108 (N.D. Tex. 1986)(open courts guarantee exceeds federal due process clause in protections by using less strict test for deciding law's validity); *LeCroy*, 713 S.W.2d at 339 (enforcing additional rights in Texas Constitution strengthens federalism); Nelson v. Krusen, 678 S.W.2d 918, 923 (Tex. 1984)(Texas Supreme Court required to protect additional rights guaranteed by state constitution); Sax v. Votteler, 648 S.W.2d 661, 664 (Tex. 1983)(additional rights provided by open courts provision does not necessitate further review under Texas or federal equal protection clause).

109. *See* Wright v. Central Du Page Hosp. Ass'n, 347 N.E.2d 736, 743 (Ill. 1976) ($500,000 overall damage cap violates rational relationship test); White v. State, 661 P.2d 1271, 1274-75 (Mont. 1983)($300,000 economic damage cap fails equal protection test by abrogating fundamental right to sue for personal injuries); Carson v. Maurer, 424 A.2d 825, 831-35 (N.H. 1980)($250,000 non-economic damage cap fails to pass substantial relationship test); Arneson v. Olson, 270 N.W.2d 125, 135-36 (N.D. 1978)($300,000 economic damage limit violates equal protection by being unreasonable and arbitrary); Duren v. Suburban Community Hosp., 482 N.E.2d 1358, 1363 (Ohio Com. Pl. 1985)(court applies equal protection analysis and holds $200,000 general damage cap violates substantial relation test); *see also* Keith, *The Texas Medical Liability and Insurance Improvement Act - A Survey of its History, Construction and Constitutionality*, 36 BAYLOR L. REV. 265, 327 (1984)(damage limit violates equal protection clause); Witherspoon, *Constitutionality of the Texas Statute Limiting Liability for Medical Malpractice*, 10 TEX. TECH L. REV. 419, 453 (1979)(damage cap violates equal protection clause under rational relationship test); Comment, *Medical Liability and Insurance Improvement Act of Texas: The New Legislative Procedure for Amputation of Patients' Rights*, 30 BAYLOR L. REV. 481, 507 (1981)(damage limit subject to equal protection attack). *Contra* Redish, *Legislative Response to the Medical Malpractice Insurance Crisis: Constitutional Implications*, 55 TEX. L. REV. 759, 771 (1977)(damage limits should survive equal protection scrutiny on either rational relationship or strict scrutiny levels).

110. *See* TEX. REV. CIV. STAT. ANN. art. 4590i, § 1.02(b)(1),(2),(5),(6) (Vernon Supp. 1988); *see also* FINAL REPORT OF THE TEXAS MEDICAL PROFESSIONAL LIABILITY STUDY COMMISSION TO THE 65TH TEXAS LEGISLATURE 3-8 (December 1976)(available in Texas Legislative Reference Library) (purposes of law to reduce spiraling medical malpractice insurance rates).

could be classified as an economic regulation.[111] As an economic regulation, the measure likely would have been tested by the court on an intermediate level that emphasized the legislature's purposes in enacting the statute.[112] Because the court already has determined through its open courts review that the legislature was arbitrary and unreasonable in enacting the damage cap,[113] the court may arrive at the same conclusions under an equal protection analysis and invalidate the damage limit in the future.[114]

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111. *See* Farrell, *Virginia's Medical Malpractice Cap and the Doctrine of Substantive Due Process*, 23 TORT & INS. L.J. 684, 702 (1988)(damage caps classified as economic regulation). The damages cap bears strong resemblance to an economic regulation since one of its primary purposes was to cause medical malpractice insurance rates to decrease. *Id.*

112. *See* Williams v. Vermont, 472 U.S. 14, 22-23 (1985)(court struck down tax because did not promote legitimate state purpose); Whitworth v. Bynum, 699 S.W.2d 194, 197 (Tex. 1985)(unreasonableness signalled when legislative classification overinclusive); *see also* Metropolitan Life Ins. Co. v. Ward, 470 U.S. 869, 881-82 (1985)(court may inquire into reasons behind legislative classification). Texas may have been ahead of the United States Supreme Court in "putting teeth" into the rational relationship test, particularly regarding economic regulation. *Compare Ward*, 470 U.S. 869, 881-82 (among first economic cases to which Court applied its bite) *with* Houston & T.C. Ry. Co. v. City of Dallas, 98 Tex. 396, 416, 84 S.W. 648, 654 (1905)(employing the rational relationship with "bite" test). As long ago as 1905, the Texas Supreme Court emphasized whether a regulation's interference with the economic system was "unwarranted or arbitrary." *See Houston & T.C. Ry. Co.*, 84 S.W. at 654 (economic regulation cannot be arbitrarily imposed); 1 BRADEN, THE CONSTITUTION OF THE STATE OF TEXAS: AN ANNOTATED AND COMPARATIVE ANALYSIS 17-18 (1977)(Texas rational relationship inquiry has long had "bite" when economics cases reviewed); *see also* San Antonio Retail Grocers v. Lafferty, 156 Tex. 574, 579, 297 S.W.2d 813, 817 (1957)(law prohibiting groceries from offering under-priced merchandise posed arbitrary and unreasonable classification); Humble Oil & Ref. Co. v. City of Georgetown, 428 S.W.2d 405, 407-08 (Tex. Civ. App.—Austin 1968, no writ)(ordinance regulating gasoline tank truck size subject to review for arbitrariness and unreasonableness). Joseph Witherspoon advocates the use of strict scrutiny rather than the rational relationship test when reviewing damage limits under equal protection. *See* Witherspoon, *Constitutionality of the Texas Statute Limiting Liability for Medical Malpractice*, 10 TEX. TECH L. REV. 419, 462 (1979)(strict scrutiny merited by damage limit's denial of fundamental rights and invidious discrimination). According to Witherspoon, damage limits deny fundamental rights by partially abrogating the right to have a jury decide damages. *See id.* at 458. Invidious discrimination occurs because damage limits pose a statutory preference for the health care industry over seriously injured medical malpractice victims. *See id.* at 453. Some states have used heightened levels of equal protection scrutiny to strike down damage limits. *See, e.g.*, White v. State, 661 P.2d 1272, 1274-75 (Mont. 1983)(strict scrutiny required when plaintiff's fundamental right to bring action for personal injuries abrogated); Carson v. Maurer, 424 A.2d 825, 830 (N.H. 1980)(right to remedy requires showing that statute fair and substantially related to legitimate legislative objective); Duren v. Suburban Community Hosp., 482 N.E.2d 1358, 1363 (Ohio Com. Pl. 1985)(court adopts *Carson* holding that substantial relationship test merited by importance of right to remedy).

113. *See* Lucas v. United States, 31 Tex. Sup. Ct. J. 423, 427 (May 11, 1988)(legislature arbitrary and unreasonable in imposing damage cap).

114. *See* Wright v. Central Du Page Hosp. Ass'n, 347 N.E.2d 736, 743 (Ill. 1976) ($500,000 overall damages cap violates rational relationship test); Arneson v. Olson, 270 N.W.2d 125, 135-36 (N.D. 1978)($300,000 economic damages limit violates equal protection

By guaranteeing the right to a remedy, the open courts provision in the Texas Constitution gives Texas citizens rights not found in the United States Constitution. The Texas Supreme Court correctly protected these added rights by using the open courts provision to invalidate Texas' $500,000 limit on medical malpractice damages. The court's application of the open courts principle was consistent with precedent and mirrored substantive due process review, which views the guarantee as a source of substantive due process requiring the legislature to fashion a reasonable substitute when restricting a common-law remedy. This broad interpretation enabled the court to strike down the damage cap without using the Texas equal protection clause. Yet, the court may use the equal protection analysis to strike down future legislation that resurrects the damage limit and includes a substitute remedy.

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by being unreasonable and arbitrary); Keith, *The Texas Medical Liability and Insurance Improvement Act - A Survey and Analysis of its History, Construction and Constitutionality*, 36 BAYLOR L. REV. 265, 327 (1984)(limitation on damages violates equal protection clause); Witherspoon, *Constitutionality of the Texas Statute Limiting Liability for Medical Malpractice*, 10 TEX. TECH L. REV. 419, 453 (1979)(damages cap violates equal protection clause under rational relationship test); Comment, *Medical Liability and Insurance Improvement Act of Texas: The New Legislative Procedure for Amputation of Patients' Rights*, 30 BAYLOR L. REV. 481, 507 (1978)(damages limitation subject to equal protection attack). In evaluating the legislative purposes of a damages cap under the equal protection clause, other courts have inquired into whether the cap provides a specific quid pro quo in return for the creation of a discriminatory classification. *See Wright*, 347 N.E.2d at 742 (societal quid pro quo insufficient to fulfill equal protection requirement of reasonableness); *Carson*, 424 A.2d at 837-39 (damage cap's lack of specific reasonable substitute violates equal protection). Thus, it is possible that question of a quid pro quo also would have arisen had the Texas Supreme Court evaluated the non-economic damages limit according to equal protection. *See* Witherspoon, *Constitutionality of the Texas Statute Limiting Liability for Medical Malpractice*, 10 TEX. TECH L. REV. 419, 462-63 (1979)(quid pro quo could be required by Texas Supreme Court when evaluating damages limitation). The court's open courts analysis in *Lucas* demonstrates that the absence of a quid pro quo when common-law rights are abrogated is considered evidence of the statute's unreasonableness. *See* Lucas v. United States, 31 Tex. Sup. Ct. J. 423, 426-27 (May 11, 1988)(lack of specific quid pro quo makes damage limit unreasonable when weighed against statutory purposes).

APPENDIX

Table I

States That Have Enacted Damage Limitations for Medical Malpractice

STATE	*ENACTED*	*TYPE OF LIMIT*	*CHALLENGES*
Alaska	1986	$500,000 non-economic, all civil actions	
California	1975	$250,000 non-economic	*Fein v. Permanente Medical Group*, 695 P.2d 665 (Cal. 1985)(cap does not violate federal equal protection or due process).
Colorado	1986	$250,000 non-economic, all civil actions	
Florida	1986	$450,000 non-economic all civil actions	*Smith v. Dept. of Ins.*, 507 So. 2d 1080 (Fla. 1987)(cap unconstitutional for violating state open courts guarantee).
Idaho	1975	$300,000 overall	
Illinois	1975	$500,000 overall	*Wright v. Central Du Page Hosp. Ass'n.*, 347 N.E.2d 736 (Ill. 1976) (cap violates equal protection clause in Illinois Constitution).
Indiana	1975	$500,000 overall	*Johnson v. St. Vincent Hosp. Inc.*, 404 N.E.2d 585 (Ind. 1980)(cap consistent with Indiana open courts doctrine, state and federal due process and federal equal protection guarantees).
Kansas	1986 1986	$250,000 non-economic $1 million overall	*Kansas Malpractice Victims Coalition v. Bell*, 757 P.2d 251 (Kan. 1988)(caps violate Kansas constitutional rights to trial by jury and due process).
Louisiana	1975	$500,000 overall	*Sibley v. Board of Supervisors*, 462 So. 2d 149 (La. 1985), *on reh'g*, 477 So. 2d 1094 (La. 1985)(cap meets equal protection, due process and open courts requirements).
Maryland	1986	$350,000 non-economic, all civil actions	
Massachusetts	1986	$500,000 non-economic	
Michigan	1986	$225,000 non-economic	
Minnesota	1986	$400,000 non-economic, all civil actions	
Missouri	1986	$375,000 non-economic	
Montana	1977	$300,000 economic	*White v. State*, 661 P.2d 1271 (Mont. 1983)(cap violates state equal protection guarantee).

(Continued)

Table I (continued)

States That Have Enacted Damage Limitations for Medical Malpractice

STATE	*ENACTED*	*TYPE OF LIMIT*	*CHALLENGES*
Nebraska	1976	$500,000 overall	*Prendergast v. Nelson*, 256 N.W.2d 657 (Neb. 1977)(cap meets state due process and equal protection requirements).
New Hampshire	1979	$250,000 non-economic	*Carson v. Maurer*, 424 A.2d 825 (N.H. 1980)(cap violates state and federal equal protection guarantees).
	1986	$875,000 non-economic, applies to all civil actions	
New Mexico	1976	$50,000 non-economic	
North Dakota	1977	$300,000 economic	*Arneson v. Olson*, 270 N.W.2d 125 (N.D. 1978)(cap violates state equal protection clause).
Ohio	1976	$200,000 general damages	*Duren v. Suburban Community Hospital*, 482 N.E.2d 1358 (Ohio Com. Pl. 1985)(cap violates state and federal equal protection clauses).
South Dakota	1986	$1 million overall	
Texas	1977	$500,000 non-economic	*Lucas v. United States*, 31 Tex. Sup. Ct. J. 423 (May 11, 1988)(cap violates state open courts guarantee).
Utah	1986	$300,000 non-economic	
Virginia	1977	$1 million overall	*Boyd v. Bulala*, 647 F. Supp. 781 (W.D. Va. 1986), *reh'g denied*, 672 F. Supp. 915 (W.D. Va. 1987)(cap violates federal and state constitutional rights to trial by jury).
	1987	$350,000 punitive	
Washington	1986	$500,000 overall	
West Virginia	1986	$1 million overall	
Wisconsin	1975	$200,000 overall	*Strykowski v. Wilkie*, 261 N.W.2d 434 (Wis. 1978)(cap consistent with state and federal equal protection, federal due process and state open courts guarantees).

Table II

Statutes Limiting Recovery of Damages In Medical Malpractice Lawsuits

NOTE: Underlined Statutes - Have been declared unconstitutional

STATE	*ENACTED*	*CITE*
Alaska	1986	ALASKA STAT. § 09.17.010(a) and (b) (Supp. 1986)
California	1975	CAL. CIV. CODE § 3333.2 (Deering 1984)
Colorado	1986	COLO. REV. STAT. § 13-21-102.5 (Supp. 1986)
Florida	1986	1988 FLA. STAT. ANN. § 768.80 (West)
Idaho	1975	IDAHO CODE § 39-4201 to 39-4213 (1975)(Repealed 1977)
Illinois	1975	ILL. ANN. STAT. ch. 70, para. 101, § 4 (Smith-Hurd 1975) (Repealed 1979)
Indiana	1975	IND. CODE ANN. §§ 16-9.5-1-1 to 16-9.5-10-5 (Burns Supp. 1988)
Kansas	1986	KAN. STAT. ANN. § 60-3402 (Supp. 1987)
Louisiana	1975	LA. REV. STAT. ANN. § 40.1299.39 (West Supp. 1988)
Maryland	1986	MD. CTS. & JUD. PROC. CODE ANN. § 11-108 (Supp. 1987)
Massachusetts	1986	MASS. ANN. LAWS ch. 231, § 60H (Law. Co-op. Supp. 1988)
Michigan	1986	MICH. STAT. ANN. § 27A.1483 (Callaghan Supp. 1988)
Minnesota	1986	MINN. STAT. ANN. § 549.23 (West 1988)
Missouri	1986	MO. ANN. STAT. § 538.210 (Vernon 1988)
Montana	1977	MONT. CODE ANN. § 2-9-104 (1977)(Repealed 1983)
Nebraska	1976	NEB. REV. STAT. §§ 44-2801 to 44-2855 (1984)
New Hampshire	1979 1986	N.H. REV. STAT. ANN. § 507-C:7 (1983) N.H. REV. STAT. ANN. § 508:4-d (Supp. 1987)
New Mexico	1976	N.M. STAT. ANN. § 41-5-6 (1986)
North Dakota	1977	N.D. CENT. CODE § 26-40-11 (1978)
Ohio	1976	OHIO REV. CODE ANN. § 2307.43 (Baldwin 1984)
South Dakota	1986	S.D. CODIFIED LAWS ANN. § 21-3-11 (1987)
Texas	1977	TEX. REV. CIV. STAT. ANN. art. 4590i, §§ 11.01-11.05 (Vernon Supp. 1988)
Utah	1986	UTAH CODE ANN. § 78-14-7.1 (1987)
Virginia	1977 1987	VA. CODE ANN. § 8.01-581.15 (1984) VA. CODE ANN. § 8.01-38.1 (Supp. 1988)
Washington	1986	WASH. REV. CODE ANN. § 4.56.250 (1988)
West Virginia	1986	W. VA. CODE § 55-7B-8 (Supp. 1988)
Wisconsin	1975	WIS. STAT. ANN. § 655.27 (West 1980)