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BATTLING A RECEILING TORT FRONTIER: CONSTITUTIONAL ATTACKS ON MEDICAL MALPRACTICE LAWS

DAVID RANDOLPH SMITH*

Introduction

On January 24, 1848, at Coloma, California, James W. Marshall discovered gold. By year's end a hundred thousand persons would strike out toward Eldorado to seek their fortunes. Yet those caught up in the gold rush, as Frederick Jackson Turner noted at the century's end, were but actors in a great historic cycle—the migration toward a disappearing frontier.

One cannot help but wonder whether the medical malpractice litigation rush of the past decade has not triggered a similar cycle of self-destruction for the tort system's method of compensating personal injuries. The sudden yet sustained recent increases in insurance premiums,1 medical malpractice

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1. See AMERICAN MED. ASS'N, SPECIAL TASK FORCE ON PROF. LIAB. & INS., PROFESSIONAL LIABILITY IN THE '80s, REPORT 1, at 3 (Oct. 1984) [hereinafter cited as AMA SPECIAL TASK FORCE REP. No. 1] ("'physicians' costs for professional liability insurance protection have risen to extraordinary levels in many areas, threatening to divert some physicians out of their major specialties and barring young physicians from practicing in places or specialties where premiums are especially high."). The report goes on to state that: "Between 1975 and 1983, medical liability premiums increased by more than 80% in general." Id. at 8. In New York, Insurance Department officials recently approved a 52 percent rate increase for a New York medical malpractice insurer, the Medical Malpractice Insurance Association. AGAIN THE MALPRACTICE CRUNCH, N.Y. Times, Feb. 4, 1985, col. 1, A18, (editorial). New York's largest medical malpractice insurer, Medical Liability Mutual Insurance Company, has asked for a 60 percent rate increase. MALPRACTICE FEES: DOCTORS VS. INSURERS, N.Y. Times, Feb. 28, 1985, at 14, col. 4. Obstetricians on Long Island paid an average of $54,282 for malpractice insurance in 1984. Id. See also Medical Dilemma, N.Y. Times, Feb. 18, 1985, A16, col. 6 (letter of Richard W. Green, M.D.) ("In the New York area, physicians in surgical specialties such as obstetrics and orthopedics have malpractice premiums that are frequently 30 percent or more of their overhead."). Nationally, medical malpractice insurance premiums are slightly in excess of 1.5 billion dollars. A.M. BEST'S INSURANCE MANAGE-
claims, and million-dollar jury verdicts and settlements have generated an intense nationwide effort to reduce insurance and health-care costs by altering the common law rules applicable to medical malpractice litigation. For example, on February 14, 1985, the American Medical Association’s Special Task Force on Professional Liability and Insurance sounded a call for “immediate definitive action” to combat what it called a national medical malpractice problem of “crisis proportions.” As part of its third and final report, the Special Task Force proposed an Action Plan calling for legislative and policy

MEMENT REPORTS, quoted in The AMA’s Campaign to Reduce Malpractice Suits, N.Y. Times, Feb. 10, 1985. By midyear 1983 the nation’s physicians and surgeons faced insurance increases in the range of 20 to 30 percent. Tavella, Physicians Faced With Ballooning Malpractice rates, Bus. Ins., Sept. 26, 1983, at 1, 56. One New York carrier requested a 180 percent increase but was allowed only 30 percent by the state insurance department. Id. See also, Some OB/GYN Specialists Hit Hard by Rate Increases, Bus. Ins., Sept. 26, 1983, at 57. By contrast, medical malpractice annual premiums for all specialties in Canada in 1984 was $1,150 as compared with $35,000 to $90,000 premiums for some specialties in New York state. The Trouble with Doctors Might be Lawyers, N.Y. Times, Feb. 1, 1985, A28, col. 6 (editorial page and letter of Wilfred Gordon, M.D.).

2. According to the American Medical Association’s Special Task Force on Professional Liability and Insurance, “No segment of litigation has had a more rapid growth during the past 15 years than claims emanating from health care in the United States.” AMA SPECIAL TASK FORCE REP. No. 1, supra note 1, at 14. Figures supplied by the AMA indicate that the percentage of physicians sued in malpractice suits nearly tripled in the period from 1978 to 1983. Id. at 10. In 1983 there were sixteen malpractice claims for every 100 doctors, 20 percent more than in 1982. Id. In mid-1984 the American College of Obstetricians and Gynecologists told a congressional committee that 60 percent of all OB-Gyns in the nation have been sued, 20 percent of them three or more times. Id. at 10-11. Although there is general agreement that the total number of medical malpractice claims has risen steadily since the early seventies, Patricia Danzon, a professor at Duke University’s Center for Health Policy Research and Education, points out that “[a]fter 1976, average claim frequency nationwide actually fell.” Danzon, The Frequency and Severity of Medical Malpractice Claims, 27 J. L. & Econ. 115, 116 (1984); AMA SPECIAL TASK FORCE REP. No. 1, supra, at 6.

3. The number of million-dollar medical malpractice verdicts against health-care providers more than doubled between 1973 and 1982 according to Jury Verdict Research, Inc. of Solon, Ohio, AMA SPECIAL TASK FORCE REP. No. 1, supra note 1, at 12. See also Nat’l L.J., Aug. 27, 1984, at 9, col. 1. Since 1973 there have been 196 awards of one million dollars or more. Id. High-dollar settlements are on the rise as well. In 1982 more than 250 medical malpractice settlements exceeded $1 million, a tenfold increase in just four years. Again the Malpractice Crunch, supra note 1. According to the American Medical Association, the average medical malpractice case is now settled for $330,000. Doctors Organize Battle to Reduce Malpractice Suits, N.Y. Times, Feb. 15, 1985, at 1, col. 14 (quoting Dr. James H. Sammons, executive vice-president of the AMA). “Trends in Million-Dollar Verdicts” headlines the front cover of the September, 1984 American Bar Association Journal. The article notes a nationwide trend toward million-dollar verdicts in personal injury suits of all kinds at the rate of more than four per week in 1982 as opposed to no more than five per year during the 1960s. Frank, Trends in Million-Dollar Verdicts, 70 A.B.A.J., 52, 53 (1984). Professor Danzon notes that while claim frequency declined after 1976, “severity (average dollar indemnity, per paid claim, including court awards and payments in out-of-court settlements) continued to outpace the rate of inflation.” Danzon, supra note 2, at 116.

4. AMERICAN MED. ASS’N, SPECIAL TASK FORCE ON PROFESSIONAL LIABILITY AND INSURANCE ACTION PLAN (Feb. 1985) [hereinafter cited as AMA ACTION PLAN]. The report characterizes the professional liability dilemma of physicians:
actions by the AMA, doctors, insurance companies, state legislatures, and the federal government. Similar action has been initiated at the state level.

For example, in Florida, physicians sought to restructure the state's tort system by placing a constitutional amendment on the November, 1984 ballot that would have required mandatory summary judgment. The amendment would also have abolished joint and several liability and put a limit of $100,000 per defendant on noneconomic damages in all tort cases. The Florida Medical Association and its political action committee, Reason '84, spent $3.6 million promoting the amendment; however, on October 3, 1984, the Florida Supreme Court ruled the amendment could not be placed before the voters because,

Few issues in medicine have generated as much concern among physicians, exacted such high personal and financial tolls from them, or threatened to undermine the practice of high quality medicine as greatly as professional liability.

Efforts to resolve the problem, which reached crisis proportions ten years ago, have only been partially and temporarily successful. Now the problem has reemerged in more serious form, precipitating a new crisis that is affecting not just physicians but the entire nation. Id. at 3.

5. The AMA Action Plan recommends legislative and policy actions in four major areas: education and community action, legislation, defense coordination, and insurance risk control and quality-control activities. AMA ACTION PLAN, supra note 4, at 3. The report sets forth eighteen specific recommendations. In the education and community action area the report urges the AMA to (1) take the professional liability issue to the public; (2) arm state, local, and specialty societies with information to carry the professional liability message to the public; (3) publish a pamphlet for individual patients; (4) develop an effective advocacy program on the professional liability problem; (5) enlist the cooperation of health-care coalitions composed of opinion leaders and policy makers; (6) expand the AMA's clearinghouse role; and (7) maintain professional liability as a critical priority. On the legislative front, the report recommends that the Association (8) propose to the AMA's Council on Legislation and Committee on Professional Liability a federal incentive program to encourage state tort reforms. The specific tort reforms are: limits on noneconomic damages, elimination of punitive damages, itemization of jury verdicts, structured settlements, establishment of patient compensation funds, elimination of the collateral source rule, restriction on attorneys' contingent fees, mandatory pretrial screening panels, special standards for expert witnesses, modified statutes of limitations, affidavits of noninvolvement for defendants who were sued improperly, penalties for frivolous suits (see Malpractice Fees: Doctors vs. Insurers, supra note 1, recent law passed by New York State Senate would impose fines up to $10,000 for frivolous suits), and voluntary arbitration in lieu of litigation. The AMA Action Plan also calls on the AMA to (9) provide legislative assistance to the states; and (10) study other approaches to resolving professional liability claims. To assist defense of medical malpractice lawsuits, the task force proposes to (11) provide defense coordination services (hotline for professional liability questions from physicians and their attorneys; information from a panel of nationally prominent defense attorneys retained by the AMA; liaison with defense organizations; and legal education courses). To control insurance risk and assure quality review, the group proposed that the AMA (12) provide a clearinghouse for information and offer practice management programs; (13) collect and analyze quality-of-care information and implement findings; (14) determine, through the AMA Office of Education Research, whether a physician's educational performance affects state disciplinary actions; (15) expand peer activities; (16) strengthen state licensing boards; (17) sponsor a series a roundtable discussions on professional liability issues; and (18) continue to fight for high-quality medicine while recognizing that competition and cost containment are permanent aspects of the practice of medicine.

as worded, the amendment was not limited to one subject as required by the Florida constitution. Florida physicians, however, have not ruled out legislative proposals or another referendum attempt in 1986. An estimated thirty-eight states are expected to consider medical malpractice bills when legislatures reconvene in the fall of 1985.

Similarly, the Moore-Gephart Alternative Medical Liability Act (H.R. 5400) now being considered in Congress would create a partial no-fault compensation system by abolishing the right to recover noneconomic losses for patients treated in federally funded health-care programs. The New York Times en-

9. Medical Malpractice Battles Heat Up in States, Legal Times, July 22, 1985, at 2, col. 1. New York’s new medical malpractice bill, which Governor Mario Cuomo signed into law in July, 1985, typifies the new legislative proposals. The law includes provisions to (1) allow judges to assess up to $10,000 for bringing frivolous suits; (2) allow periodic payment of pain and suffering awards of over $250,000; (3) provide for procedural changes to speed up hearing of medical malpractice suits; (4) require prior disclosure of qualifications of experts in medical malpractice suits; and (5) limit contingent fees in medical malpractice actions. Medical Malpractice Insurance Bill Becomes Law, N.Y. State Bar Ass’n, State Bar News, July, 1985, at 3, col. 1.
10. H.R. 5400, 99th Cong., 2d Sess., 130 Cong. Rec. 2553 (1984). See Moore & O’Connell, Foreclosing Medical Malpractice Claims By Prompt Tender of Economic Loss, 44 La. L. Rev. 1267 (1984). The bill essentially provides: (1) that if a hospital, physician, or other health-care provider believes that a patient has suffered adverse results from treatment, then the hospital, physician, or health-care provider can offer to pay the net economic loss suffered by the victim (future medical and hospital care, rehabilitation, nursing care, loss of wages, and other pecuniary expenses, but not including damages for pain, suffering, disfigurement, or punitive damages), offset by collateral source payments within 180 days of the patient’s discharge, or, if the event did not occur in the course of an admission, within 180 days of the event giving rise to the possible medical malpractice claim; (2) that in exchange for the offer to pay net economic loss, the patient would be foreclosed from bringing a tort action seeking recovery for pain, suffering, mental anguish, and punitive damages (subject to exceptions for wrongful death cases and cases involving intentional medical malpractice; (3) that if the physician or hospital makes no offer to the patient within the required time, or if the patient believes that one of the exceptions applies and rejects the tender, the patient may bring a tort action as under present law; (4) that defendants who are found liable will make periodic payment of net economic losses; however, a lump-sum payment can be made by the agreement of the parties; and (5) that claimants may recover, in addition to net economic loss, reasonable expenses, including attorneys’ fees incurred in obtaining legal advice about the tender and collecting benefits. Procedurally, the bill encourages state legislatures to adopt legislation that meets the objectives of the bill. Otherwise, as of January 1, 1987, the proposal would apply to all federally funded health care in the state (Medicare, Medicaid, VA, etc).

It is important to note that the Moore-Gephart bill is not a genuine no-fault compensation plan because the bill does not provide for payment when the hospital chooses to deny settlement for economic loss. Under full no-fault plans a physician or health-care provider would be automatically responsible, regardless of fault, for any adverse outcome associated with a compensable event (e.g., hepatitis as a result of blood transfusion). See O’Connell, Elective No-Fault Liability by Contract—With or Without An Enabling Statute, 1975 U. Ill. L.F. 59-72 (1975); Havighurst & Tancredi, Medical Adversity Insurance—A No-Fault Approach to Medical Malpractice, 51 Milbank Mem. Fund Q. 125-68 (1973); Havighurst, Medical Adversity Insurance: Has Its Time Come?, Duke L.J. Symposium (1977), at 55-105; Munch, Costs and Benefits of the
dorsed the Moore-Gephardt bill in its lead editorial on February 14, 1985, by observing: "The problem is national. The costs of malpractice litigation contribute substantially to the fierce inflation of medical costs. They threaten insurers with insolvency. With state responses inadequate, the need for Federal leadership is urgent."

Predictably, lawyers have responded to the recent barrages with a staunch defense of the tort system. In a news conference on February 15, 1985, held in Detroit at the American Bar Association's midwinter meeting, ABA President John C. Shepherd rejected the AMA's proposal to limit monetary awards in medical malpractice actions and termed the AMA's assertions "exaggerated." Other examples of antireform sentiment among lawyers are readily available.

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Tort System if Viewed as a Compensation System, RAND CORP. (1977). It is unclear, however, whether no-fault systems would actually result in a real saving. See Schwartz & Komesar, Doctors, Damages and Deterrence: An Economic View of Medical Malpractice, 298 NEW ENG. J. MED. 1282 (June 8, 1978) (replacing tort system with no-fault compensation insurance scheme would not necessarily be cheaper because litigation disputes would still exist over coverage and causality and substantial amounts would have to be paid to patients who were injured, though not as a result of negligence. Additionally, no-fault coverage might abolish the deterrent effect of fault-based liability rules). Fears of increased costs under the partial no-fault plan embodied in H.R. 5400 have also been expressed by the nation's largest medical malpractice insurer, St. Paul Fire and Marine Insurance Company. A recent New York Times article reports:

St. Paul among others, is unsure that the idea [H.R. 5400] would save money. "Theoretically it would save money, because people who make mistakes and fees up would save those lawyers' fees and pain and suffering awards," says Jerry Engeleiter, St. Paul's government affairs officer. "But it's hard to tell. Doctors are very reluctant to admit errors." He brings up another fear—that for all the talk about the avalanche of medical malpractice claims, there is reason to believe that far more malpractice goes on then is ever reported. Many people, Mr. Engeleiter says, do not realize they have been harmed, or they are too close to their doctors to want to sue. A no-fault system might set off a new avalanche.


The bill has been criticized as an undue restriction on the rights of injured patients, particularly on the right to trial by jury and the traditional tort right of recovery for noneconomic losses such as pain and suffering. See infra note 143; Stiglitz & Gomez, It's [H.R. 5400] A Major Departure, 71 A.B.A.J. 39 (Jan. 1985). The possible unfairness of denying pain and suffering awards in cases of grievous injuries but small economic losses (e.g., loss of eye or limb) has caused the authors of the bill to suggest that in addition to exceptions for wrongful death and intentional tort cases, a third exception be added for cases involving serious injuries that result in little or no economic loss. Moore & O'Connell, supra, at 1282. The authors feared, however, such an exception might create "too broad a loophole for arguably sympathetic cases." Id. See also O'Connell, Offers That Can't Be Refused: Foreclosure of Personal Injury Claims by Defendant's Prompt Tender of Claimant's Net Economic Losses, 77 Nw. U.L. Rev. 589 (1983).

11. Again the Malpractice Crunch, supra note 1.


13. See Lawyers Oppose Medical Malpractice Bill, 71 A.B.A.J. 40 (Jan. 1985) (reporting that 60 percent of the nation's lawyers are opposed to H.R. 5400, sponsored by Representatives Moore and Gephardt); Medical Malpractice: Role of Lawyers, supra note 12 (quoting New York medical practitioner lawyer Charles Kramer as saying, "The A.M.A. is embarking on a massive public relations campaign to brainwash the American public. The way to solve this 'crisis' is for doctors..."
Beyond rhetoric, however, the most significant tool in the lawyer's arsenal is a constitutional attack. Indeed, even the AMA views constitutionality as "the single greatest legal weakness of nearly all reform measures."14 Seeking to stem the tide of legislative reforms, personal injury and medical malpractice plaintiffs and their attorneys have leveled a wide array of constitutional salvos against so-called "doctor's legislation."

After a brief overview of the nature of the proposed tort reforms in part I, parts II and III of this article examine the federal and state constitutional theories that injured patients have advanced to challenge laws that limit tort liability for medical malpractice. Part IV then discusses the constitutionality of specific medical malpractice limitation measures and, where appropriate, addresses the merits of the newer reform proposals of the AMA and the Moore-Gephardt bill.

State legislative reforms that alter or limit tort rights in personal injury cases, particularly in medical malpractice actions, will continue to spark state constitutional challenges. Contrary to the opinion of legal commentators in the past, constitutional objections, particularly those premised on adequate and independent state constitutional grounds, are far from "insubstantial."15 In fact, state court constitutional attacks have enjoyed increasing success. Central to this trend of judicial reversals of tort reform laws is the discovery or rediscovery of state constitutional interpretation by state court judges. In stark terms, medical malpractice remedial laws undermine a tradition that many state court judges hold dear: the personal injury suit and the plaintiff's lawyer. Because of these factors, successful personal injury tort law reform must come through federal legislation. Reliance on state legislation is very much misplaced.

I. Overview of Medical Malpractice Laws

The high cost and unavailability of medical malpractice liability insurance between 1973 and 197516 prompted every state in the Union except West

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16. For example, the Insurance Service Office, an actuarial adviser to malpractice insurers, recommended premium increases in 1974 of 70.1 percent for physicians and surgeons and 56.5 percent for hospitals. In 1975 the percentage increases recommended by ISO were 100.8 percent and 87 percent, respectively. Nat'l Academy of Sciences, Institute of Med., Beyond Malpractice: Compensation for Medical Injuries 8 nn.5-7 (1978); Redish, supra note 15, at 759 n.1.
Virginia to enact laws that substantially modify tort law principles governing medical malpractice cases. Recurrent constitutional attacks on these state laws focus on measures that:

1. limit the amount of recovery by plaintiffs or the total liability of individual health-care providers;
2. abolish the collateral source rule in medical malpractice actions;
3. permit periodic payment of damage judgments in medical malpractice actions in lieu of the traditional lump-sum award;
4. shorten the limitations period for actions against health-care providers;
5. establish mandatory pretrial review or screening panels;
6. require plaintiffs to submit a written notice of claim to health-care defendants as a precondition to filing suit;
7. permit voluntary arbitration agreements whereby claimants give up their right to bring a tort suit in favor of arbitration; and
8. place limits on the amount of attorneys' fees recoverable in medical malpractice lawsuits.

In addition to state reform laws, the American Medical Association and others have proposed federal medical malpractice legislation along the lines of state reform measures.

Both federal and state constitutions provide grounds for invalidating remedial state medical malpractice laws. A federal constitutional objection that is directed against virtually all state medical malpractice reforms is that the measure constitutes denial of equal protection of laws under the fourteenth amendment. Critics also charge a federal constitutional violation of substantive due process under the fifth amendment, applied to the states through the fourteenth amendment. Additionally, plaintiffs premise attacks by rely-

18. See infra text accompanying notes 136-168.
19. See infra text accompanying notes 169-175.
20. See infra text accompanying notes 176-184.
22. See infra text accompanying notes 194-204.
23. See infra text accompanying notes 202-205.
25. See infra text accompanying notes 228-240. These are the major legislative reforms. Others include: elimination of the \textit{ad damnum} clause; increasing a plaintiff's burden of proof; provisions relating to informed consent; providing peer review immunity; requiring that a promise to cure be in writing; permitting advance payments; creating patient compensation funds for payment of excess verdicts; providing for joint underwriting associations or risk management to handle the residual market; and eliminating the res ipsa loquitur doctrine. See generally AMA Action Plan, supra note 4; AMA Special Task Force Rep. No. 2, supra note 8, at 15; D. Lousell & H. Williams, Medical Malpractice ¶ 20.07 (Supp. 1984); Comment, An Analysis of State Legislative Responses to the Medical Malpractice Crisis, 1975 Duke L.J. 1417.
26. See supra notes 5, 10. The federal laws proposed by the AMA and Representatives Moore and Gephardt present no serious constitutional problem. See infra note 257 and infra text accompanying notes 27-46.
ing upon state constitutional guarantees (equal protection, due process, right to trial by jury, open access to courts) or prohibitions (against special legislation or legislative usurpation of the judicial function).

II. Theories of Federal Constitutional Attacks

Federal Equal Protection Analysis as Articulated by the United States Supreme Court

The fourteenth amendment prohibits a state from denying "to any person within its jurisdiction the equal protection of laws." Traditionally, the United States Supreme Court analyzed equal protection claims against the backdrop of two standards, strict scrutiny and minimum rationality. To withstand strict judicial scrutiny, a legislative classification must advance a compelling state interest by the least restrictive means available. As the Court observed in a recent case, "only rarely are statutes sustained in the face of strict scrutiny."27 And as a leading commentator has observed, strict scrutiny review is "strict" in theory but usually "fatal" in fact.28 The Court has reserved strict scrutiny for classifications based upon race, religion, nationality, alienage,29 and upon categorizations involving fundamental rights.30

By comparison, the mere rationality or rational basis test requires only that the challenged legislation rationally promote a legitimate governmental objective.31 Minnesota v. Clover Leaf Creamery Co. illustrates the Court's commitment to lenient rationality review when considering equal protection challenges to regulation of economic and commercial matters.32 Clover Leaf Creamery involved a Minnesota law that banned the retail sale of milk in plastic nonreturnable containers, but permitted retail sales in other nonreturnable containers, such as paper cartons. The law's stated purpose was to conserve resources and ease solid-waste disposal problems. The Minnesota Supreme Court accepted the legislature's justification; however, the court engaged in an independent review of the evidence and found that the discrimination against plastic nonrefillables was not rationally related to the law's objectives.33 The

33. 289 N.W.2d. 79 (Minn. 1979).
United States Supreme Court reversed, holding that the ban bore a rational relationship to the legislature’s objectives and that “a legislature ‘may implement [its] program step by step . . . adopting regulations that only partially ameliorate a perceived evil and deferring complete elimination of the evil to future regulations.’”

Justice Brennan’s majority opinion emphasized that the fact the statute would promote environmental objectives was not at issue. The equal protection clause was satisfied if the Minnesota legislature could rationally have decided that its ban might foster greater use of environmentally desirable alternatives. In short, observed the Court, the state court had “erred in substituting its judgment for that of the legislature.” While no Justice dissented from the Court’s denial of the equal protection claim, Justice Stevens dissented on the ground that state courts, unlike federal courts, were free under the Constitution to substitute their own evaluation of the legislative facts for that of the state legislature. In subsequent cases Justice Stevens has continued to articulate the view that the Supreme Court should not review state supreme court decisions when the state supreme court vindicates individual rights by invalidating state statutes on state constitutional grounds. Justice Hans Linde of the Oregon Supreme Court has similarly articulated the concept that state constitutional challenges to state legislation should always be addressed and resolved by state courts before they address federal constitutional challenges.

A variety of Supreme Court decisions since Clover Leaf Creamery have considered a host of issues under rationality review. The reasoning and result in recent cases indicate the continued vitality of extremely deferential rationality review. Exxon Corp. v. Eagerton illustrates the Court’s current disposition to reject challenges under the rationality standard of equal protection. In denying an equal protection attack on an Alabama severance tax, Justice Marshall, writing for a unanimous Court, referred to the Court’s “lenient standard of rationality” and observed, “under that standard a statute will

34. 449 U.S. at 466.
35. Id.
36. Id. at 469.
37. Id. at 478-82 (Stevens, J., dissenting).
40. See G. GUNTHER, CONSTITUTIONAL LAW 159-74 (10th ed. Supp. 1984) (recurring issues in Supreme Court cases involving rationality review between 1980 and 1984 include: allocating burden of presenting data on the validity of challenged classification; whether the legislature’s actual or articulated purpose matters as opposed to purposes suggested by counsel or hypothesized by courts; whether rationality review has any bite).
be sustained if the legislature could have reasonably concluded that the challenged classification would promote a legitimate state purpose. 42

Recent Supreme Court cases have also signaled the development of an intermediate level of review that requires a more rigorous standard of judicial scrutiny than under the traditional rational basis test. The Court has applied a so-called "substantial relationship test" in cases involving gender-based classifications and categorizations premised on legitimacy. 43 Under this test, a classification is valid if it is reasonable and premised on "some ground of difference having a fair and substantial relationship to the object of the legislation, so that all persons similarly circumstanced [are] treated alike." 44 Moreover, the party seeking to uphold the statute must demonstrate that the classification serves "important government objectives." 45 As one commentator has observed, this test is "no more than an ad hoc evaluation of the worth of each controverted statute." 46

**Equal Protection Challenge Analysis as Applied by State Courts**

**Strict Scrutiny.** In an effort to trigger strict judicial scrutiny of state statutes that discriminate against victims of medical malpractice, many plaintiffs have sought to characterize the right to recover damages in a personal injury tort action as a "fundamental right" akin to the right of privacy or the right to vote. 47 Courts for the most part have viewed restrictions on personal injury tort rights as a valid exercise of economic or social welfare regulation and have refused to recognize the right to sue for personal injuries as a fundamental right. 48

42. *Id.* at 196. See also Minnesota State Bd. for Community Colleges v. Knight, 104 S.Ct. 1058, 1069 (1984) (rejecting equal protection challenge, under the rational basis standard, against a Minnesota law that excluded community college faculty members from "meet and confer" sessions between employers and designated representatives); G.D. Searle & Co. v. Cohn, 455 U.S. 404 (1982) (rejecting equal protection claim). Accord Schweiker v. Hogan, 457 U.S. 221 (1981) (in a 5-4 decision that rejected an equal protection challenge to discriminatory payments under the Social Security Income program, the dissenters stressed the need to identify "discernible" or "identifiable" legislative purposes); U.S. Railroad Retirement Bd. v. Fritz, 449 U.S. 166 (1980). But see Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982) (a case in which a majority of the Court agreed that a state law requiring a "fact-finding conference" within 120 days of filing an unfair employment practices complaint or else the Illinois Fair Employment Practices Commission would lose jurisdiction and leave claimants without a remedy was irrational).

43. To date the Court has applied this intermediate level of review only to gender-based classifications, see *e.g.*, Mississippi Univ. for Women v. Hogan, 458 U.S. 718 (1982); Craig v. Boren, 429 U.S. 190 (1976); Reed v. Reed, 404 U.S. 71 (1971); and to those categorizations based upon legitimacy, see *e.g.*, Trimble v. Gordon, 430 U.S. 762 (1977).


47. See, *e.g.*, Witherspoon, *supra* note 15, at 462 (strict scrutiny should apply to review of medical malpractice limitation statutes because the right to sue for personal injuries properly involves fundamental rights).

Recent cases in Arizona and Montana, however, have treated the right to recover damages for bodily injury as a fundamental right, thereby requiring strict scrutiny equal protection review. In *White v. State*, the Montana Supreme Court considered a statute that limited recovery in personal injury suits against the state, a county, or a municipality by disallowing plaintiffs (1) noneconomic damages, or (2) economic damages of more than $300,000 for each claimant and $1 million for each occurrence. The Montana court held the statute unconstitutional as violative of the equal protection clause of the federal and state constitutions. The Montana court based its holding on the ground that the right to bring a civil action for personal injuries was a fundamental right, and the state had failed to demonstrate a compelling interest to justify the classification.

The result in *White v. State* is at odds with United States Supreme Court precedents because under federal equal protection analysis fundamental rights have been limited to those rights found in the Constitution. Moreover, characterizing personal injury tort rights as "fundamental" ignores the long line of federal decisions upholding economic and social legislation under rationality review principles, particularly those cases that have upheld worker's compensation laws. It must be recognized, however, that state courts may interpret their constitutions to provide different and more extensive rights than those provided by the Federal Constitution. The greater willingness on the part of state courts to recognize new fundamental rights and the corresponding reluctance to afford presumptive validity to state legislation or regulations, although at variance with federal precedents, is entirely consistent with the judicial and political function of state courts.

Additionally, a number of state constitutions contain provisions that explicitly bar imposing limits on the amount of damages recoverable in personal injury actions. In these states, state legislation limiting damages infringes fundamental rights under strict scrutiny analysis. The latest holdings


50. 661 P.2d 1272 (Mont. 1983).

51. Id. at 1275. Interestingly, the Montana legislature subsequently restored the limitation on governmental liability. See Simmons v. Montana, 670 P.2d 1372 (Mont. 1983).

52. See supra note 30.

53. See supra text accompanying notes 31-42; infra note 79.


55. See infra text accompanying and notes 76-77.

56. See Redish, supra note 15; at 790 n.191 (e.g., Arizona, Kentucky, and Oklahoma have constitutional bans on personal injury damages limits).

of the Arizona Supreme Court illustrate how a state constitutional provision
proscribing abrogation or limitation of personal injury damages can produce
strict scrutiny review.

In Kenyon v. Hammer, the court examined the constitutionality of
Arizona's medical malpractice statute of limitations, which required filing all
suits against health-care providers within three years of the date of the injury. The
court struck down the statute as violative of Arizona's constitutional
guarantee of equal protection. In reaching this result the court reasoned that
the right to recover damages for bodily injury was a fundamental right
guaranteed by several provisions of the Arizona constitution, most notably
a section providing that "the right of action to recover personal injuries shall
never be abrogated, and the amount recovered shall not be subject to any
statutory limitation." Under strict scrutiny review the court found that no
compelling interest supported a special limitations provision for medical
malpractice cases, particularly since 95 percent or more of all medical malprac-
tice claims were reported within three years of the date of the negligent act
and medical malpractice insurance premiums and health-care costs had not
decreased but had actually increased since the legislation was enacted.

Interestingly, Justice Feldman's majority opinion expressly stated that the de-
cision rested entirely on state constitutional grounds and that the citation of
federal authorities was merely for the purpose of guidance. In a subsequent
decision the Arizona Supreme Court held that a separate tolling provision
for infants injured by health-care providers violated the fundamental
constitutional right to recover damages for personal injuries guaranteed by
the Arizona constitution.

Intermediate Scrutiny: The Substantial Relationship Test. While federal
courts have restricted intermediate scrutiny to cases involving gender and
legitimacy classifications, several state courts have chosen to apply the substan-

59. The case involved a physician's liability for the alleged negligence of a nurse in incorrectly
recording a pregnant woman's Rh factor during a 1971-72 pregnancy. The nurse erroneously
marked the patient's chart to indicate an Rh-positive blood type. Following the birth of a healthy
first child in 1972, the woman developed an immune response to the Rh positive blood cells
of her first child. Unaware of the Rh-negative condition, in 1978 the couple produced a second
child who was stillborn as a result of the destruction of its blood cells by the mother's Rh an-
tibodies. Defendants maintained that the infant's wrongful death claim and the wife's injury
claim were barred by limitations because the suit was not filed until 1979. Defendants argued
the statute had expired either in 1974 (three years after the date the nurse incorrectly entered
an Rh positive reading on the chart) or in 1975 (three years from the date the doctor failed
to administer an immunosuppressent drug, RhOgAM, which would have prevented the immune
response that proved fatal to the second child). Defendant's argument produced the absurd result
that the medical malpractice limitations statute barred the infant's wrongful death before the
baby was conceived and barred the mother's claim for personal injuries before she could possibly
have discovered that she had been injured.

60. ARIZ. CONST. art. 18, § 6.
tial relationship test to statutes that affect the right to litigate a personal injury claim. Conceptually, these decisions buttress Justice Stevens' views that a state constitution's equal protection clause may be "significantly broader" than the federal provision and that state supreme courts should be able to vindicate individual rights by striking down state laws on state constitutional grounds.\textsuperscript{65} \textit{Carson v. Maurer},\textsuperscript{66} a New Hampshire Supreme Court case, is illustrative. Because of the importance of the right involved (recovery for personal injuries), the court subjected the legislative restrictions to a more rigorous judicial scrutiny than allowed under the rational basis test and required that the classifications created by the medical malpractice statute require a fair and substantial relation to the object of the legislation. The court concluded that state courts, in interpreting their constitutions, "are not confined to federal constitutional standards and are free to grant individuals more rights" than permitted by the Federal Constitution.\textsuperscript{67} Courts in Idaho,\textsuperscript{68} North Dakota,\textsuperscript{69} and Indiana\textsuperscript{70} have also held that classifications created by malpractice legislation are to be measured by the substantial relationship test.

Using the substantial relationship test to assess the constitutionality of legislation that alters or diminishes personal injury tort rights seems similar to the discredited era of substantive due process analysis and the infamous case of \textit{Lochner v. New York}.\textsuperscript{71} Indeed, in \textit{Arneson v. Olson},\textsuperscript{72} the North Dakota Supreme Court openly admitted that "North Dakota has never renounced substantive due process as a constitutional standard," even though the federal courts renounced the doctrine after the 1937 decision in \textit{West Coast Hotel v. Parrish}.\textsuperscript{73} The North Dakota court went farther and stated that the substan-

\begin{footnotesize}
66. 120 N.H. 925, 424 A.2d 825 (1980).
67. \textit{Id.} at 932, 424 A.2d at 830-31 (citations omitted).
69. Arneson v. Olson, 270 N.W.2d 125, 133 (N.D. 1978) (North Dakota Medical Malpractice Act held unconstitutional under substantial relationship test, which court compared to substantive due process).
71. 198 U.S. 45 (1905) (striking down a New York labor law that prohibited bakery employees from working more than 60 hours per week).
72. 270 N.W.2d 125, 132 (N.D. 1978).
73. 300 U.S. 379 (1937) (upholding Washington's minimum wage law to women).
\end{footnotesize}
tial relationship test that it chose to apply to the legislature’s malpractice law “closely approximates the substantive due process test.”

Employing intermediate scrutiny analysis to medical malpractice remedial measures (or to other laws proscribing tort rights) does permit courts to sit as superlegislatures and seems to run counter to the history and precedent of the federal court’s deferential rationality review of economic and social legislation. It is, however, important to note the argument made by Justices Stevens and Linde that there is a distinction between federal nullification of state legislation and state court judicial review of state statutes. State court judges possess the political power to declare laws unconstitutional, whereas federal courts are restrained by concepts of federalism from overturning state laws on constitutional grounds. There are several reasons for the distinctive judicial review powers of state courts. Most notable among these are:

1. state courts occupy a different institutional position in the state court system than does the Supreme Court in the federal system;
2. state courts routinely engage in fashioning general common law—a power denied to federal courts since Erie Railroad v. Tompkins;
3. state constitutional rights may differ qualitatively from the federal constitutional rights;
4. federal courts are obliged to pay due deference to state laws out of concerns for federalism; and
5. unlike federal courts, state courts are not courts of limited jurisdiction and are often invested with broad general jurisdictional powers to adjudicate cases.

Nevertheless, state courts are not free to arbitrarily second-guess legislative or executive actions; judicial deference continues to serve as the polestar that guides state court review of state statutes, as it has in the tort field since the worker’s compensation decisions. The substantial relationship test, however, allows state courts to exercise greater latitude and flexibility when charting the course of judicial review.

Rationality Review. The majority of state courts continue to review equal protection attacks against medical malpractice laws under the traditional rational basis standard. As a result, most challenges have been unsucces-

74. 270 N.W.2d at 133.
75. See Note, supra note 46.
76. See supra text accompanying notes 37-38.
77. See Williams, supra note 54, at 390-91, 397-402.
78. Id.
79. Following passage of the worker’s compensation laws, many cases challenged the constitutionality of the act on the ground that they denied equal protection of laws. State courts and the United States Supreme Court upheld the statutes as valid exercises of the police power. See, e.g., New York Central R.R. v. White, 243 U.S. 188 (1917); Annot., 6 A.L.R. 1562 (1920).
ful.\textsuperscript{81} Courts usually uphold malpractice remedial measures as rationally serving a valid state purpose, for example, reducing health and insurance costs or assuring adequate health-care delivery.\textsuperscript{82} In several recent cases, however, state courts have struck down malpractice reforms on the basis that the legislature’s classification was irrational and bore no reasonable relationship to a legitimate governmental purpose.\textsuperscript{83} In \textit{Boucher v. Sayeed},\textsuperscript{84} for example, the Rhode Island


82. State \textit{ex rel.} Strykowski \textit{v.} Wilkie, 81 Wis. 2d 491, 261 N.W.2d 434, 442-43 (1978). The reasoning of the Wisconsin Supreme Court is typical:

\begin{quote}
This court is not concerned with the wisdom or correctness of the legislative determination, however; its task is to determine whether there was a reasonable basis upon which the legislature might have acted. . . .

We believe there is a rational basis upon which the legislature could and did act when enacting Chapter 655.

Some of its reasons are suggested by the findings set forth in sec. 1, ch. 37, Laws of 1975. The legislature cited a sudden increase in the number of malpractice suits, in the size of the awards, and in malpractice insurance premiums, and identified several impending dangers: increased health care costs, the prescription of elaborate "defensive" medical procedures, the unavailability of certain hazardous services and the possibility that physicians would curtail their practices. In addition, resolution of a malpractice claim under the traditional tort litigation process has been found to require an average of nineteen months. A patient's compensation panel, on the other hand, must render a decision within 150 days after the submission of controversy is filed. Sec. 655.04(4)(a). Stats.

The statute satisfies the . . . criteria of reasonableness set forth in many of this court's decisions. Medical malpractice actions are substantially distinct from other tort actions. The classification is plainly germane to the act's purposes. The law applies to all victims of health care providers as described therein. The legislature declares that the circumstances surrounding medical malpractice litigation and insurance required the enactment of the legislation.


84. 459 A.2d 87 (R.I. 1983)
Supreme Court declared that the preliminary hearing procedures mandated by a 1981 statute were unconstitutional under rationality review because there was no medical malpractice crisis in 1981 and thus no rational basis to support the legislation.85

Such decisions openly bring the public policy debate over whether a malpractice litigation or insurance crisis in fact exists into the courts for ad hoc review. The result reached in Boucher is very difficult to reconcile with traditional federal rationality review principles that afford presumptive validity to economic and social regulations and restrict the court's ability to independently evaluate legislative objectives. However, if one recognizes the special nature of state courts and the resurgence of state court constitutional jurisprudence, state court cases invalidating medical malpractice laws under rationality review should come as no surprise.

**Substantive Due Process**

Constitutional guarantees of substantive due process ensure that statutes or other official governmental actions will not deprive any citizen of "life, liberty, or property without due process of law." Laws that diminish tort rights are subject to challenge as constituting a "taking" of the injured patient's property, the right to sue, without due process of law.87 The Supreme Court distinguishes due process from equal protection by observing that "[d]ue process emphasizes fairness between the state and the individual . . ." whereas "[e]qual protection . . . emphasizes disparity in treatment by a State between classes of individuals whose situations are arguably indistinguishable."88 To decide whether a state statute or regulation is fair to both individuals and the state, the United States Supreme Court engages in a standard of review that is roughly equivalent to the two-tiered standard employed in equal protection cases. Economic and social regulations are presumptively constitutional and will be sustained if not wholly arbitrary or capricious.89 For cases involving fundamental rights or restrictions on political processes, however, the state must prove a compelling reason to justify the legislation.90

The contention that suing for personal injury damages is a fundamental right comparable to such rights as privacy has fared no better in state courts

85. Id. at 92-93.
86. U.S. CONST. amend V, amend. XIV.
under a due process theory than under an equal protection claim. As in the case of equal protection attacks, a preponderance of state and federal courts have rejected both due process and equal protection claims by engaging in rationality review similar to that employed in equal protection cases.

Procedural Due Process: Right of Access to Courts

In Boddie v. Connecticut, the Supreme Court considered a case brought by indigent welfare recipients who charged that state filing and service of process fees for divorce actions restricted the right of access to courts in violation of the due process clause of the fourteenth amendment. In finding for the indigents, Justice Harlan's majority opinion declared that, absent a countervailing state interest of overriding significance, due process required that "persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard." The Court placed significant emphasis on two aspects of the case: (1) the marital relationship occupied a "basic position" in society's hierarchy of values, and (2) a state court lawsuit constituted the only means for legally dissolving the marital relationship.

Justice Harlan noted that while the Court had seldom been asked to consider access to courts as an element of procedural due process, this was because resort to the courts is not usually the only available and legitimate means for resolving private disputes.

In post-Boddie decisions, the Court further narrowed its definition of the procedural due process right of access to courts. In United States v. Kras, the Court distinguished the filing fee requirement in bankruptcy cases from the divorce fees in Boddie by noting that Boddie involved the "fundamental" marital relationship, while the interest in discharge in bankruptcy did not rise to "the same unconstitutional level." Similarly, in Ortwein v. Schwab, the Court held that Oregon's twenty-five dollar filing fee for judicial review of


92. See, e.g., cases cited supra note 91.


94. Id. at 377.

95. Id. at 374.

96. Id. at 375. The Court took care to limit the reach of its holding.


98. Id. at 445. The Court also noted that Boddie had stressed the exclusive nature of the court remedy of obtaining a divorce, while governmental control over debts was not nearly so exclusive. Id.

administrative denial of welfare benefits, like the bankruptcy discharge in *Kras*, had "far less constitutional significance than the interest of the *Boddie* appellants." In short, under federal standards, a procedural due process right of access to courts exists only when fundamental interests or rights are present, as opposed to economic or social welfare benefits, and when the state has exclusive control over the "adjustment of the legal relationships involved."  

In the context of medical malpractice laws, statutes that alter or abrogate the right to bring a personal injury suit should not violate federal procedural due process standards by denying a right of access to courts. First, as noted above, courts have viewed the right to recover money damages in a medical malpractice tort action as an economic or social welfare benefit rather than a fundamental right, such as the right to vote, travel, or marry. Although many cases recognize that an individual has a fundamental right to be free from bodily invasions at the hands of the state absent compelling state interests, these decisions do not stand as authority for the proposition that obtaining an economic benefit from an injury inflicted by a tortfeasor is also a fundamental right, as some have contended. Second, even if tort rights could somehow rise to a fundamental or inalienable level, most medical malpractice reform laws do not deprive victims of their sole means of redress. Other than shorter limitations periods and, arguably, mandatory pretrial notice or screening panel requirements, medical malpractice reform measures do not deny litigants an opportunity to vindicate their rights or to be heard. The few cases that have considered whether pretrial screening laws violate federal procedural due process standards by depriving litigants of full access to courts have found no violation.

III. *Theories of State Constitutional Attacks*

State constitutional provisions provide a significant avenue for constitutional challenges to medical malpractice laws. State constitutions are a cache of seldom-constituted rights and powers differing greatly from those set forth in the Federal Constitution. As Bernard Bailyn has observed, state constitutions reflect the "contagion of liberty" that expanded upon the rights

100. *Id.* at 659. The per curiam opinion in *Schwab* held that welfare payments fell within the area of economics and social welfare and did not involve a suspect classification such as race, nationality, or alienage. *Id.* at 660.  
102. See *supra* text accompanying note 48.  
106. See *Williams*, *supra* note 54, at 401.
won in the American Revolution and set forth in the Federal Constitution. The new-found zeal of state courts in interpreting state constitutional rights has produced a raft of state constitutional objections against medical malpractice limitations, including:

(1) equal protection and due process guarantees contained in state constitutions (theories and analysis discussed above); 

(2) prohibitions against special legislation, 

(3) the right to trial by jury, 

(4) right of access to courts, and 

(5) usurpation of the judicial function.

Right to Jury Trial. Almost every state constitution guarantees the right to trial by jury in civil cases. Malpractice laws permitting arbitration, or mandating pretrial review by screening panels, or requiring plaintiffs to submit written notice of claim to health-care providers prior to suit have been attacked as violative of the right to trial by jury. For example, in Mattos v. Thompson, the Pennsylvania Supreme Court declared the screening panel provision of Pennsylvania's malpractice act unconstitutional on the basis that the panels resulted in oppressive delay and impermissibly infringed upon the state constitutional right to trial by jury. Courts in Illinois, North Dakota, and Ohio have reached similar results. However, most courts that have considered challenges to screening panels, voluntary arbitration, notice statutes, and other malpractice remedial laws on the basis of the right to jury trial, have found no constitutional violation.

Right of Access to Courts. Closely tied to the issue of due process is a provision contained in many state constitutions that grants a right of open

110. The seventh amendment right to trial by jury has not been incorporated into the due process clause of the fourteenth amendment; therefore, the constitutional right to a jury in a civil case in a state court must arise from the state constitution. Minneapolis & St. L. R.R. v. Bombolis 241 U.S. 211, 217 (1916).
111. 491 Pa. 385, 421 A.2d 190 (1980).
112. Id. at 391, 421 A.2d at 196.
113. See Wright v. Central Du Page Hosp. Ass'n, 63 Ill. 2d 313, 347 N.E.2d 736, 740-41 (1976) (review panel procedure violates right to jury trial); Arneson v. Olson, 270 N.W.2d 125, 137 (N.D. 1978) (provision whereby claimant who receives $100,000 policy limit settlement from insurer must then sue patient trust fund in a nonjury trial held unconstitutional denial of state constitutional right to trial by jury); Simon v. Saint Elizabeth Med. Ctr., 3 Ohio Op. 3d 164, 355 N.E.2d 903 (Ct. Com. Pl. 1976) (admissibility of review panel findings at subsequent trial violates right to jury trial).
114. "[A] substantial majority of state and federal courts addressing the constitutionality of similar [medical malpractice] statutes have found no infringement of constitutional rights, and have specifically rejected arguments that . . . arbitration boards or panels in medical malpractice cases [violate] an individual's right to a fair and impartial jury." Beatty v. Akron City Hosp., 67 Ohio St. 2d 483, 424 N.E.2d 586, 590-91 (1981) (citing numerous cases).
access to courts. Several state court decisions have struck down medical malpractice reform measures (pretrial screening and shorter limitations periods) on right of access grounds; but, a majority of cases have found the remedial restrictions reasonable in light of legislative goals to reduce insurance premiums and health-care costs.

Analytically, the decisions that find no denial of access to courts have tended to employ the traditional two-tier test applied in due process and equal protection cases. A few federal diversity cases have relied upon *Ortwein v. Schwab* and *United States v. Kras* for the proposition that if a claim does not involve a fundamental right, access to courts may be hindered if supported by a rational basis. Interestingly, cases employing a state constitutional right of access theory to invalidate pretrial screening or limitations law have ignored jurisprudence concerning the federal right of access to courts and have relied solely on state authorities. *Kluger v. White,* a leading Florida Supreme Court case, illustrates one state's novel approach to suits

115. *E.g.*, art. I § 22 of the Louisiana constitution provides: "All courts shall be open, and every person shall have an adequate remedy by due process of law and justice, administered without denial, partiality, or unreasonable delay, for injury to him in his person, property, reputation or other rights." Thirty-seven state constitutions have provisions with some form of this language. See McGovern, *The Variety, Policy and Constitutionality of Product Liability Statutes of Repose*, 30 Am. U.L. Rev. 579, 615-18 (1981).

116. The Supreme Court of Missouri declared Missouri's mediation plan unconstitutional on the ground that it violated a litigant's right to seek immediate redress in the courts. State *ex rel.* Cardinal Glennon Memorial Hosp. for Children *v. Gaertner*, 583 S.W.2d 107 (Mo. 1979). In *Nelson v. Krusen*, 678 S.W.2d 918 (Tex. 1984), the Texas Supreme Court declared a statute of limitations unconstitutional on the basis of the open courts provision of the Texas constitution insofar as it cut off a cause of action before the injury could have been discovered. Similarly, in *Neagle v. Nelson*, 685 S.W.2d 11 (Tex. 1985), the court struck down a two-year medical malpractice limitations statute (running from the date of the negligent act) as violative of the Texas constitution's open courts guarantee. The court had previously declared that a statute that provided for a shortened limitations period for minors in medical malpractice actions violated the due process guarantee set forth in the open courts provision of the Texas constitution. *Sax v. Votteler*, 648 S.W.2d 661 (Tex. 1983). Cf. *Aldana v. Holub*, 381 So. 2d 231 (Fla. 1980) (screening panel statute, in practice, violated due process; in dicta court noted that to lengthen statutory period for panel process would result in violation of right of access to courts), 381 So. 2d at 238; *Mattos v. Thompson*, 491 Pa. 385, 421 A.2d 190 (1980) (pretrial arbitration panels result in oppressive delay; court, in dicta, mentioned possible violation of open courts provision), *id.* 421 A. 2d at 197.


118. *See generally* cases cited *supra* in note 117.


120. 409 U.S. 434 (1973).

121. *See supra* cases at note 105.

122. *See* state court cases cited *supra* in note 117.

123. 281 So. 2d 1 (Fla. 1973).
claiming a deprivation of a state constitutional right of access to courts. In *Kluger*, the court struck down the portion of the Florida no-fault insurance statute that barred suits for property damage in excess of $500 as violative of the access to courts clause of the Florida constitution. The basis of the court’s decision was that where court access had been provided by common law or statute, the legislature could not “abolish such a right without providing a reasonable alternative to protect the rights of the people of the State to redress for injuries,” except on a showing of “overpowering public necessity” and no reasonable alternative.124

More recently, a Florida appellate court recognized a child’s cause of action for loss of parental society (love and companionship) stemming from injuries to a parent on the ground, *inter alia*, that the denial of the child’s cause of action was violative of Florida’s constitutional guarantee of open access to courts.125 In short, while most states have interpreted the claim of right of access to courts as essentially a due process objection subject to minimal rationality review,126 there is the potential of a more vigorous application of the doctrine to malpractice laws.127

**Usurpation of Judicial Function.** Most state constitutions vest all judicial functions exclusively in the courts.128 Mediation plans and other procedural revisions mandated by malpractice laws have been targeted on the basis that judicial power has been improperly delegated to a coordinate branch of government. Attacks on pretrial screening or mediation panels have by and large failed.129 In a few cases, however, courts have relied upon usurpation of judicial functions as a justification for invalidating statutes allowing periodic payment of judgments130 and prohibiting the stating of dollar figures in the *ad damnum* portion of the plaintiff’s complaint.131

**Special Legislation.** Many state constitutions contain a prohibition against “special legislation when a general law could be applied.”132 In *Wright v.*

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124. *Id.* at 4. See also Sax v. Votteler, 648 S.W.2d 661, 666-67 (Tex. 1983).
128. Article 4, § 1 of the Maryland constitution is typical: “The judicial power of this State is vested in a Court of Appeals, and such intermediate courts of appeal as [shall be provided] by law *...* and a District Court.”
132. *E.g.*, the Illinois constitution provides: “The General Assembly shall pass no special or
Central Du Page Hospital Association,\textsuperscript{133} the Illinois Supreme Court struck down Illinois' $500,000 limit in malpractice actions on the ground, inter alia, that it violated the special legislation provision.\textsuperscript{134} In reaching this result the court did not explain how its analysis of the special legislation clause differed from traditional equal protection principles. Although in general the standards for interpreting special legislation prohibitions closely mirror the two-tier approach used for equal protection claims, standards may vary from state to state depending upon the particular language of individual state constitutional special legislation provisions.\textsuperscript{135}

IV. Constitutionality of Specific Medical Malpractice Remedial Provisions

Limitations on Liability

A number of states have enacted laws that place a maximum dollar limitation on the damages recoverable in medical malpractice actions.\textsuperscript{136} Some laws apply to all components of loss, while others limit losses for noneconomic damages only.\textsuperscript{137} In addition, states have enacted measures that limit the liability of sovereign entities (state, counties, and municipalities) in personal injury actions.\textsuperscript{138} A 1982 study found that states with damage caps had an average drop of 19 percent in the amount of awards within two years of enactment.\textsuperscript{139} A study of the New York State Medical Society reports that if a $100,000 cap on noneconomic damages were instituted, a 25 percent savings on medical liability costs could be realized.\textsuperscript{140} The recent Action Plan announced by the AMA Special Task Force on Professional Liability and Insurance calls for limiting noneconomic damages (pain, suffering, mental anguish, and loss of consortium) on the grounds that such damages are "a

\textsuperscript{133} 63 Ill. 2d 313, 347 N.E.2d 736 (1976).
\textsuperscript{134} Id. at 329-30, 347 N.E.2d at 743.
\textsuperscript{135} See Redish, supra note 15, at 783-84.
\textsuperscript{137} See sources supra note 136.
\textsuperscript{138} See, e.g., supra text accompanying note 52. Cf. Ryszkiewicz v. City of New Britain, 193 Conn. 589, 479 A.2d 793 (1984) (concluding that city charter which limited municipality's liability to $1,000 for damages caused by ice or snow on city's highways violated equal protection under rational basis test.)
\textsuperscript{139} Danzon, The Frequency and Severity of Medical Malpractice Claims, RAND CORP., INST. FOR CIVIL JUSTICE, R-2870-ICJ-1982, Santa Monica, Cal.
\textsuperscript{140} AMA Action Plan, supra note 4, at 5.
primary cause of grossly distorted awards.\textsuperscript{141} The Moore-Gephardt Alternative Medical Liability Act proposes to abolish all noneconomic damages in medical malpractice actions.\textsuperscript{142} American Bar Association President John Shepherd and 60 percent of the nation's lawyers, according to an American Bar Association poll, oppose such limits.\textsuperscript{143}

Putting aside for a moment the constitutional issues raised by the debate over noneconomic damages in medical malpractice cases, and turning to the substantive merits of proposals to abrogate pain and suffering awards, one is struck by the peculiar timing of the noneconomic damages tort reform effort. While the AMA and others denounce a tort system that allows recovery of huge sums for "intangibles" such as pain and suffering, conversely, courts throughout the nation are rapidly expanding the right to recover damages for psychic injuries, even when there is no physical injury.\textsuperscript{144}

To place this incongruity in context, one must recognize that tort law has long recognized the right to recover mental suffering in physical injury cases,\textsuperscript{145} with damages for emotional distress frequently comprising the principal damage element in many tort actions.\textsuperscript{146} To obtain damages for mental suffering in a negligence case, however, the law traditionally required plaintiffs to demonstrate that actual physical harm either preceded or simultaneously accompanied the psychic injury.\textsuperscript{147} In recent years, encouraged by decisions of the Supreme Court of California,\textsuperscript{148} an increasing number of courts have allowed injured victims and bystanders to recover damages for emotional distress if emotional injury was reasonably foreseeable.\textsuperscript{149} Expanded liability for psychic

\textsuperscript{141} Id. at 19.

\textsuperscript{142} See supra note 10.

\textsuperscript{143} Attorneys Go to Mat With MD's, supra note 12 ("I doubt that any American, including health care providers and their families, would be willing to accept a fixed amount for the loss of a limb or an eye. Or in even worse circumstances, the death of a loved one. Should a victim's pain and suffering not be taken into account?"); Lawyers Oppose Medical Malpractice Bill, supra note 13 (60 percent of those lawyers surveyed opposed the Moore-Gephardt Bill.)


\textsuperscript{145} W. PROSSER & P. KEETON, PROSSER AND KEETON ON TORTS 56-57 (5th ed. 1984).


\textsuperscript{147} PROSSER & KEETON, supra note 145, at 361-64.


\textsuperscript{149} See supra note 144.
injury has not been limited to cases involving negligent infliction of emotional distress. Mental suffering damages have been quite significant in cases involving loss of society or companionship (of a spouse, child, or parent); wrongful death and survival actions; future risks of illnesses; mental trauma as a consequence of outrageous conduct; worker’s compensation; invasion of privacy; deprivation of constitutional rights; and libel and slander. Simply put, the movement to deny or seriously limit mental suffering awards in medical malpractice actions collides with a growing legal and medical trend toward greater recognition of psychic injuries.

Returning to the constitutional questions, ceiling on awards have been attacked as violating federal and state constitutional guarantees to equal protection, due process, and trial by jury. As the AMA Special Task Force reports, “Liability limits generally have been extremely vulnerable to constitutional challenges.” State constitutional bans against special legislation have also been urged. Courts in California, Louisiana, Indiana, Nebraska, and Wisconsin have upheld medical malpractice damages limitations against constitutional challenges. However, state courts in Florida,


151. See sources cited supra note 144. Medical recognition of psychic injuries and disorders has gained new momentum with the American Psychiatric Association’s publication of the Diagnostic and Statistical Manual of Mental Disorders (3d ed. 1980). See Smith, supra note 144. In many cases awarding significant damages for psychic injury, testimony by psychiatrists provides critical evidence. Id.; Silvain, Psychic Injury: Overview (paper presented at American Bar Ass’n, Prof. Educ. CLE Prog., The Litigation of a Psychic Injury Case, Boston, Ma., May 21-22 (1984)). See also Teret, supra note 144.

152. AMA SPECIAL TASK FORCE REP. No. 2, supra note 8, at 19.

153. See supra note 16.


157. Prendergast v. Nelson, 199 Neb. 97, 256 N.W.2d 657 (1977) (three-justice plurality expressed the view that the $500,000 limit on damages was not unconstitutional).

158. State ex rel. Strykowski v. Wilkie, 81 Wis. 2d 1, 256 N.W.2d 343 (1978).

159. Florida Med. Ctr., Inc. v. Von Stetina, 436 So. 2d 1022 (Fla. Dist. Ct. App. 1983) (former statutory provision limiting liability of health-care provider to $100,000 per claim and limiting payment of award by state compensation fund held violative of due process and equal protection
Texas, Idaho, New Hampshire, North Dakota, Ohio, and Illinois have declared such limitation in malpractice suits unconstitutional. As noted earlier, the Montana Supreme Court invalidated on equal protection grounds a $300,000 limit that applied to all personal injury suits against the state.

This division of authority confirms that state courts are exercising their judicial and political prerogative of finding state constitutional violations of state statutes in order to vindicate individual rights.

On the federal front, there is strong precedent for the constitutionality of federal liability limitations. Duke Power Co. v. Carolina Environmental Study Group, Inc., illustrates the circumspect nature of federal judicial review of damage limitations. The Supreme Court upheld a dollar limit on the liability of licensed private companies and the government due to a single nuclear accident because the limit bore a rational relationship to Congress' desire to encourage production of electricity by nuclear power. In short, under the federal constitutional standard, damage caps in medical malpractice actions would almost certainly pass constitutional muster under existing equal protection and due process theories. Unless a federal court dramatically departed from precedent and recognized the right to recover tort damages in a personal injury suit as a "fundamental right," damage limitations would be upheld.

Abolition of the Collateral Source Rule

The collateral source rule is a common law doctrine that prohibits a defen-
dant in a tort suit from introducing evidence that the plaintiff has received benefits or other sources of compensation from third parties (e.g., private health or disability insurance, worker's compensation, or Social Security disability payments). Critics term the rule obsolete and unfair. The AMA's Action Plan calls for an elimination of the rule in favor of a mandatory offset of the collateral source income, provided that amounts spent by the plaintiff to obtain the additional compensation insurance premiums would be offset from any deduction. Proponents, however, argue that the rule prevents confusion in jury awards and that a plaintiff, not a defendant, deserves the benefits resulting from multiple compensation. In an attempt to reduce over-compensation for losses, some states have passed laws that abolish the application of the collateral source rule in medical malpractice cases by allowing or mandating offsetting of compensation from collateral sources. As in the case of damage ceilings, state courts have utilized equal protection and due process to invalidate legislative modification of the collateral source rule for medical malpractice actions. Other courts, however, have upheld abolition of the rule under rationality review.

Periodic Payment of Damages

At common law, a plaintiff who suffered physical injury at the hands of a tortfeasor was traditionally compensated for both past and future damages through a lump-sum judgment, payable at the conclusion of the trial. In recent years, many states have enacted provisions authorizing the periodic payment of damages in a variety of tort fields, including medical malpractice.

171. AMA Action Plan, supra note 4, at 6.
176. 2 F. HARPER & F. JAMES, TORTS § 25.2 (1956).
178. States that have enacted laws providing for periodic payment of damages include Alabama, Alaska, Arkansas, California, Delaware, Florida, Illinois, Kansas, Maryland, Michigan, New Hampshire, New Mexico, North Dakota, Oregon, South Carolina, Washington, and Wisconsin.
Periodic payment procedures can benefit both plaintiffs and defendants by assuring that when future expenses are incurred there will be funds to pay future medical expenses or earning losses. The AMA reports that NORCAL Mutual Insurance Company, a Northern California physician-owned company, attributed a $2 million savings to California's periodic payment provision.

Courts in New Hampshire and Florida have declared medical malpractice periodic payment provisions unconstitutional on equal protection grounds. In a significant recent case, however, the California Supreme Court upheld California's periodic payment statute for medical malpractice cases. The court rejected both due process and equal protection claims, finding that the statute reasonably promoted legitimate state ends. Also, in an earlier case the Wisconsin Supreme Court validated its medical malpractice periodic payment law.

Shorter Limitations Periods

Narrowing the time limits on bringing a suit for personal injuries is another way to reduce the scope of liability for medical malpractice. Many states alter the traditional filing period in medical liability cases by providing that the statutes of limitations begin to run from the date of the negligent act or injury, as opposed to the date the plaintiff discovers the injury. In cases involving minors, some statutes provide that children under a certain age (age six, for example) can bring suit until attainment of a later age (eighth birthday in this example). Claims by minors have been cited by professional liability


179. KEETON & O'CONNELL, BASIC PROTECTION FOR THE TRAFFIC VICTIM—A BLUEPRINT FOR REFORMING AUTOMOBILE INSURANCE 351-58 (1965); Henderson, Periodic Payment of Bodily Injury Awards, 66 A.B.A.J. 734 (1980). The AMA Action Plan endorses periodic payment of damages on the grounds that structured settlements are less expensive to finance, assure available resources over time or as needed, and eliminate the "windfall" to relatives or heirs that would otherwise occur where the plaintiff dies earlier than predicted. AMA ACTION PLAN, supra note 4, at 6.

180. AMA ACTION PLAN, supra note 4, at 20.


183. See supra note 178.


186. For example, the Indiana statute provides that a medical malpractice action must be brought within two years of the date of the negligent act, except that minors under six years of age have until their eighth birthday to bring suit. See Johnson v. Saint Vincent Hosp., 273 Ind. 374, 404 N.E.2d 585 (1980).
insurers as a serious problem in setting insurance rates because of the long-term potential for suit on such claims. The AMA’s Action Plan advocates special statutes of limitations for physicians who treat infants to bar claims unless brought by age eight.

Plaintiffs usually argue that differing limitation periods on medical malpractice suits violate due process, equal protection, and state constitutional rights of access to courts. Though courts in Georgia, Ohio, Texas, and New Hampshire have accepted such reasoning and found constitutional violations, many other courts have disagreed.

Screening Panels

As part of the medical malpractice reform movement, many states have established nonbinding pretrial review of medical malpractice claims in an effort to sort out spurious claims and encourage pretrial settlement. The AMA endorses mandatory pretrial panels and proposes that parties pay fees of opposing counsel when plaintiffs bring frivolous matters before the panel, or when defendants fail to make prompt, good-faith settlement offers on plainly meritorious claims. It is questionable whether screening panels have been effective in settling cases or reducing costs. In New York an ad hoc committee on medical malpractice panels, appointed by New York’s chief administrative judge, found that the review board panel system was ineffective and costly and recommended that it be abolished.

188. AMA Action Plan, supra note 4, at 7.
189. Shessel v. Stroup, 253 Ga. 56, 316 S.E.2d 15 (1984) (two-year statute running from date of negligent act held unconstitutional where injury was discovered more than two years after date of the negligent act.)
191. Sax v. Votteler, 648 S.W.2d 661 (Tex. 1983) (statute removing previously allowed tolling of two-year period in medical malpractice actions by minors after six months held unconstitutional). See also Texas cases cited supra note 116.
192. Carson v. Maurer, 120 N.H. 925, 424 A.2d 825 (1980) (statute running from date of negligence except for cases involving foreign bodies left in the body and that providing that children less than eight may sue until age ten held unconstitutional).
194. See AMA Dep’t of State Legislation Rep., supra note 136; AMA Special Task Force Rep. No. 2, supra note 8, at 15-16 (thirty states originally adopted pretrial panels); A.B.A., Legal Topics Relating to Medical Malpractice 49 (1977) (twenty-nine states and the Virgin Islands provided by statute for review panels; in twenty-one states panel review prior to trial was mandatory; states also varied on whether the panel finding was admissible into evidence at a subsequent trial).
196. See Fuchsberg, Abolish Malpractice Panels, 15 Trial Law. Q. 3 (No. 4 1983). The committee found that the panel system had not met the legislature’s goals of promoting pretrial
Successful constitutional assaults on panels have focused upon whether requiring preliminary panel review results in impermissible delay, thus violating a plaintiff's right of access to the courts;\(^{197}\) whether such a separate system for medical malpractice violates the guarantees of due process and equal protection of laws;\(^{198}\) whether panels encroach on the judicial function;\(^{199}\) and whether admitting the panel findings into evidence at a subsequent trial infringes the claimant's right to trial by jury.\(^{200}\) Apart from these cases, a preponderance of courts have upheld pretrial screening panels against all constitutional challenges.\(^{201}\)

settlements or of reducing the number of cases actually brought to trial. The committee concluded that an aggressive pretrial conference conducted by a court in the ordinary course of its business would generate a greater settlement rate than a court encumbered by an additional procedural layer in the form of medical malpractice panels. The committee also noted that the system had likewise failed to reduce the dollar value of medical malpractice verdicts and settlements. Not only was the system not alleviated the problem of excessive verdicts and settlements, the panel had exacerbated it. Plaintiffs who had received unanimous panel decisions were notorious in demanding extremely high settlements and in proceeding to trial. Defendants receiving unanimous panel decisions were rarely willing to even discuss settlement. The committee said New York's medical malpractice review system failed to provide a structured forum for settlement negotiations. The goal of the legislature to promote settlements at the panel stage had simply not been met. Settlements at the panel stage were rare—approximately 4.3 percent of all cases brought before the panel were settled—and litigants routinely awaited a panel recommendation before they even considered settling. The ultimate recommendation of the ad hoc committee was that the panel system be abolished in New York. See Jones, Medical Malpractice Litigation: Alternatives for Pennsylvania, 19 Duq. L. Rev. 407, 447 (1981). In recommending vigorous pretrial conferences, the committee noted that if a conference was not successful, the parties could then choose to submit their dispute to a mediation panel or could have their case placed on a general court calendar. Doctor Robert Fear, president of Suffolk County Medical Society, reached much the same conclusion as the ad hoc committee: "The reaction from both legal and medical professions is that the panels are an enormous waste of time." Fuchsberg, supra, at 3.

197. See, e.g., State ex rel. Cardinal Glennon Memorial Hosp. v. Gaertner, 583 S.W.2d 107 (Mo. 1979) (Missouri panel review procedure violates constitutional right of access to courts).


Written Notice of Claim

A few states have measures requiring a medical malpractice plaintiff to give health-care providers written notice of a claim before filing suit. 202 A notice requirement arguably allows potential defendants to settle claims before litigation expenses accumulate. 203 The Arkansas Supreme Court recently upheld a notice provision in the Arkansas medical malpractice law; 204 however, the New Hampshire Supreme Court declared that state’s notice law unconstitutional on equal protection grounds. 205

Voluntary Arbitration Agreements

Arbitration, unlike mandatory review panels, involves dispute resolution by expert fact finders. Under voluntary arbitration, a patient agrees before treatment to have any claim or dispute resolved by arbitration and forgoes the right to bring suit and the right to trial by jury. Medical malpractice claims can theoretically be arbitrated in at least thirty states under general arbitration statutes; however, thirteen states have enacted special legislation for arbitration of medical malpractice claims. 206 The AMA Action Plan urges greater use of binding voluntary arbitration agreements between patients and health-care providers as a means to reach a decision about a claim, its merits and compensation quickly, inexpensively, and fairly. 207 Most medical malpractice arbitration laws allow written arbitration agreements to cover present and future injury claims. Other state statutes, however, cover only the claims in existence at the time the patient enters into the arbitration agreement. 208

The feasibility of voluntary arbitration as a meaningful alternative to medical malpractice damages suits remains an open question. 209 Although courts in several states, including California and Michigan, 210 have upheld the validity and enforcement of arbitration agreements in medical malpractice cases, a number of cases have declared arbitration agreements or statutory arbitration procedures unconstitutional 211 or unenforceable due to bias on the part of

202. The prospective malpractice defendant must be notified in writing prior to the commencement of a lawsuit in Arkansas, California, Maine, Missouri, New Mexico, Oregon, Texas, Utah, and Virginia. LOUISELL & WILLIAMS, supra note 25, n.68.
206. AMA, DEP’T OF STATE LEGISLATION REP., supra note 136. While thirteen states enacted special arbitration laws for medical claims, two states, North Dakota and Maine, subsequently repealed their arbitration legislation. Id.; LOUISELL & WILLIAMS, supra note 25, at ¶ 1.08.
207. AMA ACTION PLAN, supra note 4, at 7-8.
208. AMA, DEP’T OF STATE LEGISLATION REP., supra note 136.
211. See, e.g., LOUISELL & WILLIAMS, supra note 25, at ¶¶ 1.08, 20.07 & n.66 (Supp. 1984);
the arbitration panel,\textsuperscript{212} coercive or emergency circumstances,\textsuperscript{213} or because the agreement constituted a contract of adhesion.\textsuperscript{214} The judicial split on arbitration agreements in medical malpractice cases further evidences the skepticism with which some state court judges view efforts to bypass common law courts in the name of reform.

The Michigan Supreme Court has upheld the constitutionality and legality of Michigan's malpractice arbitration law.\textsuperscript{215} Under Michigan's voluntary law, patients were permitted to sign agreements that they would submit any claims arising from their medical treatment to arbitration. In a constitutional challenge to the voluntary arbitration procedure the court held the act did not deprive patients of due process, that agreements to arbitrate medical malpractice claims were not contracts of adhesion, and that medical providers did not commit constructive fraud upon patients by providing them with agreements to arbitrate without informing them of alleged bias on the part of the arbitration panel.\textsuperscript{216}

The Michigan statute allowed patients to revoke the agreements within sixty days after execution; the statute also required all such agreements to provide, immediately above the space for parties' signatures in 12-point boldface type, that the agreement to arbitrate was not a prerequisite to receiving health care.\textsuperscript{217}

In \textit{Wixted v. Pepper}, however, the Nevada Supreme Court recently struck down a medical patient's agreement with a clinic to arbitrate any future medical malpractice claim on the ground that the agreement constituted a contract of adhesion.\textsuperscript{218} The court reasoned that even though the medical situation did not present an emergency, the arbitration agreement was an adhesion contract in which "the weaker party has no choice as to its terms . . . [but] to sign . . . or to forego treatment."\textsuperscript{219} Nevada, unlike Michigan, had not enacted a specific medical malpractice arbitration statute.

For adults, voluntary arbitration plans present neither jury trial nor right of access problems since either right may be waived.\textsuperscript{220} When a minor is involved, however, the results may be different unless the statute expressly authorizes parents to bind their children to such arbitration agreements. Generally, absent statutory authorization or court approval, agreements by parents that waive, compromise, or release rights or causes of action belong-


\textsuperscript{212} See, e.g., Wheeler v. Saint Joseph Hosp., 63 Cal. App. 3d 345, 133 Cal. Rptr. 775 (1977) (bias of one arbitrator is ground for vacating award).

\textsuperscript{213} See, e.g., Tunkl v. Regents of the Univ. of Cal., 60 Cal. 2d 92, 383 P.2d 441, 32 Cal. Rptr. 33 (1963) (a hospital emergency room contains no bargaining table).


\textsuperscript{216} Id.

\textsuperscript{217} Id. at 738.

\textsuperscript{218} 693 P.2d 1259 (Nev. 1985).

\textsuperscript{219} Id. at 1260-61.

\textsuperscript{220} See Redish, \textit{supra} note 15, at 799-80. Compulsory plans, on the other hand, raise severe constitutional problems. \textit{Id.}
ing to their children are illegal and unenforceable. The Michigan arbitration law, however, contains a provision that purports to bind children to arbitration agreements made by parents: "A minor child shall be bound by a written agreement to arbitrate disputes, controversies, or issues upon the execution of an agreement on his behalf by a parent or legal guardian. The minor child may not subsequently disaffirm the agreement." 

In Lovell v. Sisters of Mercy Health Corp., the Michigan Court of Appeals declared that this section of the medical malpractice act was "unconstitutional or unconscionable, or both." The court, however, did not discuss the constitutional implications of parental waiver and simply relied on earlier Michigan cases that had declared the act unconstitutional in other settings on due process and equal protection grounds. While the Michigan Supreme Court later upheld the constitutionality of the medical malpractice arbitration act, the court did not discuss Lovell, section 600.5046(2) of the act (the provision relating to minors), or the issue of parental waiver. One could draw an analogy between the legislature's power to authorize parental arbitration of children's claims and the legislature's right to shorten the limitations periods applicable to minors. A continued split of opinion can be expected in state courts considering constitutional attacks against voluntary arbitration involving minors. Under federal constitutional analysis such a provision would likely survive deferential rationality review.

**Attorneys' Fees**

During the medical malpractice reform movement of the mid-1970s, many states passed statutes limiting or otherwise affecting the amount of attorney's fees recoverable in medical malpractice actions. Some states provide a sliding scale for the plaintiff's attorney's fees: as the amount of the award increases the allowed contingent fee percentage decreases. In early 1985 the California Supreme Court upheld a section of California's medical malpractice law that

221. See 67A C.J.S. Parent and Child § 114 (1978): "In the absence of statutory authorization or proper procedure in court, a parent has no authority, merely because of the parental relation, to waive, release, or compromise claims by or against his child." See also Walker v. Stephens, 3 Ark. App. 205, 626 S.W.2d 200, 204 (1981) (parent has no authority to settle child's claim absent judicial approach).


224. Id. at 620.

225. Id.


227. See supra text accompanying notes 185-188.


229. California, Delaware, New Hampshire, New York and Pennsylvania utilize a sliding scale approach in medical malpractice actions. AMA Dep't of State Legislation Rep., supra note 136; AMA Special Task Force Rep. No. 2, supra note 8, at 16-19. In Delaware, for example, the plaintiff's attorney's fees may not exceed 35 percent of the first $100,000, 25 percent of the next $100,000, and 10 percent of the balance of any awarded damages.
established a sliding scale for plaintiff's attorney's fees in medical malpractice cases.\textsuperscript{230} The court held that the attorney's fee regulation was rationally related to the legislature's goal of curbing malpractice insurance costs.\textsuperscript{231} Justice Bird filed a lengthy dissenting opinion arguing that the law violated equal protection and due process guarantees.\textsuperscript{232} The AMA Special Task Force has endorsed a sliding scale for contingent fees.\textsuperscript{233}

In addition to the sliding scale approach, other states permit the court to review fees in medical malpractice cases and approve only what the court considers to be a "reasonable fee."\textsuperscript{234} A third approach places a flat limit on the contingent fee percentage.\textsuperscript{235} Indiana, for example, enacted a provision limiting the amount of a plaintiff's attorney's contingency fee to not more than 15 percent of any recovery.\textsuperscript{236} The Indiana Supreme Court upheld this provision against claims that it interfered with the individual's right to contract and right to earn a living, and therefore violated due process and equal protection guarantees.\textsuperscript{237}

Statutes have also been enacted that award attorney's fees to the prevailing party. In \textit{Florida Medical Center, Inc. v. Von Stetina},\textsuperscript{238} the court considered a constitutional challenge to a Florida statute that provided for the prevailing party to be awarded attorney's fees in medical malpractice actions. The court concluded that the classification bore a reasonable relationship to permissible legislative objectives and was not unconstitutional.\textsuperscript{239} \textit{Von Stetina} represents the prevailing viewpoint: medical malpractice laws that establish a contingent fee scale for plaintiff's attorneys, or which provide for awards of attorney's fees to the prevailing party have generally withstood due process and equal protection challenges under standards of rationality review.\textsuperscript{240}

\textbf{Punitive Damages}

At present, no state expressly forbids punitive damages awards in medical malpractice actions. Idaho's medical malpractice statute restricted a plaintiff's recovery to compensatory damages not satisfied from collateral sources, but the statute was declared unconstitutional in \textit{Jones v. State Board of Medicine}.\textsuperscript{241} In calling for the elimination of punitive damages, the AMA Action Plan reasons that punitive damages are inappropriate because in medical malprac-

\textsuperscript{231} Id.
\textsuperscript{232} Id.
\textsuperscript{233} AMA ACTION PLAN, supra note 4, at 6.
\textsuperscript{234} States authorizing court approval of reasonable fees include Arizona, Florida, Hawaii, Iowa, Kansas, Maryland, Nebraska, Rhode Island (repealed), Tennessee, and Washington. Id.
\textsuperscript{235} Idaho, Indiana, and Oregon take this approach. Id.
\textsuperscript{236} Ind. CODE ANN. § 16-9.5-5-1 (Burns 1983).
\textsuperscript{238} 436 So. 2d 1022 (Fla. Dist. Ct. App. 1983).
\textsuperscript{239} Id. at 1030-31.
tice suits, "state licensing boards, medical societies and hospital peer review systems, and the criminal justice system provide adequate mechanisms to discipline physicians." Generally, punitive damages are awarded in addition to compensatory damages as punishment for outrageous conduct. Willful, wanton, or malicious conduct is usually required, although some states permit punitive damages awards in medical malpractice cases upon a showing of gross negligence.

The meager statutory treatment of punitive damages in state medical malpractice acts does not support eliminating punitive damages in medical actions. New Mexico limits a plaintiff's aggregate recovery to $500,000 unless punitive damages are awarded. The New Mexico act specifically provides that punitive damages shall not be paid from the state's patient compensation fund and further states that, "A judgment of punitive damages against a health care provider shall be the personal liability of the health care provider." Oregon's act contains a similar provision. Delaware law limits punitive damage awards in medical malpractice cases to injuries resulting from willful or wanton misconduct of the health-care provider. In short, state laws preserve the right to punitive damages against physicians or hospitals in cases involving aggravated culpable misconduct.

Punitive damages awards in actions against health-care defendants are rare because physicians are infrequently found to be guilty of grossly negligent or reckless treatment. Perhaps because of this fact, punitive damages were not discussed in the AMA's first two task force reports and were mentioned only briefly in the February, 1985 Action Plan. Although the need for punitive damages, particularly the asserted deterrence rationale, has been questioned, a key facet of the critique is the thesis that compensatory awards are an adequate deterrent. The AMA's Action Plan assumes as much by defining punitive damages as an award in addition to "full compensation for a plaintiff's injuries." However, if a plaintiff does not receive a full recovery, and ceilings are placed on noneconomic losses, there may be a significant deterrence trade-off if punitive damages are abolished.

242. AMA Action Plan, supra note 4, at 5-6.
243. See Restatement (Second) of Torts § 908 (1979).
244. See Noe v. Kaiser Found. Hosps., 248 Or. 420, 435 P.2d 306 (1967) (under Oregon law punitive damages require malicious conduct, except in medical malpractice cases, where gross negligence can justify punitive damages.)
249. AMA Special Task Force Rep. No. 2, supra note 8, at 18 ("punitive damages are rare" in medical malpractice actions).
251. See supra text accompanying note 242.
Conclusion

[If anyone invokes in an American court a law which the judge considers contrary to the Constitution, he can refuse to apply it. This is the only power peculiar to an American judge, but great political influence derives from it.

Alexis de Tocqueville]

State medical malpractice laws continue to provoke a variety of constitutional assaults. Though many courts uphold these tort reform measures, a surprising and increasing number of state courts have declared medical malpractice laws unconstitutional under various state and federal constitutional theories. Because state judges have broad power to declare that state legislation violates state constitutional provisions, any future tort reform legislation at the state level can be expected to engender successful state court constitutional challenges. The persistent success of constitutional arguments in medical malpractice cases indicates heightened interest among state court judges in constitutional jurisprudence, particularly in state constitutional interpretation.

Cases striking down tort reforms on constitutional grounds may also indicate a bias on the part of some state courts born of a desire to preserve the integrity of the traditional personal injury tort suit. After all, if the legislature can abolish or severely limit tort rights in malpractice actions, what but a constitution is to prevent the wholesale emasculation of the tort system's approach to compensation for personal injuries? It is not too far-fetched to suggest that many state court judges, who may themselves have been a part of the personal injury tort tradition, feel the need to protect the personal injury suit and the plaintiff's personal injury lawyer from extinction. Medical malpractice as well as products liability are heirs to many decades of tort litigation involving railroads, automobiles and slip-and-falls. To validate the new tort law reforms exemplified by the medical malpractice laws could signal the demise of the personal injury system. This may explain the reluctance of many state courts to recognize the restriction of personal injury tort rights.

The vulnerability of state statutes to state court constitutional attacks suggests the wisdom of federal tort reform legislation. Federal regulation of medical malpractice claims, as well as product liability claims or personal injury claims in general, would not spawn a successive wave of constitutional attacks. The

254. After the Florida Supreme Court ruled that the constitutional amendment to limit economic losses could not be placed on the November, 1984 ballot for essentially procedural reasons, Florida Medical Association President Dr. Frank Coleman termed the decision "an outrageous travesty of justice that raised serious questions concerning the method of selecting [Florida's] Supreme Court Justices." Florida High Court Halts Tort Vote, Nat'l L.J., Oct. 22, 1984, at 3, col. 1.
supremacy clause of article VI of the United States Constitution effectively muzzles the use of state constitutional arguments. When Congress exercises a granted power, federal legislation may supersede state authority and preempt state law. As long as federal legislation is a valid use of the commerce clause or congressional spending powers, state constitutional objections must fail, provided the proposed new tort reform legislation does not violate any rights guaranteed by the Federal Constitution. Under lenient federal rationality review medical malpractice laws should survive constitutional challenge.

255. See, e.g., Wickard v. Filburn, 317 U.S. 111 (1942). Concerns for state autonomy limits on the commerce power, expressed in National League of Cities v. Usery, 426 U.S. 833 (1976), are no longer particularly important in light of the reversal of Usery in Garcia v. San Antonio Metro. Trans. Auth., 105 S. Ct. 1005 (1985). In affording employees of the San Antonio Metropolitan Transit Authority the protection of the minimum-wage and overtime requirements of the Fair Labor Standards Act, Congress contravened no affirmative limit on its power under the commerce clause. In overruling Usery, the Court also ruled that the attempt to draw boundaries of state regulatory immunity in terms of traditional governmental functions is unworkable and contrary to principles of federalism. The Court further held that the states' continued role in the federal system is primarily guaranteed not by any externally imposed limits on the commerce power, but by the political process.

256. See, e.g., Oklahoma v. United States Civil Service Comm'n, 330 U.S. 127 (1947) (federal highway funds could be conditioned on a state's compliance with a provision of the Hatch Act that state officials involved in federally funded programs not take any part in political activities). The United States Supreme Court has consistently held that the federal government has the power to fix the terms on which its money allotment to the states shall be disbursed. See also Fed. Energy Reg. Comm'n v. Mississippi, 456 U.S. 742 (1982); Fulilove v. Klutznick, 448 U.S. 448 (1980); Lau v. Nichols, 414 U.S. 563 (1974).

257. A federal medical malpractice act such as the Moore-Gephardt Bill, which by operation of federal law, abolished noneconomic damages, for example, would preempt state law and void state constitutional objections as long as the federal legislation (1) was a valid exercise of Congress' power and (2) did not violate any liberties or rights set forth in the Federal Constitution (equal protection or due process). On the initial question of federal power, given the national scope of health care and insurance, such a law would almost certainly fall within Congress' broad commerce clause power. See supra note 261. Objections premised on states' rights or state autonomy would also fall in the wake of Garcia v. San Antonio Metro. Trans. Auth., 1-5 S. Ct. 1005 (1985). The AMA, however, has proposed "federal incentive legislation" rather than direct federal regulation. See AMA ACTION PLAN supra note 4, at 5. According to the task force, "The legislation will not impose a federal program on the states. Instead, it will provide monetary and other incentives for states to pass specified tort and judicial reform legislation. . . . Monetary incentives may be available through existing federal programs." Id. This proposal, like the federally imposed 55-miles-per-hour speed limit, utilizes the spending power under article 1 § 8 to legislate rules upon the states by fixing the terms on which Congress will disburse federal money to the states. Unlike direct federal regulation pursuant to the commerce clause, states can refuse to accept the federal funds and thereby avoid the regulations. Thus, whether federal incentive as proposed by the AMA will in fact produce state tort reforms depends upon the nature and extent of the federal fund incentives. The AMA Action Plan does not specify how significant or coercive its monetary incentives would be. Loss of Medicare or highway funds, for example, would virtually compel states to adopt the federal reforms. Although state constitutional attacks could still occur, even if the state supreme courts struck down federally mandated state laws, the states would have overpowering incentives to amend their constitutions. If the federal fund incentives were less critical, some states might refuse to enact the reforms and state laws would still be vulnerable to state court constitutional attacks. In short, legislation enacted pursuant to the spending power is much in the nature of a contract: in return for federal funds, the states agree to comply with

On the secondary question of a possible violation of federal equal protection or due process rights, federal medical malpractice legislation would enjoy presumptive validity under the permissive federal rationality review standards that are routinely applied to uphold economic regulations. See supra text accompanying notes 28-48. See also O’Connell, (Foreword by D. Maynhans), Ending Insult to Injury 204-45 (1975).