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Richard C. Turkington

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Recommended Citation
Richard C. Turkington, Constitutional Limitations on Tort Reform: Have the State Courts Placed Insurmountable Obstacles in the Path of Legislative Responses to the Perceived Liability Insurance Crisis, 32 Vill. L. Rev. 1299 (1987).
Available at: http://digitalcommons.law.villanova.edu/vlr/vol32/iss6/5
CONSTITUTIONAL LIMITATIONS ON TORT REFORM:
HAVE THE STATE COURTS PLACED INSURMOUNTABLE
OBSTACLES IN THE PATH OF LEGISLATIVE RESPONSES
TO THE PERCEIVED LIABILITY INSURANCE CRISIS?

RICHARD C. TURKINGTON*

I. INTRODUCTION

CURRENT state legislation restricting the common law rights of seriously injured tort plaintiffs popularly referred to as "tort reform,"1 is the offspring of the "medical malpractice" crisis of the early 1970's. Public attention was brought to spiraling liability insurance costs to the medical profession by work slowdowns and threats of massive losses of health service in the areas of medical practice that were experiencing the most dramatic increase in insurance rates.2 Although voices raised in congress


1. See White, Tort Reform in the Twentieth Century: An Historical Perspective, 32 Vill. L. Rev. 1265 (1987). Professor White points out in his article that there have been several important reform movements in our legal system regarding torts in the last century. Id. He discusses workers' compensation laws, no-fault legislation, comparative negligence, and the current movement that is the subject of this symposium. Id. The current phenomenon of legislation which restricts established common law rights of tort plaintiffs in negligence actions carries with it the official designation of "tort reform" in the media, the legal profession, and among tort scholars. See Priest, The Current Insurance Crisis, 96 Yale L.J. 1521, 1587 (1986). I shall use the popular appellation of "tort reform" throughout this article to describe legislation in the medical malpractice and negligence areas that is characterized by (1) the use of pre-trial screening panels; (2) limitations on recoverable non-economic and punitive damages; (3) regulation of attorneys' fees; (4) optional periodic payments of damage judgments; (5) abolition or restriction of the collateral source rule; and (6) selective restriction on statutes of limitation and changes in related concepts such as the discovery rule. No-fault, comparative negligence, workers' compensation laws and restrictions on recovery in products liability cases "reform tort law" also, but are not formally designated by the term "tort reform." The constitutionality of these laws will only be addressed obliquely in this article.


(1299)
sional reports and other forums questioned the bona fide nature of the supposed "crisis," many states, guided by legislation enacted in California, adopted laws that dramatically altered the traditional common law action for personal injuries caused by the negligence of a physician. These medical malpractice reform laws were based upon the perception of state legislatures that there was a malpractice insurance crisis and were intended to reduce liability insurance costs. Such laws were intended to make liability insurance more readily available by changing both the legal process for recovering against physicians in a negligence action and the amount of damages that could be recovered. Some legislation tied "reform" to additional regulations of the insurance industry; most did not.

Centrally featured in medical malpractice legislation were provisions for review of malpractice claims by non-judicial screening panels prior to adjudication in the courts, and caps on the amount of non-economic damages that could be recovered. In addition, many state laws sought to further limit the costs of malpractice insurance through an abundance of legal scholarship on the subject. See, e.g., Learner, Restrictive Medical Malpractice Compensation Schemes: A Constitutional "Quid Pro Quo" Analysis To Safeguard Individual Liberties, 18 HARv. J. ON LEGIS. 143 (1981). Professor Redish, the author of an early and important article thought the "crisis" was of such magnitude that "few commentators doubt its seriousness" Redish, Legislative Response to the Medical Malpractice Insurance Crisis: Constitutional Implications, 55 TEX. L. REV. 759 (1977). Most recently, in another important article, Professor Priest bases his views on the premise that there is an insurance crisis. See Priest, supra note 1.

4. See MICRA, ch. 1, § 1, 1975 Cal. Stats. 2d Ex. Sess. 3949 (1975) (not regulating insurance premium rates); cf. Pennsylvania's Health Care Service Malpractice Act, 40 PA. CONS. STAT. ANN. §§ 1301.01-.1006 (Purdon Supp. 1987) (establishes catastrophe loss fund as state regulated fund that is the sole carrier of certain malpractice claims and which is funded by surcharge imposed on health care practitioners). The Florida Tort Reform and Insurance Act of 1986, ch. 86-160, § 1 et seq., contains extensive regulation of the insurance industry as well as limitations on recoverable damages by tort plaintiffs. The current Florida legislation applies to tort plaintiffs, generally. For a discussion of the current Florida legislation, see infra notes 107-08 and accompanying text.
practice actions by providing for periodic installment payments of some damages, reducing any judgment by the amount that had been paid by sources collateral to the malpractice action, restricting the amount of attorneys' fees recoverable by the attorney representing the injured patient in a malpractice action, shortening the statute of limitations by abolishing the discovery rule and abolishing or restricting punitive damages.\(^5\)

The success of the medical profession in rather swiftly persuading state legislatures to restrict liability in negligence suits prompted the insurance industry, other professionals and potential tort defendants to pursue similar changes in negligence and products liability law. Proposals are currently pending or have been enacted to alter the rights of tort plaintiffs in other negligence actions along the lines of medical malpractice legislation in virtually all of the states.\(^6\) Except for the use of review panels, these laws contain changes similar to those found in the malpractice legislation, including caps on non-economic damages, changes in the collateral source rule, provisions for periodic payments and restrictions on the amount of attorneys' fees recoverable by attorneys representing tort plaintiffs. In addition, punitive damages have been eliminated or capped and restrictions have been placed on joint and several tort liability.

The pace of legislative activity in the last two years has been phenomenal. A majority of states have enacted or proposed changes in joint and several tort liability. Nearly as many have acted similarly in considering changes in the collateral source rule and regulation of attorneys' fees. A substantial number of the states have enacted laws that cap non-economic damages or restrict punitive damages. In 1987 alone, thirty-six states resuscitated some form of governmental immunity and several states

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5. Additional features of medical malpractice tort reform legislation include a shorter statute of limitations in tort actions brought in negligence against health care practitioners, a requirement that notice of claims be given in writing as a precondition to initiating a lawsuit in negligence against health care practitioners and the sanctioning of arbitration agreements in which claimants forfeit their negligence action.

6. See Nat'l Conf. of State Legislatures, 1987 Summary on Liability Insurance (1987) [hereinafter Nat'l Conf. Summary]; Nat'l Conf. of State Legislatures, 1986 State Legislative Action: Liability Insurance (1986). The details of the surveys for 1986 and 1987 are beyond the scope of this article. Some idea of the pace of legislative activity can be gleaned from the fact that the 1987 summary of enacted and proposed legislation is 239 pages. This is six times that of the 1986 survey. The 1987 survey notes that in 1986, 10,000 bills were introduced and forty-four states enacted some form of tort reform or insurance regulation. Thirteen thousand bills were introduced in 1987.
re-established charitable immunity or provided selective immunity for other activities. In a very short period of time, tort reform has broken away from its origins in medical malpractice to become a permanent and important feature of tort law.  

II. APPELLATE COURT RESPONSES TO CONSTITUTIONAL CHALLENGES TO MEDICAL MALPRACTICE REFORM LEGISLATION

During the thirteen years since California first enacted medical malpractice reform legislation, many state and federal courts have been asked to determine the constitutionality of such legislation when challenged on the basis of a variety of constitutional claims. The review panel features of these laws have been challenged primarily as violating the tort plaintiff’s right to a jury trial or right of access to the courts, or as constituting an unconstitutional delegation of judicial power to non-courts in violation of the doctrine of separation of powers. Other aspects of medical malpractice legislation have been challenged as violating the tort plaintiff or plaintiff’s attorney’s right not to be deprived of liberty or property without due process or equal protection of the law. These due process and equal protection challenges have been complemented in some instances by reference to specific state constitutional provisions such as the prohibition against special legislation or specific state constitutional limitations on legislative restrictions on damages.

A number of these constitutional challenges have been successful. Indeed, a majority of state courts that have fully considered constitutional challenges have found that medical malpractice reform legislation was in whole or in part unconstitutional. The frequency with which state courts have found reform legislation unconstitutional is both interesting and of much

7. See Nat’l Conf. Summary, supra note 6, at 223-34.
9. See, e.g., Kenyon v. Hammer, 142 Ariz. 69, 688 P.2d 961 (1984) (abolition of discovery rule violates plaintiffs’ fundamental right to recover full damages); Smith v. Department of Ins., 507 So. 2d 1080 (Fla. 1987) ($450,000 damage cap violates litigants’ right of access to courts); Carson v. Maurer, 120 N.H. 925, 424 A.2d 825 (1980) (several sections of medical malpractice statute held unconstitutional on federal and state equal protection grounds).
10. For a summary of these state court decisions, see infra note 52.
practical significance. For if reform legislation is found unconstitutional by a high state court, the future of reform legislation in that state is necessarily called into question and would have to be resolved in one of three ways. The least difficult solution would be to reenact the legislation without the constitutional defects. The other two options would be more problematic. The state constitution might be amended, or Congress might enact national legislation which would preempt state law with respect to many basic areas of personal injury and tort law.

In the first part of this article I will examine the constitutional jurisprudence that has developed in the last decade in cases adjudicating the constitutionality of medical malpractice legislation. I will then examine the extent to which this jurisprudence will carry over to tort reform legislation beyond medical malpractice. Finally, I will examine the extent to which the invalidation of tort reform legislation by state courts constitutes a legitimate exercise of constitutional review.

III. THE CONSTITUTIONALITY OF MEDICAL MALPRACTICE REFORM LEGISLATION UNDER THE UNITED STATES CONSTITUTION

Medical malpractice reform legislation has been challenged under the federal constitution on the basis of several constitutional provisions. Some of this constitutional adjudication has focused on a common feature of such legislation, namely, requiring the plaintiff to have the negligence claim screened by a non-judicial panel, prior to adjudication in the courts. The major thrust of constitutional complaints against such panels is that they violate the seventh amendment right to a jury trial or general due process principles encompassing the right of access to the courts to redress a civil claim.12

The fourteenth amendment prohibits the states from depriving any person of "life, liberty or property" without due process or equal protection of the law. Major provisions in medical malpractice reform legislation bring into question the due process or equal protection clause of the fourteenth amendment. Such legislation characteristically: (1) places a cap on the recoverable


amount of non-economic damages, (2) limits the collateral source rule, (3) allows for periodic payment of the damage judgment, and (4) restricts attorneys' fees. A permanently injured plaintiff with damages in excess of the legislative cap and that plaintiff's attorney with a contingency fee agreement in excess of the legislative restriction would have liberty and property interests implicated by the legislation that would give them standing to raise due process and equal protection challenges.

These federal constitutional claims have, with few exceptions, been rejected by federal courts. It is clear to me that they will continue to be rejected, and that there are no significant federal constitutional restrictions on medical malpractice tort reform legislation or on general tort reform legislation that has spun off from legislation that initially focused on malpractice actions against health care practitioners. While this ought not to be a startling proposition to students of the Constitution, it is less obvious to members of the plaintiff and defense bar who only infrequently litigate constitutional claims, and who are now at the forefront of litigation attacking such legislation as unconstitutional.

IV. SEVENTH AMENDMENT RIGHT TO JURY TRIAL CHALLENGES: CONSTITUTIONAL LIMITATIONS ON MALPRACTICE SCREENING PANELS

A major feature of medical malpractice reform legislation is the requirement that the plaintiff's claim be submitted to a screening panel for consideration prior to a determination by a court. In composition, these screening panels consist of lawyers, physicians, laymen and judges in a mix that varies considerably from state to state. None of the state laws make the determinations by screening panels binding, and in one form or another, the parties ultimately have access to the courts for adjudication of


the malpractice claim. Most states admit the panels' determinations in a subsequent court adjudication, although the panel findings are not binding on the jury.\footnote{For a useful summary of the array of substantive and procedural features of the pre-trial screening portions of medical malpractice reform legislation, see Alexander, \textit{State Medical Malpractice Screening Panels in Federal Diversity Actions}, 21 Ariz. L. Rev. 959, 963-73 (1979).} These screening panels alter the traditional dispute resolution process in malpractice actions by providing for testimony, evaluation of evidence, and determinations on questions of liability and damages in a non-judicial forum. In many instances, the result is considerable additional delay and expense to litigants. As a consequence, these panels have been challenged as violating the constitutional right to a jury trial.

The seventh amendment to the United States Constitution guarantees the right to a jury trial in suits brought in federal courts where the amount in controversy exceeds twenty dollars and the legal claim is similar to the type of claim for which a jury trial would have been guaranteed at common law.\footnote{U.S. Const. amend. VII. The seventh amendment provides, in pertinent part: "In suits at common law, where the value in controversy exceeds twenty dollars, the right of trial by jury shall be preserved." Id.} An early twentieth century decision, not since overturned, firmly established that the right to a jury trial under the seventh amendment, is not applicable to the states.\footnote{See Minneapolis & St. Louis R.R. v. Bombolis, 241 U.S. 211 (1916).} Therefore, arguments that screening panel systems violate jury trial rights when raised in state courts are limited to provisions in state constitutions which track the language and ideas of the seventh amendment. Where medical malpractice actions are brought in federal court on the basis of diversity of citizenship, seventh amendment challenges to review panels are properly raised. Federal courts have unanimously rejected such claims.\footnote{See, e.g., DiAntonia v. Northampton-Accomack Memorial Hosp., 628 F.2d 287 (4th Cir. 1980); Woods v. Holy Cross Hosp., 591 F.2d 1164 (5th Cir. 1979); DiFilippo v. Beck, 520 F. Supp. 1009 (D. Del. 1981); cf. Awa v. Guam Memorial Hosp. Auth., 726 F.2d 594 (9th Cir. 1984) (pretrial screening panels held violative of statute providing for right to jury trial in Guam).}

When the parties to a malpractice action are citizens of different states, the plaintiff may sue on the state tort claim in federal court on the basis of diversity of citizenship. If the suit is brought pursuant to a state law that requires prejudicial screening of malpractice claims, the federal court must decide whether (1) the screening panel requirement applies to the litigants; (2) if so, whether the findings of the panel are admissible in a state court...
adjudication; and (3) whether the state law must be part of the federal court suit. Resolution of the question of whether state malpractice reform laws requiring utilization of screening panels are applicable in diversity actions, requires that the federal court characterize the screening panel requirement as "substantive," or "procedural." If they are found to be "substantive," then under the fundamental principle of *Erie R.R. v. Tompkins*, the screening panel requirement would be part of the state law that the court is required to apply, and the plaintiff would have to submit the claim to a panel prior to the federal court's consideration. The opposite would be true if such panels were viewed as a matter of "procedural" law, as the federal rules of procedure would then govern the question, and a pre-court screening panel requirement is not mandated by the federal rules.

Considerable scholarly discussion and jurisprudence has revolved around the concept of "procedure and substance" that followed from the *Erie* decision. Initially, the United States Supreme Court appeared to adopt the view that if the question at issue would substantially affect the outcome of the litigation, it was "substantive" for purposes of applying state law. The outcome-determinative test resulted in issues such as statutes of limitation being viewed as "substantive," and, to some extent, the characterization of laws viewed for other purposes as procedural under state law as applied to federal court proceedings in diversity actions. This approach was thought by the Court to further the twin aims of *Erie*, namely, to provide for uniformity of result in both state and federal court, and to discourage forum shopping. The outcome-determinative test was later qualified by the Supreme Court. In cases where the state rule was an integral part of the substantive relationship created under state law, the federal courts would apply the state rule. In cases where the state rule was not integral to the bundle of state rights, whether state or federal rules should apply depended both upon an evaluation of forum shopping concerns, and a balancing of the countervailing


20. Id. at 112.

21. See Byrd v. Blue Ridge Rural Elec. Coop. Inc., 356 U.S. 525, 536 (1958) (judge-jury relationship in federal courts may not be disrupted by state law providing for factual determination by judge in workers' compensation dispute; question of whether plaintiff was "employee" was for jury, not judge).
federal interests involved with the federal rule.\(^{22}\)

Federal courts have overwhelmingly concluded that pre-court screening panels in malpractice reform legislation are “substantive” for \(\textit{Erie}\) doctrine purposes under all of the various formulas.\(^{23}\) Since plaintiffs are required to proceed with panel reviews before adjudicating rights in tort against physicians, they may be outcome-determinative and integrally tied to the rights provided for in malpractice legislation. Given the forum shopping concerns of the \(\textit{Erie}\) doctrine in the context of diversity jurisdiction, this result is imminently correct.\(^{24}\) As a consequence, in diversity actions, plaintiffs are required to proceed before the state screening panels prior to federal court adjudication of the claim. Therefore, plaintiffs do have standing to raise seventh amendment objections to the screening panels.

The principle arguments that have been raised are (1) that the delay and expense of proceeding before the screening panel denies the plaintiff effective right to a jury trial\(^{25}\) and (2) that admitting the panel’s findings into the subsequent federal court trial precludes the jury from making an independent judgment on the merits of the malpractice claim.\(^{26}\)

These arguments have uniformly been rejected by federal


\(^{23}\) The leading case is Woods v. Holy Cross Hospital, 591 F.2d 1164 (5th Cir. 1979). Judge Tjoflat, speaking for a unanimous panel after summarizing the evolution of the \(\textit{Erie}\) concept of “substantive and procedural law” discussed above, said: “Under any of the relevant tests we are convinced that the Florida statutes [malpractice reform legislation, including pre-trial screening panels] . . . must be applied in federal court.” \textit{Id.} at 1168; \textit{see also} DiFilippo v. Beck, 520 F. Supp. 1009, 1012-14 (rejecting earlier case holding that referring to malpractice panel was matter of procedure which, under \(\textit{Erie}\) doctrine, ought not be employed in federal court); cf. \textit{Seck} by \textit{Seck} v. Hamrang, 657 F. Supp. 1074 (S.D.N.Y. 1987) (state created malpractice panel conflicted with federal court power to fashion techniques for settlement and use by federal court of such panel inappropriate in present case).

\(^{24}\) Woods v. Holy Cross Hosp., 591 F.2d 1164, 1168 (5th Cir. 1979). As was noted by Judge Tjoflat in \textit{Woods}: “Our opinion on this matter is heightened by the fact that we are guided by ‘the policies underlying the \(\textit{Erie}\) rule.’” \textit{Id.} (quoting Hanna v. Plumer, 380 U.S. at 467-68); \textit{see also} Guaranty Trust Co. v. York, 326 U.S. 99, 108-12 (1945).


\(^{26}\) Woods v. Holy Cross Hosp., 591 F.2d 1164, 1179 (5th Cir. 1979).
courts (one court has characterized the arguments as frivolous)\(^{27}\) on the basis of clearly established parameters on the limits of seventh amendment jury trial guarantees. Supreme Court decisions have long established that neither delays produced by requirements that administrative remedies be exhausted prior to court adjudication nor the admissibility in subsequent federal court proceedings of non-judicial determinations deprive parties of right to jury trial guarantees.\(^{28}\) In evaluating the constitutionality of screening panels, federal courts have read these early Court decisions as providing only for the right to have the ultimate determination of liability made by the jury. Medical malpractice reform statutes universally provide only that the panel decision be admissible or \textit{prima facie} evidence of the malpractice claim. The plaintiff is still provided with an opportunity in the federal court trial to present relevant evidence and to cross-examine witnesses relied upon by the panel.\(^{29}\) Panel determinations are analogized to expert witnesses testimony, or the reports of masters appointed by the federal courts. The introduction of such evidence may influence or aid the jury but does not supplant the jury as the ultimate trier of fact.

V. FEDERAL DUE PROCESS AND EQUAL PROTECTION LIMITATIONS ON MEDICAL MALPRACTICE TORT REFORM LEGISLATION

The genesis of the present Supreme Court's philosophy toward constitutional review of legislation like tort reform under due process and equal protection grounds goes back to the dissenting opinion of Justice Holmes in \textit{Lochner v. New York},\(^{30}\) a 1905

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28. See, e.g., \textit{Ex parte Peterson}, 253 U.S. 300 (1920) (federal court appointment of auditor with authority to investigate and provide opinion on issues of fact did not deprive party of right to jury trial guaranteed by seventh amendment); \textit{Capital Traction Co. v. Hof}, 174 U.S. 1 (1898) (delay caused by pre-federal district court jury determination by jury empaneled by justice of peace did not violate right to jury trial guaranteed in seventh amendment).
29. See \textit{DiAntonia v. Northampton-Accomack Memorial Hosp.}, 628 F.2d 287 (4th Cir. 1986); \textit{Woods v. Holy Cross Hosp.}, 591 F.2d 1164 (5th Cir. 1978); DiFilippo v. Beck, 520 F. Supp. 1029 (D. Del. 1981). Some of the pretrial panel systems have assessed the costs of the prescreening process, including per diem fees for members of the panel. See, e.g., \textit{Woods}, 591 F.2d at 1180 (Florida scheme challenged). The argument that these charges unduly burden malpractice plaintiffs' access to a jury and violate the seventh amendment has been rejected. \textit{Id.} at 1181. Relying in part on \textit{Ortwein v. Schwab}, 410 U.S. 656 (1973) and United States v. Kras, 409 U.S. 434 (1973), the \textit{Woods} court upheld an assessment of reasonable fees as a condition to bringing a court action in cases other than those involving fundamental rights. \textit{Woods}, 591 F.2d at 1180 n.27.
30. 198 U.S. 45 (1905).
case. The majority of the Court held that a New York law that restricted the number of hours a baker could work per week deprived the baker and his employer of "liberty to contract" in violation of the due process clause of the fourteenth amendment. Justice Holmes dissented, stating that the majority opinion was wrongheaded for several reasons. First, Holmes said, the Court was trying to impose a particular philosophy on the nation; that of laissez-faire economics. In addition, the Court wrongly assumed that it was properly its business to determine whether state economic policy was wise, desirable or in some other way sound. In language that has been cited in numerous subsequent cases, Justice Holmes said:

The Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics. ... But a Constitution is not intended to embody a particular economic theory whether of paternalism and the organic relationship of the citizen to the State or of laissez faire.31

I think if Justice Holmes were alive today and tort reform legislation were challenged under due process and equal protection claims, he would say that the fourteenth amendment was not intended to embody the economic policies of the Insurance Institute and those who support tort reform, or the theories of social justice espoused by the American Trial Lawyers Association and others who oppose tort reform. Justice Holmes' view did not become the philosophy of a majority of the Supreme Court until some thirty-two years later. It has had the support of a clear majority of the Court for fifty years and I think that even with the recent changes on the Court, a majority of the Court will continue to embrace Holmes' view in the foreseeable future.32 This philos-

31. Id. at 75 (Holmes, J., dissenting).
32. The pivotal decision is West Coast Hotel Co. v. Parrish, where a bare majority of the Court upheld a minimum wage provision against the economic substantive due process arguments that Justice Holmes had found wanting in his dissent in Lochner. 300 U.S. 379 (1937). The reaction to the activist philosophy of the Lochner era in reviewing the constitutionality of economic policy under the fourteenth amendment has been extreme since Parrish. Later Supreme Court cases established a most deferential posture to the constitutional review of state legislation. See, e.g., Williamson v. Lee Optical, 348 U.S. 483 (1955). In Lee Optical ("The Opticians Case"), the Court rejected a challenge by opticians to an Oklahoma law requiring virtually all eye glasses service to be performed pursuant to a prescription written by an optometrist or ophthalmologist. The Opticians Case established clearly that the state need not articulate the purpose of particular legislation for that legislation to be reasonable. If the Court can conceive of a valid purpose that would more or less be furthered, such laws are constitutional. Judicial hypothesizing of purpose is perhaps the most extreme feature of
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ophy is aptly described as a "hands-off non-interventionist deferential approach" to substantive constitutional review of economic policy.

A. The Rational Basis Test and the Presumption of Constitutionality in Operation

This hands-off deferential approach to constitutional review is implemented by the Supreme Court primarily by the application of two legal devices. The first is a legal presumption of constitutionality which attaches to such laws and which places the burden on the parties challenging those laws to overcome that presumption. The second is a principle of constitutional law which is utilized to evaluate the legislation. That principle is that if the legislation reasonably furthers a legitimate interest of the state, it is constitutional. This is generally referred to as the rational basis test. The presumption of constitutionality and the rational basis test have operated in tandem to effectively immunize legislation like tort reform from meaningful constitutional review. In practice, the presumption of constitutionality is in fact, very rarely overcome. Practitioners versed in constitutional law know they must bring their case out from under the rational basis test if they are to be successful in challenging legislation under the due process or equal protection clause of the fourteenth.
amendment. To demonstrate precisely how this presumption of constitutionality works in the context of tort reform legislation, I will break tort reform legislation into its three major pieces, summarize the major arguments that are raised against it, and show how they fare under the rational basis test.

One of the major features of medical malpractice tort reform legislation is the legislature's perception that an insurance problem or crisis exists. Tort reform legislation is based upon the assumption of societal facts that this perception proceeds from, namely, the unavailability of reasonably priced liability insurance for the health care practitioner. Another feature of tort reform is the special policies that are adopted to deal with the problem. As previously discussed, the cores of these policies are: (1) damage caps, (2) abolishing the collateral source rule, (3) periodical payments, (4) restricting contingency fees and (5) selectively shortening the statute of limitations. These are the major policies that are set in place to deal with the assumed societal facts of a liability insurance crisis. A final feature of tort reform is the general purpose of making reasonably priced insurance coverage more readily available by reducing the costs of legal claims against health care practitioners.

An examination of the arguments that are raised challenging these three features of tort reform and the response to these arguments by courts employing the rational basis test clearly demonstrates why there are no significant federal due process or equal protection constitutional restraints on tort reform legislation. A major argument that has been raised by tort reform challengers is that there is no insurance crisis. This argument directly attacks the factual assumptions upon which such legislation is based, and assumes that since the legislative fact-finding is incorrect, the restrictions on plaintiffs' rights embodied in that legislation are unreasonable. However, when applying the rational basis test, courts uniformly reject this argument. They do so by concluding that it does not matter whether there is in fact an insurance crisis. It is enough that the legislature could have reasonably perceived the existence of an insurance problem. If it is at least debatable that there is such a crisis, then the party challenging the legislation has not overcome the presumption of constitutionality that such laws enjoy. Even when challengers have demonstrated to lower courts that the best evidence is that there is no insurance crisis, appellate courts applying the deferential approach of constitutional review have reversed, finding that if the question is at
least debatable, the law is reasonable. Under the rational basis test, if there is some doubt, if the legislature might reasonably have concluded that there is an insurance crisis, the law is constitutional.34

The major argument against the constitutionality of medical malpractice reform legislation focuses on the limited class of plaintiffs and attorneys at which the law is directed. Damage caps primarily affect the catastrophically injured plaintiff and restrictions on attorneys' fees are generally limited to the malpractice plaintiff's lawyer. The argument is that even assuming there is an insurance crisis, it is unfair and unreasonable to place the major onus of this problem on a small group of plaintiffs and a small group of attorneys. This argument is followed up with a related argument: it is especially unfair and onerous to place this burden on the permanently injured plaintiff with catastrophic damages because such plaintiffs have the most compelling need for full compensatory damages. When this argument is raised, courts reject it by concluding that the legislature is not required to be even-handed under the rational basis standard of review. The legislature may deal with a problem "one step at a time" and if a little bit of the mischief is dealt with, the law is reasonable, even though other and more major parts of the societal problem that the law is responding to are not addressed by the legislation. With this "one step at a time—little bit of the problem—you don't have to be even-handed" analysis, the major argument against tort reform is rejected under the rational basis test.35

The third major argument is that there is no significant relationship between the special rules and policies established in tort reform legislation and insurance rates and, therefore, such laws do not reasonably further their purposes and are unconstitu-

34. See Bernier v. Burris, 113 Ill. 2d 219, 497 N.E.2d 763 (1986). The court stated:

The history of the legislation amply demonstrates that it was enacted in response to what was perceived to be a crisis in the area of medical malpractice. . . . It may fairly be said that whether a malpractice crisis existed was a question 'at least debatable.' Our task, therefore, is limited to determining whether the legislation in question is constitutional, not whether it is wise as well.

Id. at 229-30, 497 N.E.2d at 768-69; cf. Boucher v. Sayeed, 459 A.2d 87 (R.I. 1983) (taking judicial notice that no insurance crisis existed at time of enacting medical malpractice reform legislation, and invalidating statute on that basis).

tional. After all, what effect is abolishing the discovery rule or adopting a shorter statute of limitations for medical malpractice claims likely to have on the price of liability insurance? The response by federal courts to this argument under the rational basis test is that if the laws in fact reduce costs, they more or less further their purpose and are constitutional.36

These are the ways that the presumption of constitutionality and the rational basis test operate in the federal courts when challenges to medical malpractice tort reform legislation is raised under various fourteenth amendment, liberty, property, due process and equal protection claims.

As the above discussion illustrates, when the presumption of constitutionality, with its rational basis test is the standard for evaluating the constitutionality of state economic policy, federal courts will not in any meaningful way review the reasonableness or sensibleness of the legislation. The rational basis test is not then a test, but rather a term in constitutional law that masks a longstanding philosophy of the Supreme Court that it is not the Court’s business to judge the wisdom of state economic policy when performing the sensitive task of exercising constitutional review. The underlying broader theme of this noninterventionist posture is that economic judgments at both the federal and state level are, by and large, matters for the more directly accountable branch of the government, the legislature.

B. Rejecting Heightened Standards of Scrutiny for Tort Reform

In reviewing the constitutionality of a limited range of legislation that has been challenged under the fourteenth amendment due process and equal protection provisions, the Supreme Court has adopted a philosophy that is almost exactly the antithesis of that described above. When state laws affect carefully circumscribed interests that the Court has characterized as “fundamental,” or are directed at carefully circumscribed groups that the Court has described as “discreet and insular minorities or inherently suspect,” significant review of these laws has occurred.37 In fact, as has often been observed, characterizing a law as significantly affecting a fundamental interest or suspect class is tanta-

37. An official and often quoted statement of this two-tiered view of scrutiny under equal protection and due process is found in Justice Powell’s majority opinion in San Antonio Independent School District v. Rodriguez, 411 U.S. 1 (1973). For a discussion of early dissatisfaction with this approach, see infra note 50 and accompanying text.
mount to a designation that the law is constitutionally defective. This philosophy of judicial intervention and activism is utilized by the Supreme Court using conceptual machinery that is the flip-side of that employed under the rational basis test. A presumption of unconstitutionality attaches to such legislation and the state is required to overcome that presumption by demonstrating that the law is necessary to further a compelling state interest. This presumption is practically impossible to overcome, primarily, because if the law may be furthered by means that are less harmful to individual interests or do not focus exclusively on the suspect group, it will be held unconstitutional. This standard of review is aptly described as strict scrutiny. 38

In addition, the Court has adopted a similarly interventionist posture with respect to a limited range of state legislation by applying a standard of review described as “intermediate scrutiny.” 39 Where intermediate scrutiny is applied, a presumption of unconstitutionality also applies but the presumption is overcome if the state demonstrates that the law “substantially furthers a significant state interest.” 40 While this presumption is overcome more often than when the compelling state interest test and rigid judicial scrutiny approach are applied, the state is more likely

38. See, e.g., Dunn v. Blumstein, 405 U.S. 330, 342 (1972); Shapiro v. Thompson, 394 U.S. 618, 634 (1968) (voting and welfare residency requirements effecting opportunity to vote and interstate travel are unconstitutional unless the state can demonstrate that such laws are “necessary to promote a compelling governmental interest”). Cf. Skinner v. Oklahoma, 316 U.S. 535, 541 (1942); United States v. Carolene Products Co., 304 U.S. 144, fn. 4 (1938).

39. In Craig v. Brown, the Supreme Court first officially recognized the “intermediate tier” of equal protection review. 429 U.S. 190 (1976); see also Mississippi Univ. for Women v. Hogan, 458 U.S. 718 (1982). Professor Gunther had identified multiple levels of scrutiny in the practice of employing the equal protection clause before Craig was decided. See Gunther, In Search of Evolving Doctrine in a Changing Court: A Model for a Newer Equal Protection, 86 HARV. L. REV. 1 (1972).

40. Intermediate scrutiny provides the court with more flexibility in exercising constitutional review. As such, generalizing about characteristics of this standard of review is much more treacherous. Some patterns in the employment of intermediate scrutiny are discernible. The level of judicial scrutiny more nearly approximates that of rigid scrutiny than the minimal scrutiny applicable to purely economic legislation. The presumption of unconstitutionality attaches to legislation subject to intermediate scrutiny. Courts will not presume or judicially hypothesize valid purposes which have not been articulated by public authority. Furtherance of administrative or economic efficiency is generally not a sufficient interest, and under this standard of review it is generally not appropriate for a court to evaluate and/or to set aside the articulated purpose, even if evidence of a contrary purpose is strongly supported in the legislative history. See Weinberger v. Weisenfeld, 420 U.S. 636 (1975); Frontiero v. Richardson, 411 U.S. 677 (1973); Weber v. Aetna Casualty & Sur. Co., 406 U.S. 164 (1972).
than not to lose under this standard of review. The broader philosophy that is reflected when these two interventionist standards are applied, is that it is the Court's special role in our constitutional system to protect individuals and certain groups against the abuses of the majority.

Heroic efforts have been made by those challenging medical malpractice tort reform legislation in the federal courts to get out from under the rational basis standard of review by characterizing the interests affected by such laws as "fundamental," and the groups affected, as "suspect." However, these attempts have been unsuccessful because the interests that the Court has viewed as "fundamental" and the groups that are viewed as "suspect" are narrowly circumscribed. The presumption of unconstitutionality has been essentially limited to laws affecting first amendment and privacy rights, the interest in interstate travel and to laws directed at limited groups defined as race, nationality or alienage, under rigid judicial scrutiny, and to legislation distinguishing on the basis of gender or illegitimacy under intermediate scrutiny. The present Court has been unwilling to expand these limited categories and has held that the interest in public education, public housing, public assistance and public employment are not fundamental. In addition, laws directed at the poor, elderly or mentally ill are not viewed as directed at groups that are suspect for purposes of applying the presumption of unconstitutionality. Consequently, assertions that individual interests in full compensation for common law tort claims, or in liberty to practice law, or in liberty to contract for legal services and arguments

41. A major difference between intermediate and rigid scrutiny is that more over- and under-inclusiveness is tolerated in the former. As a consequence, several laws have survived constitutional challenges when evaluated under this approach. This is especially the case in reviewing legislation which makes distinctions based upon gender. See, e.g., Schlesinger v. Ballard, 419 U.S. 498 (1975); cf. Michael M. v. Superior Court, 450 U.S. 464 (1981); Kahn v. Shevin, 416 U.S. 351 (1974).

42. For a discussion of how the Supreme Court has limited the application of the presumption of unconstitutionality, see infra notes 43-49 and accompanying text.

that laws directed at catastrophically injured plaintiffs qualify as subject to the fundamental interests or suspect classification approach to constitutional review have fallen upon deaf ears when presented to the federal judiciary.

There is mounting criticism of the Supreme Court's equal protection jurisprudence, generally, and of its extremely deferential posture to equal protection and due process challenges to state laws that are to some extent, not grounded in fact, especially inefficient or in some other way clearly unwise. These criticisms, as well placed and persuasive as they may be, have not had any discernible influence on the Supreme Court and remain very much statements of what the constitution ought to mean, and not what in fact it does mean.

In my view, it is quite unlikely that the Supreme Court's attitude about the constitutional restraints on legislation like tort reform will change in the foreseeable future. The federal constitution will continue not to be a significant barrier to state tort reform legislation. This is because on the question of whether it is appropriate in our constitutional system for the Court to review state legislation involving economic or social policy, major and generally divergent philosophies of constitutional review come together in support of nonintervention. Those members of the current Court, such as Chief Justice Rehnquist, and Justices O'Connor and Scalia, who take a politically conservative view of state rights and/or of judicial review would obviously not be expected to exercise constitutional review with respect to tort reform legislation. For entirely different reasons, members of the court such as Justices Brennan, Marshall and Blackmun, who, to a varying degree, view the Court's role as much more expansive in reviewing state legislation, would also be unlikely to support an aggressive exercise of constitutional review with respect to tort reform legislation. This is because of their view that the Court's role in protecting individual rights and in preventing injustice ought to be primarily focused on noneconomic fundamental rights such as privacy, speech or association, or on legislation unfairly directed at groups such as racial minorities, or women who have traditionally been foreclosed by unfriendly legislation from fully participating in society. For

these and other reasons, the federal constitution has and is likely to remain largely irrelevant to the question of the constitutional-ity of medical negligence or other types of tort reform legislation. In view of this, it is somewhat surprising that substantial resources have been spent in challenging the constitutionality of tort reform under the federal constitution on equal protection and due process grounds.

VI. STATE COURT CONSTITUTIONALIZATION OF MEDICAL MALPRACTICE TORT REFORM

A. State Constitutional Limitations on Tort Reform

Constitutional attacks on medical malpractice reform legislation under state constitutional provisions have, in direct contrast to federal constitutional challenges, been quite successful. As of the time of the writing of this article, seventeen states have found all or part of medical malpractice reform legislation unconstitutional. Moreover, sixteen states have found reform legislation

51. Two cases illustrate this. In Duke Power Co. v. Carolina Environmental Study Group, the rational basis test was applied to review of the $560 million cap on liability for nuclear power plants under the Price-Anderson Act. 438 U.S. 59 (1978). The majority opinion was written by then Chief Justice Burger and joined by Justices Brennan, Marshall, Blackmun, White, and Powell. Justices Stewart, Stevens and Rehnquist concurred in the result, apparently affirming the standard for review, but disagreed with the majority’s analysis of the jurisdiction and justiciability issues in the case. In New Orleans v. Dukes, a unanimous court in a per curiam opinion overruled Morey v. Doud, 354 U.S. 457 (1957) a rare Warren Court decision invalidating a flagrant piece of special legislation on equal protection grounds where purely economic interests were affected. 427 U.S. 297 (1976); see United States R.R. Retirement Bd. v. Fritz, 449 U.S. 166 (1980) (upholding federal legislation eliminating future retirement benefits that had been granted in earlier legislation, by applying the most deferential notion of rational basis, that of hypothesizing a rational objective for distinction made in the law); see also Schweiker v. Wilson, 450 U.S. 221 (1981) (same).

However, even if the Court were to adopt the position that reasonableness be evaluated only on the basis of an articulated purpose, this would have no apparent impact on federal review of tort reform legislation because such laws do entail an articulated purpose. Generally, the purpose is to reduce costs and make reasonably priced liability insurance more available. Beyond that, two justices, Marshall and Brennan, appear to express a sliding scale philosophy of judicial review. This view was developed by Justice Marshall in Rodriguez, and would evaluate the standard of review on the basis of the relationship of the law in question to laws that impinge on fundamental interests or involve suspect classifications. San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 76-133 (Marshall, J., dissenting). A majority of the court has never adopted the sliding scale approach. Even if it did, such an approach would not likely make a difference in tort reform cases.

52. The Virginia state constitutional right to a jury trial was the basis of a federal court’s invalidation of Virginia’s damage cap in Boyd v. Bulala, 647 F. Supp. 781 (W.D. Va. 1986). Thus, Virginia is the eighteenth state whose constitution has been the basis for invalidating part of tort reform legislation. States
in the products liability and professional negligence areas uncon-

founding all or portions of medical malpractice legislation unconstitutional, in-
clude, in alphabetical order:


(2) **Colorado:** Austin v. Litvak, 682 P.2d 41 (Colo. 1984) (three-year statute of repose found unconstitutional under state equal protection guarantee as it applied to one class of claims, and not others).

(3) **Florida:** Smith v. Dept. of Ins., 507 So. 2d 1080 (Fla. 1987) ($450,000 damage cap found unconstitutional as barring access to courts; rebate requirements unconstitutional as impairment of existing contracts); Aldana v. Holub, 381 So. 2d 231 (Fla. 1980) (review panel process violates state due process right of access to courts).

(4) **Georgia:** Shessel v. Stroup, 253 Ga. 56, 316 S.E.2d 155 (1984) (medical malpractice statute of limitations running from date of negligent act or omission from discovery of injury, held violative of equal protection); Clark v. Singer, 250 Ga. 470, 298 S.E.2d 484 (1983) (statute of limitations applicable to medical malpractice claims is unconstitutional as applied to wrongful death malpractice claims).

(5) **Idaho:** Jones v. State Bd. of Medicine, 97 Idaho 859, 555 P.2d 399 (1976) (remanding cases to determine whether damage and liability limitations in medical malpractice legislation bear a fair and substantial relationship to legislative objective), cert. denied, 431 U.S. 914 (1977).


(8) **Michigan:** Gale v. Provident Hosp., 118 Mich. App. 405, 325 N.W.2d 439 (1983) (arbitration agreement is unconscionable because patient is deprived of opportunity to decide whether to relinquish constitutional right of access to courts).

(9) **Missouri:** Strahler v. St. Luke's Hosp., 706 S.W.2d 7 (Mo. 1986) (statute of limitation applicable to minors violates right of access to courts); State ex rel. Cardinal Glennon Memorial Hosp. for Children v. Gaertner, 583 S.W.2d 107 (Mo. 1979) (delay in pre-trial panel review violates right of access to courts).

(10) **Montana:** White v. State, 283 Mont. 363, 661 P.2d 1272 (1983) ($300,000 damage cap on non-economic damages violates equal protection).


(12) **New Mexico:** Jiron v. Mahlab, 99 N.M. 425, 659 P.2d 311 (1983) (review panel violates right of access to courts).

(13) **North Dakota:** Arneson v. Olson, 270 N.W.2d 125 (N.D. 1978) (modification of collateral source rule and cap on damages violates equal protection; joinder
Constitutional Limitations on Tort Reform

This is a clear majority of those states that have fully and res ipsa loquitur provisions violate exclusive authority of state supreme court to establish rules of evidence.


Several jurisdictions have found unconstitutional, legislation responding to a perceived insurance liability crisis by limiting plaintiffs' rights in products liability and professional negligence actions against architects. Many of these cases have involved statutes of repose provisions. States holding such legislation unconstitutional, include, in alphabetical order:


(2) Hawaii: Fujioka v. Kam, 55 Haw. 7, 514 P.2d 568 (1973) (statute of repose applicable to claims brought against engineers and contractors deprives plaintiffs of right to equal protection of law).


(4) Kentucky: Tabler v. Wallace, 704 S.W.2d 179 (Ky. 1985), cert. denied, 107 S. Ct. 89 (1986) (statute of repose applicable to architects, engineers and builders violates equal protection); Saylor v. Hall, 497 S.W.2d 218 (Ky. 1973) (statute of
considered state constitutional challenges.

Pre-trial screening panels have been held unconstitutional in Illinois, Michigan, Ohio, New Hampshire, New Mexico, Pennsylvania, and Rhode Island. Caps on recoverable damages have been found unconstitutional in Montana, Ohio, Texas, North Dakota, Idaho, Illinois, Louisiana, New Hampshire, Wyoming and Florida. Restrictions on the collateral source rule have been struck down in Kansas, New Hampshire and Ohio. Legislation that limits the period in which actions may be brought against physicians by minors have been found unconstitutional in Arizona, Connecticut, Colorado and New Hampshire. Restrictions on attorneys’ fees in malpractice actions have been invalidated in New Hampshire and Pennsylvania; New Hampshire has also invalidated legislation providing for periodic payments of damage awards.54 The constitutionalization of tort reform legislation is repose unconstitutional as violative of common law right of action existing at time of statutory enactment).

(5) Minnesota: Bernthal v. St. Paul, 376 N.W.2d 422 (Minn. 1985) (statute prohibiting suits against municipality if plaintiff is eligible for workers’ compensation violates equal protection); Pacific Indem. v. Thompson-Yeager, 260 N.W.2d 548 (Minn. 1977) (statute of repose applicable to actions against engineers, architects and other improvers of real property violates equal protection).


(9) Oklahoma: Loyal Order of Moose, Lodge 1785 v. Cavaness, 563 P.2d 143 (Okla. 1977) (statute of repose applicable to action against architect, engineer and builder violates equal protection).


(12) South Dakota: Oien v. Sioux Falls, 393 N.W.2d 286 (S.D. 1986) (governmental immunity extended to cover municipal operations of parks, playgrounds and pools violates litigants right of access to courts); Daugaard v. Baltic Coop. Bldg. Supply Ass’n, 349 N.W.2d 419 (S.D. 1984) (statute of repose applicable to products liability violates right of access to courts).


54. For a discussion of the various tort reform provisions which have been held unconstitutional by these states, see supra note 52.
an interesting, somewhat surprising, and obviously important development in state constitutional law.

It is quite appropriate in our federal system for state courts to interpret state court constitutions in a more expansive way than the United States Supreme Court interprets the United States Constitution, even when the case before the state court involves a state constitutional provision that is identical in language to a clause in the United States Constitution. This is because the supremacy clause of the federal Constitution imposes a floor, but not a ceiling, on a state court's interpretation of individual rights. It is an increasingly important feature of our federal system that states may develop their own distinctive tradition of individual rights against state government beyond those rights granted under federal constitutional guarantees. During the Warren Court era when the Supreme Court was expanding due process and equal protection rights under the federal constitution, the independent expansion of rights against government by state courts was seldom invoked, and little noticed when it was.

During the last two decades, the Burger and Rehnquist Courts have put an end to, or at least retarded the expansion of due process and equal protection rights previously undertaken by the Warren Court, especially in such areas as criminal procedure and first amendment rights. This has prompted a revitalized practice of expansively interpreting individual rights under state constitutions. This development, initially coined "new federalism" is now an established aspect of our legal system. Expansive interpretation of individual rights under state constitutional provisions has occurred most often in areas of non-economic fundamental rights, such as first amendment, privacy or criminal procedure rights, or with respect to discrimination directed at groups such as racial minorities, women, the indigent, or the mentally handicapped, all of which have been the subject of special focus by the courts under equal protection. State court review of economic or social policy has generally tracked that of the Supreme Court and has been upheld by applying the rational ba-

sis deferential standard of review. However, there have been some exceptions. A majority of courts have invalidated guest statutes and in a few states, no-fault legislation has been found unconstitutional. But by and large, legislative changes in tort law in such areas as comparative negligence, no-fault insurance, and the statutory resurrection of governmental immunity have survived challenges on state constitutional grounds, and are not usually the focus of constitutional review in the state courts.56

This appears not to be the case with respect to medical malpractice tort reform legislation. Constitutional review has been employed in a consistently more active way by state courts to malpractice tort reform legislation than to constitutional challenges that have been raised against other legislation in the torts area or to state legislation promoting other economic policies of the state.

1. The Need for State Courts to Clearly Indicate That the State Constitution is an Independent Basis for Invalidation of Tort Reform Legislation

Erroneous interpretations of the federal constitution are subject to review by the United States Supreme Court. This normally occurs when the state court has erroneously upheld a state law that has been challenged under the United States Constitution. The Supreme Court may also review state court invalidation of a state law based upon an erroneous interpretation of the federal constitution. However, if a state court's invalidation of state legislation is based on the state constitution, the Supreme Court will not review the decision.57


For a discussion of guest statutes, see generally Annotation, Constitutionality of Automobile and Aviation Guest Statutes, 66 A.L.R. 532 (1975 & Supp. 1987). Guest statutes have generally been repealed even in those states where their constitutionality has been upheld, and they are now of little significance in tort law.


57. See generally Pollock, Adequate and Independent State Grounds as a Means of Balancing the Relationship Between State and Federal Courts, 63 Tex. L. Rev. 977, 980
Many state court challenges to medical malpractice legislation are brought under both federal and state constitutional provisions. This is especially the case with challenges to damage caps, which have been primarily challenged in state courts as violating the fourteenth amendment and state constitutional equal protection clauses. Where constitutional challenges to tort reform are brought in state court under both federal and state constitutional provisions that have identical language, such as "equal protection of the laws," it is important that a decision invalidating the legislation be clearly based on the state constitutional provision. 58 Where the state constitutional provision is identical to a federal constitutional provision, it is important that the court make it clear that the state constitutional provision is being interpreted in an independent and different way than the federal constitutional clause has been interpreted by the Supreme Court. 59

If, for example, a state court were to invalidate tort reform legislation solely on the basis that it violated the equal protection clause of the fourteenth amendment by applying the rational basis test in a different way than it has been employed by the Supreme Court, the state court decision would run the risk of reversal by the Supreme Court. 60

(1985) (tracing proposition that Supreme Court will not review decisions with independent and adequate state grounds to Murdock v. Memphis, 87 U.S. 590 (1875)).

58. Until recently, it probably was sufficient if there was any reference to the state constitution in the state court decision. See, e.g., In re Estate of Cavill, 459 Pa. 411, 414 n.7, 329 A.2d 503, 505 n.7 (1974) (invalidating Pennsylvania's mortmain statute almost exclusively on basis of fourteenth amendment of United States Constitution, with reference to state proscription against special legislation in footnote). However, Michigan v. Long strongly suggests that a closer evaluation of the state court basis will occur. 463 U.S. 1032 (1983). The majority opinion in Long, written by Justice O'Connor, adopts a presumption that the state court decision is based upon the federal constitution where state and federal grounds are intertwined, and requires a plain statement that the state ground was relied upon. Id. at 1040-41; cf. Oregon v. Hass, 420 U.S. 714 (1975) (state decision rested on federal grounds as neither state constitutional grounds nor state law was cited as basis for decision).


60. A recent example of this is Minnesota v. Clover Leaf Creamery Co., where the Supreme Court reversed the Minnesota Supreme Court's invalidation of Minnesota legislation on fourteenth amendment equal protection grounds, on the basis that the Minnesota high court had not properly applied the presumption of constitutionality and the rational basis test applicable to the economic legislation challenged in the case. 449 U.S. 456 (1981).
2. The Constitutionality of Review Panels Under State Constitutions

a. Right to Jury Trial and Separation of Powers Challenges

Constitutional challenges to the requirement contained in many medical malpractice laws that claims be brought before screening panels prior to state court adjudication have been successful in several instances. The constitutional issues depend to some extent on the composition of the panel, and on the evidentiary force that the review panel’s determination has on the subsequent court action. Some statutes provide for panels consisting of lawyers and health care practitioners, others include a single judge. The evidentiary effect of the panel determination ranges from not being admissible in the subsequent court action to establishing a *prima facie* case of malpractice.  

The broadest based challenge to review panels is that they constitute a delegation of judicial power in violation of state constitutional provisions providing for a separation of powers among the judicial, executive and legislative branches. For example, the Illinois Supreme Court found review panels unconstitutional on this basis in *Wright v. Central Du Page Hospital Ass'n*.  

Although the determination of the review panel under Illinois law was not admissible in court, the supreme court found that delegating the authority to the panel (consisting of one circuit judge, one physician and one practicing attorney) to apply principles of law to malpractice claims, and to make conclusions of law and fact, constituted an unconstitutional delegation of judicial authority. The *Wright* court rather clearly indicated that the constitutional deficiency in the review panel scheme was that the non-judges on the panel could override the judge’s determination of law and fact since majority vote governed the decision. Nearly a decade after *Wright*, however, the Illinois Supreme Court, in *Bernier v. Burris*, invalidated a revision of the panel concept that responded directly to this concern. In *Bernier*, the Court found that a review panel system which left the determination of law and procedure exclusively to the judicial member of the panel, but shared fact-finding authority between the judge and nonjudicial members of the panel violated the Illinois constitutional proscription against delegation of judicial authority.

In Illinois it appears that any review panel that blends the

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63. 113 Ill. 2d 219, 497 N.E.2d 763 (1986).
fact-finding function between the judicial and non-judicial members of the panel, or which shares the judge's fact-finding and decision making authority with the non-judicial members of the panel is unconstitutional. This is the most broad-based and restrictive construction of constitutional limitations on review panels in our legal system.

In Pennsylvania, review panels have been found to violate the right to a jury trial because of the lengthy delays caused by administration of the review panel system. The initial challenges to the review panels on separation of powers and usurpation of the jury's fact-finding function were rejected by the high court.\(^\text{64}\) Subsequently, after data on the operation of the panel system was made available, the panel system was invalidated in \textit{Mattos v. Thompson}.\(^\text{65}\) In so holding, the Pennsylvania Supreme Court noted that an overwhelming percentage of claims filed with the arbitration panels had not been resolved, despite the fact that in many instances a significant period of time had lapsed.\(^\text{66}\)

\textit{Mattos} does not represent a significant departure from federal precedent on the constitutionality of review panels in the face of right to jury trial claims. Review panels are not viewed as intrinsically encroaching upon exclusive functions of the court and jury. As with federal court analysis, the right to a jury trial is still not violated as long as ultimately, the injured plaintiff has the right to a jury's determination of the malpractice claim. However, excessive delay in that "ultimate" determination may violate a patient's rights to a jury trial. This is a less restrictive notion of state constitutional limitations on review panels than that of the Illinois Supreme Court. There is no direct assault on alternative dispute resolution mechanisms, only a constitutional requirement that they be reasonably efficacious.

b. Challenges to Review Panels as Denying Right of Access to Courts

Several courts have found that review panels violate state constitutional provisions granting rights of access to the courts. The Supreme Court of Missouri in \textit{State ex rel Cardinal Glennon Memorial Hospital for Children v. Gaertner},\(^\text{67}\) held that the delay intrinsic in the review panel requirement violated the right of access to


\(^{65}\) 491 Pa. 385, 421 A.2d 190 (1980).

\(^{66}\) \textit{Id.} at 392-96, 421 A.2d at 194-96.

\(^{67}\) 583 S.W.2d 107 (Mo. 1979).
the courts specifically provided for in the state constitution. Other courts have found that while there is no per se violation of the right of access to courts, undue delay caused by the review panel process may violate the right of access to courts implicit in the due process clause of the state constitution.68

Ironically, review panels have been found unconstitutional in Florida because of the hardship and burdens caused by a legislatively mandated ten month period for completing the arbitration process. Initial constitutional challenges to the review panels on right to jury trial and access to court grounds were rejected.69 However, after a review of the handling of over seventy cases, the Florida Supreme Court concluded that the process was so onerous and otherwise unfair to the parties as to violate the state due process right of access to courts.70


States may go off on their own in protecting individual rights against state and local governments. In our federal system, as has already been discussed, state courts may interpret provisions in state constitutions limiting government action on the basis of rights or notions of justice as they see fit, as long as the state constitution is read to protect individual rights as much as the federal constitution does. High state courts may provide for greater, but never less protection of individual rights in interpreting state constitutions. Those state courts that choose to interpret state constitutions to expand individual rights have almost total discretion to develop their own standard for constitutional review. Many state courts, however, choose to view their state constitution in a way that tracks the basic conceptual approach taken by the United States Supreme Court. The fundamental rights-suspect classification-rigid-intermediate scrutiny system is utilized as the articulated basis for determining what level of judicial scrutiny will apply to legislation that is claimed to violate the state constitution. However, the range of legislative acts that are subject to these higher standards of review will be broader.71

70. Aldana v. Holub, 381 So. 2d 231, 236-37 (Fla. 1980).
71. See, e.g., Carson v. Maurer, 120 N.H. 925, 424 A.2d 825 (1980) (adopting federal three-tier model under state constitution, but applying intermediate
Many state constitutional provisions do not have counterparts in the federal Constitution and on their face specifically appear to apply to features of tort reform legislation. The Arizona Constitution, for example, specifically prohibits abrogation of "the right of action to recover damages," and laws "limiting the amount of damages . . . recovered for causing the death or injury of any person." The Pennsylvania and Montana Constitutions have similar textual provisions specifically limiting legislative restrictions on damages recoverable in tort. Florida, like several other states, has a provision in its constitution which provides that "[t]he courts shall be open to every person for redress of any injury." Constitutional provisions limiting legislative restrictions on damages and providing for access to courts for redress of tort injuries have been the basis of state court determinations that tort reform legislation is unconstitutional. Damage caps have been especially vulnerable, but other features of tort reform such as the abolition of the discovery rule have been held to unconstitutionally deprive certain tort plaintiffs of their right of access to the courts for redressing tort injuries.

When such specific constitutional provisions have been successfully asserted in challenging tort reform, courts have generally treated the right of access to the courts for full compensatory damages as "fundamental," and applied a strict scrutiny standard of constitutional review to that legislation.

In Pfoest v. State, for example, the Montana Supreme Court found that a $300,000.00 limitation on damages recoverable against the state violated the fundamental right to redress for tort injuries guaranteed by the state constitution. Legislation abolishing the discovery rule in malpractice actions against some health scrutiny to individual interests affected by malpractice legislation. For a further discussion of Carson, see infra notes 81-87 and accompanying text.

72. The relevant section of the Arizona Constitution reads: "the right of action to recover damages for injuries shall never be abrogated, and the amount recovered shall not be subject to any statutory limitation." ARIZ. CONST. art. 18, sec. 6.

73. Id. art. 2, § 32.

74. PA. CONST., art. 3, § 18 (1967).

75. The Montana Constitution guarantees that all persons shall have a "speedy remedy . . . for every injury of person, property, or character." MONT. CONST. art. II, § 16 (1972).

76. FLA. CONST. art. 1, § 21 (1968). For a case interpreting this provision of the Florida constitution, see infra note 80 and accompanying text.


78. 713 P.2d 495 (Mont. 1985).
care practitioners was held by the Arizona Supreme Court in *Kenyon v. Hammer*, to violate the fundamental right to bring and pursue a tort cause of action guaranteed under the Arizona Constitution.\(^79\) A $450,000.00 damage cap on non-economic loss was found unconstitutional by the Florida Supreme Court in *Smith v. Department of Insurance*, on the basis that the limitation violated the fundamental right of access to the courts guaranteed by the Florida Constitution.\(^80\)

The fundamental rights-strict scrutiny approach has its broadest implications with respect to legislation that caps damages recoverable in tort actions. This is clearly the case, of course, in states where the constitution specifically addresses legislative limitations on damages. Constitutional provisions speaking of a right of access to courts are more common and it is likely that, as in the state of Florida, caps on the non-economic aspects of compensatory damages will be successfully challenged as unconstitutional denials of plaintiffs’ right to access the courts to redress legally cognizable injuries.

4. **Intermediate Scrutiny**

The most popular approach to active substantive review of tort reform under state constitutions is to apply intermediate scrutiny and its implementing standard, the fair and substantial relationship test under the equal protection clause of the state constitution. The leading case in this area is perhaps *Carson v. Maurer*,\(^81\) a New Hampshire Supreme Court decision. Applying intermediate scrutiny, the *Carson* court found virtually every feature of the New Hampshire legislation unconstitutional. The New Hampshire Supreme Court decision is, to date, the most sweeping repudiation of medical malpractice tort reform legislation on state constitutional grounds. A $250,000.00 damage cap on non-economic damages was invalidated. Moreover, restrictions on attorneys’ fees, limitations on the collateral source rule, periodic damage payment provisions, a reduction of the existing statutes of limitations, generally and for minors, stricter requirements for expert testimony and notification of suit requirements were found


\(^{80}\) 507 So. 2d 1080, 1088-89 (Fla. 1987).

unconstitutional, as well. The potential consequences of judicial activism on tort reform by the use of the fair and substantial relationship test is aptly demonstrated by a close examination of the analysis in Carson.\(^8\)

Many of the substantive provisions in the New Hampshire statute were enacted for the purpose of reducing liability insurance costs by containing costs in the medical injury reparation system. Damage caps, restrictions on attorneys’ fees, limitations on the collateral source rule and the reduction of existing statutes of limitation were justified by the legislature on cost-efficiency and reduction of insurance premium grounds. With respect to all of these measures, the Carson court found the relationship between the legislative restrictions and liability insurance costs to be insufficient to overcome the presumption against constitutionality under the substantial relationship test. Specifically, the court found that the empirical record on the cost reduction that would be produced by such features as restrictions on attorneys’ fees, was mixed.\(^8\)

In addition, features such as damage caps and periodic payments, apply to such a small number of malpractice claims that the cost savings would be unlikely to impact on ultimate insurance costs.\(^8\)

In addition, the court reasoned that even if some demonstrable cost containment in medical negligence actions might occur as a result of these policies, it is unconstitutional to place the burden of cost containment on a limited class of plaintiffs and their attorneys.\(^8\)

Other provisions in the legislation that had been justified on the basis of straightforward tort or litigation process interests were found to be insufficiently connected to these purposes to be upheld under the substantial relationship test. The sixty-day notice requirement was found to unnecessarily restrict a plaintiff’s claim in view of the alternative notice provided to the defendant by the filing of the suit.\(^8\)

The Carson court’s analysis points to two basic constitutional deficiencies in medical malpractice reform legislation. The first is an empirical deficiency, namely, inadequate factual demonstration that the reduced costs that will be generated by the substantive changes in the law will result in more available reasonably

\(^{82}\) 120 N.H. at 934-46, 424 A.2d at 832-39.
\(^{83}\) Id. at 945, 424 A.2d at 839.
\(^{84}\) Id. at 944, 424 A.2d at 836.
\(^{85}\) Id. at 942, 945, 424 A.2d at 837, 839.
\(^{86}\) Id. at 937-38, 424 A.2d at 834.
priced liability insurance. The second is a deficiency grounded in notions of justice exemplified by the court's statement that it "offended basic notions of fairness and justice"\textsuperscript{87} to place the burden of spiraling insurance costs on a small class of plaintiffs: seriously injured victims of negligence by physicians.

These two grounds for invalidating the legislation, inadequate demonstration of the causal connection between the changes in substantive tort law, and liability insurance cost, and the lack of even-handedness in distributing the burdens of cost containment, represent obstacles different in both kind and degree to corrective actions taken by the legislature through enactment of new legislation.

B. Rational Basis With Bite: The Constitutional Vulnerability of Changes in the Collateral Source Rule

In a few instances, state courts have invalidated portions of tort reform legislation by utilizing a standard of review under state constitutional equal protection clauses that is less strict than intermediate scrutiny and more demanding than the rational basis test. Like the rational basis test employed by the federal courts, the constitutionality of the challenged legislation is presumed. But unlike the toothless review of the federal standard, the reviewing court does examine whether in fact, the specific provisions of the tort reform legislation further the purposes of the law. For example, the Supreme Court of Kansas in Farley v. Engelken,\textsuperscript{88} applied "bite" to the rational basis test under the Kansas equal protection clause to find legislative abrogation of the collateral source rule unconstitutional. Similarly, in Boucher v. Sayeed,\textsuperscript{89} the Supreme Court of Rhode Island took judicial notice of the fact that a medical malpractice insurance crisis did not exist, and concluded that the restriction on plaintiffs' rights under the challenged tort reform legislation was not reasonable.

Farley illustrates the special vulnerability of such features of tort reform as the abolition of the collateral source rule to evaluation at any level of meaningful constitutional review. The collateral source rule provides that payment for some of the costs of the accident by a source other than the defendant do not reduce the damage award against the defendant. This common-law rule is generally criticized as granting a windfall to the plaintiff. In

\textsuperscript{87} Id. at 944, 424 A.2d at 838.
\textsuperscript{89} 459 A.2d 87 (R.I. 1983).
some instances this may occur. However, in many and perhaps most cases, because of subrogation rights, the collateral source rule simply shifts the loss of these payments from the plaintiff's insurer who has paid for costs, such as medical expenses, to the defendant's insurer. Abolishing the collateral source, therefore, may result in reducing costs to the health care practitioner's insurer, but not with reduction of overall insurance costs. It also may produce the anomalous result of requiring the innocent plaintiff's insurance company to pay more than the insurer of the health care practitioner who was at fault. These two consequences of failing to reduce overall costs and shifting responsibility away from the party at fault, makes restricting or abolishing the collateral source rule especially vulnerable to constitutional attack at the state court level.90

Legislation adopting statutes of repose or selectively restricting statutes of limitations against health care professionals by abolishing the discovery rule are similarly vulnerable to meaningful constitutional review. Statutes of repose limit suits against selective actors, such as products manufacturers or architects, after a specific period of time has passed, without regard as to whether an injury has occurred. They differ from statutes of limitation that generally bar a cause of action that is not filed within a specified period after a tort injury has occurred. The argument that these features of tort reform significantly impact on cost containment has not flown with state courts that truly scrutinize tort reform legislation.91

C. Intrastate Distinctions: Picking and Choosing Among Tort Legislation: The Quid Quo Pro Concept

In those states where judicial activism in employing the intermediate or rigid scrutiny model of review has resulted in a determination that tort reform is unconstitutional, courts have sometimes distinguished between specific features of tort reform legislation, upholding some parts, and invalidating others. Beyond that, statutes defining the rights and duties in tort in areas other than malpractice have been distinguished and upheld.


D. Damage Restrictions on Governmental Liability and on Workers' Compensation Claims

Close scrutiny of the constitutionality of tort reform malpractice legislation has raised questions about the constitutionality of recent legislation in other areas of torts. Perhaps the closest analogues are damage caps on personal injury suits against government entities or in wrongful death actions and on claims brought under workers' compensation laws where attorneys fees are regulated, as well. Since much no-fault legislation places damage caps on non-economic damages, the continued constitutionality of such legislation is also placed in doubt by constitutional developments in the malpractice tort reform area.

Courts have generally not carried over the constitutional analysis from tort reform to these areas. For example, the Illinois,92 New Hampshire93 and Montana94 Supreme Courts have found damage caps in their malpractice tort reform legislation unconstitutional, and yet clearly indicated that similar caps in the wrongful death, workers' compensation and governmental tort liability areas would be constitutional. These three jurisdictions accomplish this end by adopting the peculiar state constitutional law concept of "quid pro quo." Under this notion, legislation that grants rights to tort plaintiffs that were not available under the common law may restrict recoverable damages without triggering close judicial scrutiny under the state constitution. The "quid" portions of this analysis refer to the supplementation of the common law in workers' compensation and wrongful death legislation. At common law a tort cause of action did not survive the death of the tort plaintiff, and under expanded notions of assumption of the risk and the fellow servant rule, employees' rights in tort against employers were severely restricted. On the other side, the "pro quo" is that legislation in the workers' compensation and wrongful death areas cap damages. Similarly, there was no right to sue government entities in tort at early common law, and legislation restricting damages recoverable in tort provides the "pro quo" for these expanded tort rights. No-fault legislation also fulfills the essential ingredients of this notion since fault re-

quirements are suspended (the quid) and caps on some damages generally also apply (the pro quo).

The argument that tort reform is consistent with quid pro quo principles because it provides a "societal quid pro quo" by making affordable insurance available has not been endorsed by the courts. The correlative loss benefit relationship is limited to the individual whose rights are affected by the legislation, and not to society as a whole.95

This notion that only if the legislature gives newer or greater rights to tort plaintiffs may it restrict essential features of traditional common law tort claims with constitutional immunity is essentially a state constitutional law doctrine. The quid pro quo principle is sometimes traced to dictum in New York Central Railroad v. White,96 a 1917 Supreme Court case upholding a workers' compensation law against fourteenth amendment objections. However, a due process or equal protection requirement of quid pro quo is totally at odds with the current non-interventionist philosophy of the Court and precedent.97 However, the principle performs an important function in the emerging state constitutional jurisprudence currently developing around tort reform legislation. Quid pro quo is a major device for sorting out legislative changes in the law of torts by state courts for the purpose of justifying different standards of review and constitutional accountability.

The crucial assumption upon which the quid pro quo concept is premised in state constitutional law is that long established common law causes of action and damage remedies in tort involve special kinds of personal interests and liberties that warrant greater constitutional protection than other economic or prop-

95. See Wright v. Central DuPage Hosp. Ass'n, 61 Ill. 2d 313, 328, 347 N.E.2d 736, 742 (1976); see generally Redish, supra note 3, at 789-90 (suggesting that adoption of this sense of quid pro quo is of little significance because courts would have to engage in same analysis of whether tort reform was effective means for insuring affordable insurance as under equal protection analysis).

96. 243 U.S. 188, 201 (1917).

97. Duke Power v. Carolina Envtl. Study Group, Inc., 438 U.S. 59 (1978); Silver v. Silver, 280 U.S. 117, 122 (1929); see also Redish, supra note 3, at 784-90 (author argues that quid pro quo doctrine gives unwarranted constitutional law-type status to common-law causes of action, and restricts flexibility and creativity of common-law development); cf. Learner, supra note 3. Learner advocates incorporating the quid pro quo doctrine into constitutional review of malpractice tort reform legislation. Learner's view was cited with approval, in Farley v. Engeken, 241 Kan. 663, 746 P.2d 1058 (1987), which held that abrogation of the collateral source violates equal protection. For a further discussion of Farley, see supra notes 88-89 and accompanying text.
property interests. This special status of common law personal injury tort claims plays a central role in the state constitutional law jurisprudence that is developing around tort reform legislation. Utilization of quid pro quo analysis will continue to play a complementary role in state constitutional challenges to “tort reform” legislation.

E. Severability

In state constitutional adjudication of tort reform, the question of whether the constitutionally infirm portions of a statute may be severable from other sections of the statute becomes very important. The nature of tort reform legislation and the state constitutional basis for constitutional review converge to project severability into an important role. Tort reform legislation involves an array of provisions, ranging from damage caps to alteration of the collateral source rule, the abolition of punitive damages, and provisions for periodic damages. These provisions implicate different state constitutional provisions and concerns. Damage caps have been invalidated under specific constitutional provisions providing for a right of access to courts for damage remedies. These provisions have little or nothing to do with the interests that are implicated by regulating attorneys’ fees or by altering of the collateral source rule. Moreover, in those jurisdictions that apply heightened scrutiny under state equal protection clauses, a particular provision may substantially further a valid state interest while other provisions may not. If provisions in tort reform legislation may be severed, they may be upheld because a more deferential standard of review is applied, or because there is a clearer demonstration that state interests are substantially furthered.

Severability is solely a matter of state law. Generally, a presumption that legislative provisions are severable is applied to tort reform legislation. However, this presumption is overcome if the unconstitutional provisions are “so integral and essential . . . [to] the general structure of the act” that “remaining provisions would [not] have been enacted without [them].” 98 A leading decision finding provisions in tort reform malpractice legislation unconstitutional is Carson v. Maurer, discussed above. Recall that in Carson, the New Hampshire Supreme Court found several sections of the state’s malpractice legislation unconstitutional by ap-

plying intermediate scrutiny. The court invalidated the statute as a whole because the few remaining constitutional provisions could not be severed.\textsuperscript{99}

Florida and Illinois, two jurisdictions that have been active in constitutional review of tort reform, have found parts of tort reform legislation severable. In \textit{Bernier v. Burris},\textsuperscript{100} the Illinois Supreme Court found that the pretrial screening panel requirement was unconstitutional on state separation of powers grounds, but found the balance of the legislation severable and constitutional under the rational basis standard of review. The severable portions of that legislation included a periodic damage requirement, a restriction on the collateral source rule and a prohibition on punitive damages.\textsuperscript{101} Similarly, the Florida Supreme Court has held that a damage cap of $450,000 on non-economic damages unconstitutionally violated tort plaintiffs' right of access to courts, but severed the balance of the legislative provisions and found them constitutional under the rational basis standard of review.\textsuperscript{102} These provisions included significant changes in joint and several tort liability, limitations on punitive damages, periodic payments for future economic damages, rejection of the collateral source rule and numerous other regulations of the insurance industry.\textsuperscript{103}

Experience in those jurisdictions where there has been a constitutionalization of tort reform suggests that severability will play an important role in providing flexibility within a given jurisdiction on questions of tort reform. Severability will provide much less of an obstacle to responses by the legislature to a perceived liability insurance problem in those states like Illinois and Florida, where specialized and narrow constitutional provisions are the basis for close scrutiny of tort reform legislation. However, in states like New Hampshire, where state equal protection or due process provisions trigger intermediate scrutiny and invalidation of a broader range of tort reform provisions, severability principles will make it considerably more difficult to pick and choose within reform legislation on constitutional questions.

On a somewhat inter-related issue, courts have generally not found state constitutional provisions prohibiting statutes from

\textsuperscript{99} \textit{Id.}
\textsuperscript{100} 113 Ill. 2d 219, 497 N.E.2d 763 (1986).
\textsuperscript{101} \textit{Id.} at 253, 497 N.E.2d at 767.
\textsuperscript{102} Smith v. Department of Ins., 507 So. 2d 1080, 1090-95 (Fla. 1987).
\textsuperscript{103} \textit{Id.}
containing multiple subjects to restrict tort reform legislation. This argument seems almost frivolous with respect to earlier malpractice legislation because of the specialized thrust of such laws. However, with respect to a comprehensive tort reform scheme like that of the state of Florida, where limitations on traditional recovery are also tied to pervasive regulation of the insurance industry, the single subject rule would seem to be more seriously implicated. As the Florida Supreme Court correctly observed, "tort reform" constitutes a formal recognition of the connection between substantive tort law and insurance. Therefore, as two sides of the same general coin of providing for a just and economically sound compensation system, a single general subject was found to be involved in the Florida legislation. Under the Florida Supreme Court's analysis, the single subject requirements of some state constitutions does not represent an important constitutional question in tort reform challenges.104

As the above summary suggests, tort reform legislation has been found unconstitutional in numerous states. Much of the constitutional jurisprudence has developed in challenges to malpractice tort reform legislation. This is because tort reform was initially embraced nationally in response to a perceived liability insurance crisis for health care practitioners. Tort reform legislation has now extended to personal injury actions, generally. State constitutional law developments from the medical malpractice reform area will also carryover and license significant review of tort reform generally in some states. This has already occurred with the invalidation of statutes of repose and damage caps. The constitutionalization of certain features of tort reform in many states is likely to be a feature of our legal system for some time.

VII. LEGISLATIVE RESPONSES TO THE INITIAL CONSTITUTIONALIZATION OF TORT REFORM

Legislatures have begun to respond to state court invalidation of tort reform legislation with corrective measures. Some patterns are discernible from this initial phase of attempts by state legislatures to save tort reform by statutory revision. Where invalidation has been the result of employing specific constitutional provisions with a special focus on discrete elements of tort reform

104. Id. at 1084-87; see also Bernier v. Burris, 413 Ill. 2d 219, 247, 497 N.E.2d 763, 777 (provision of statute barring punitive damages for both medical malpractice and legal malpractice actions does not violate single-subject requirement).
such as damage caps or pre-trial screening panels, many of the remaining elements of tort reform legislation have been upheld, applying a more deferential standard of review and the concept of severability. However, with respect to the specific provisions that have been found unconstitutional, constitutional amendments would probably be necessary before those aspects of tort reform would be upheld. This would appear to be the case with respect to damage caps in Florida and Montana, and to pretrial screening panels in Illinois. In the damage cap cases as a theoretical matter, if it could be demonstrated that such limitations are necessary to further the states’ interest in making affordable liability insurance available, the caps would be constitutional. As a practical matter, however, the case for damage caps could not be made because large awards of non-economic damages constitute such a diminutive portion of overall damage judgments or settlements. Recent scholarship examining the relationship between the availability of affordable liability insurance and tort reform does not appear to provide the case for a sufficient connection between damage caps and insurance rates to satisfy heightened levels of scrutiny under either the strict or intermediate standard of review.\textsuperscript{105} The Illinois Supreme Court’s analysis of separation of powers deficiencies in the pre-trial panel screening cases, leaves virtually no room for the state legislature to, short of a constitutional amendment, retain such a concept in medical malpractice cases. This would also appear to be the case in Pennsylvania with respect to pre-trial panel systems, although for different reasons.\textsuperscript{106}

Where intermediate scrutiny is utilized to invalidate tort reform legislation, the extent to which legislative revisions may cor-

\textsuperscript{105} Cf. Mooney, \textit{The Liability Crisis—A Perspective}, 32 \textit{Vill. L. Rev.} 1235 (1987) (author suggests that tort reform measures will provide for more predictability and reduced costs, but cautions that costs and insurance prices may still be excessive, if tort law continues to move away from what he calls a “fault based” system). Even if Dr. Mooney’s analysis of the cost reduction benefits of tort reform is correct, that alone would likely not provide an argument sufficient to satisfy either intermediate or rigid scrutiny, at least where tort reform legislation is limited to a small group of plaintiffs, defendants or their lawyers. Absent across the board reform measures, meaningful cost reduction is not likely to occur. Beyond that, arguments about the effect of tort reform on liability insurance rates are likely to be viewed in terms of the actual availability and price of insurance. Finally, Dr. Mooney does concede that a myriad of factors aside from tort liability standards contribute to the pricing and availability of insurance. This concession may be enough for courts to require that tort reform be accompanied with regulation of the insurance industries’ activities, including pricing decisions, for intermediate or rigid scrutiny to be satisfied.

\textsuperscript{106} See Mattos v. Thompson, 491 Pa. 385, 421 A.2d 190 (1980) (delays in pre-screening panel process violated right to trial by jury).
rect constitutional deficiencies is not at all clear. The New Hampshire Supreme Court in Carson pervasively scrutinized and invalidated most of the sections of that state’s medical malpractice reform act. It did so applying the “fair and substantial relationship test” and a high level of scrutiny to the various provisions of that legislation. Two major constitutional deficiencies were identified by the New Hampshire Court. One was the lack of evenhandedness in the statute. The other was the absence of an adequate demonstration that specific provisions in the statute were sufficiently connected to the policy objectives of the legislation.

There seem to be considerable political obstacles to satisfying the evenhandedness problem. Much of the New Hampshire Court’s focus in Carson in reviewing the malpractice law was on the unfairness of placing the burden of the alleged liability insurance problem on a small group of plaintiffs and attorneys. Significant revisions in the legislation would have to occur to cure this defect. Apparently legislative restrictions on attorneys’ fees would have to apply to counsel for both the plaintiff and the defendant. Damage caps might have to be applied to tort plaintiffs generally and to compensatory damages generally and not just to the noneconomic damages of seriously injured medical malpractice tort plaintiffs. Even if such an evenhanded treatment of parties and lawyers with respect to these issues were to appear in a revised statute, there would still have to be a demonstration that damage caps and regulation of attorneys’ fees would reduce costs enough to make liability insurance reasonably affordable. Beyond that, other provisions in the statute that were applied evenhandedly to all malpractice plaintiffs would have to also substantially further the states’ interest in affordable liability insurance or in furthering other features of the tort compensatory system. On some issues like restriction of the “discovery rule,” and abrogation of the collateral source rule, such a case has not and is not likely to be made.

In New Hampshire, new tort reform legislation was enacted after the Malpractice Reform Act was found unconstitutional. It does not respond to all of the deficiencies that were identified by the supreme court. How that new legislation will fare when subjected to the demanding scrutiny of the New Hampshire Court will dictate whether New Hampshire and states applying similar standards of review will be able to continue to reform the tort

liability system through thoughtful legislative enactments or whether amendments to their state constitutions will be required.

Ultimately, in those states where tort reform is subject to heightened judicial scrutiny under state equal protection provisions, as in New Hampshire, legislation that directly regulates insurance rates and other features of the insurance industry, as well as the rights of tort plaintiffs and personal injury attorneys might be necessary to satisfy constitutional requirements.

The Florida experience is a microcosm of the evolution of tort reform during the various periods of perceived liability insurance crisis from the middle 1970’s until now. Selective tort reform legislation was enacted with selective intervention by appellate courts under the state constitution. Most recently, the Florida legislature has enacted comprehensive legislation that regulates both substantive tort law and insurance rates, as well as other features of the insurance industry. Basic tort reform measures ranging from damage caps to restricting joint and several tort liability were coupled with extensive regulation of the insurance industry including rolling back and freezing premiums in some markets. Most of the provisions of the law, with the notable exception of the $450,000 damage cap, were upheld by the Florida Supreme Court in Smith v. Department of Insurance.

VIII. The Legitimacy of State Court Constitutionalization of Tort Reform

The constitutionalization of tort reform in many states raises serious questions for the legal system and for our constitutional democracy. Significant obstacles have been placed in the path of changes in the tort compensation system that are politically popular, if not efficacious responses to a perceived crisis in the availability of affordable insurance for some businesses and professionals. Recent history suggests that the cycle of crisis in the availability of insurance and state legislative reactions in restricting the scope of traditional tort rights will be an important

108. For a valuable discussion of Florida tort reform history, see Schulte, Availability, Affordability, and Accountability: Regulatory Reform of Insurance, 14 FLA. L. REV. 557 (1986).

109. See 507 So. 2d 1080, 1083 (Fla. 1987). Similarly, Washington has enacted a statute which, like Florida’s, requires insurance companies to examine the effect of tort reform on their decisions when they apply for rate increases. See Nat’l Conf. Summary, supra note 6, at 3. The 1987 summary also demonstrates that more states are inclined to follow the Florida model in monitoring and regulating the insurance industry.
feature of our legal system, at least until the unlikely occurrence of federal preemption of the tort reparation system. If this is the case, then those state courts which have broken from the deferential posture taken by the Supreme Court in their review of popular economic policies may be persistently placed in a confrontational posture with the political process and populace in their states.

Standing for principle-based rights against majoritarian positions is nothing new to either the state or federal judiciary. But by and large, this has mostly occurred in areas of non-economic fundamental rights and invidious discrimination directed at historically protected groups or their analogs. Much of the activism in state constitutional interpretation that has characterized our legal system over the last two decades has been in continuance and expansion of the tradition of the Warren Court in the face of more restrictive interpretations of the federal constitution by the Burger and Rehnquist courts. The features of these state constitutional developments most often discussed in the literature are criminal procedure, first amendment, privacy, and racial and gender discriminations.110

The constitutionalization of tort reform by state courts is a departure from this. Non-interventionist review of economic policy was firmly endorsed by the Warren Court. Does state court activism in reviewing legislative responses to a perceived insurance crisis constitute legitimate exercise of the anti-majoritarian power of constitutional review?

Of course from a strictly positivistic perspective of the law, the answer is clear. There are few constitutional restraints on state courts. As discussed earlier, subject to the requirement of basing its decision clearly on state constitutional grounds, state courts are provided considerable freedom to diverge from federal precedent in interpreting state constitutional provisions, even when the text of the state constitution is identical in wording to the text of the federal constitution.

That state courts have the authority in our legal system to

actively review and invalidate tort reform measures does not resolve the question of whether they ought to. Without a demonstration that departure from the Supreme Court’s interpretation of the federal constitution is warranted because of the special features of constitutional review under state constitutions, the constitutionalization of tort reform is stripped of legitimacy. Activism by state courts in the tort reform area may then be viewed as one scholar has suggested, simply as a reflection of the bias of state court judges, many of whom may have come to the bench from the personal injury tradition, toward preserving the personal injury suit.\textsuperscript{111}

Calls for state courts to lockstep their interpretation of state constitutions with federal precedent are made on behalf of both interpretivist and noninterpretivist philosophies of constitutional review. Uniformity in the meaning of textual language that is similar, is presupposed under interpretivism; language in constitutional text is an expression of the intent or values of the framers. Inconsistent interpretation of identical textual language is at odds with the philosophical assumptions of interpretivism. Indeed, primary evidence of the evils of noninterpretive review are the ever-changing and inconsistent interpretations of constitutional text espoused by the Supreme Court.\textsuperscript{112}

State court deference to federal precedent in constitutional interpretation might also be said to further the non-interpretivist agenda. Although it is proper for courts to take into account long standing traditions of justice and morality in constitutional interpretation under this view, deference to Supreme Court leadership in the identity and elaboration of these traditions may be desirable. Judges at the state and federal level are involved in a common effort to identify, expound and evolve a national tradition of political morality about rights and the justice of governmental action. When state courts go off on their own in expounding upon a different political morality, these efforts produce confusion that undercuts this mission. On the other hand, the core assumptions of noninterpretivism may not be threatened by an expanded interpretation of individual rights under state constitutions. Differences are reflections of reasonable disagreements amongst judges about traditions of political morality and of the role of a constitu-


tion in adapting to the demands of an evolving society. Propo-
nents of judicial activism find support in our federalism for state
judges having an independent voice in the national debate over
societal morality. 113

A. Invalidating Tort Reform Under Specific Textual Provisions Unique
To State Constitutions

Much of state court activism in invalidating portions of tort
reform legislation is an appropriate exercise of constitutional re-
view. Perhaps the most compelling examples are those where
state constitutional provisions with specific and pertinent textual
language form the basis of the courts' invalidation. Several of the
concerns that are raised about state courts going off on their own
in exercising constitutional review have no significant bearing on
judicial interpretation of state constitutional provisions that are
specific and unique to the state constitution that is before the
court.

Interpretevists should have no general complaint. State con-
stitutional language reflects the distinct values and intentions of
the framer under the state constitution. From a non-inter-
pretevist perspective, these provisions represent expressions of
political morality that are distinctive features of the history and
traditions of the state. 114

It is well-settled that in our legal system, states may express
their own political morality of rights against the government as
long as it is no less generous than that developed under the fed-
eral constitution. Where that political morality is expressed
clearly in specific and unique textual language, judicial review is a
reflection of the independence and autonomy of the states in our
federal system and not of the state courts' rejection of the call for
deference to traditions of political morality developed under the
federal constitution. In several states, it is clear that the specific

113. For a general discussion, see Sager, Foreword: State Courts and the Strateg-
gic Space between the Norms and Rules of Constitutional Law, 63 TEX. L. REV. 959
(1985). See Brennan, State Constitutions and the Protection of Individual Rights, 90
HARV. L. REV. 489, 502-03 (1977); Developments, supra note 55; see also State v.

114. See Bice, Anderson and the Adequate State Ground, 45 S. Cal. L. REV. 750
(1972); Keyser, State Constitutions and Theories of Judicial Review: Some Variations
on a Theme, 63 TEX. L. REV. 1051, 1063-64 (1985) (citing value of interpretivism as
system of restraint); Sager, supra note 113, at 961 (summarizing but not endors-
ing this position); Developments, supra note 55, at 1330; see also Maltz, The Dark
Side of Court Activism, 63 TEX. L. REV. 995 (1985) (arguing for uniformity on be-
half of interpretivist philosophy of interpretation of constitutional texts).

http://digitalcommons.law.villanova.edu/vlr/vol32/iss6/5
features of the state constitutional texts and the values that these provisions represent are the basis for judicial invalidation of tort reform legislation. The striking down of damage caps on the basis of provisions prohibiting limitations on damages or granting a specific right of access to courts or redress for personal injury, are the primary examples.

B. Structural Differences Supporting the Legitimacy of State Constitutional Review

In at least one area of successful constitutional challenges to tort reform, structural differences between state and federal constitutions coupled with differences in the basic functional responsibility of state courts under notions of separation of powers, further support the legitimacy of state courts in constitutional review of tort reform.

Pretrial screening panels in malpractice legislation have been found unconstitutional on the basis that such panels violate separation of powers and right to jury principles under some state constitutions. The structure of state constitutions may generally parallel that of the federal constitution in terms of the basic idea of separate legislative, judicial and executive functions. But the nature of legislative, executive and judicial powers under state constitutions is sufficiently different from that of the federal government for state courts to develop their own constitutional traditions involving separation of powers. Two examples demonstrate this notion. At the federal level, many separation of powers concerns arise as a result of a tension between the executive and legislative branches when the President has acted directly contrary to the preferences of Congress on foreign affairs. Foreign affairs involve powers that neither the legislative nor executive branch of state governments possess. Conversely, state courts, especially in areas of personal injury and torts, still function primarily in creating and interpreting the scope of rights in the common law tradition. Federal courts, on the other hand, do not in a similar way create and define rights in the common law tradition. Therefore, approaches like that of the Illinois Supreme Court in severely restricting dispute resolution mechanisms like medical malpractice screening panels may be viewed as reflections of the differences in the function of state courts and structure of state constitutions in our federal system.¹¹⁵

¹¹⁵. I am referring to the general tri-partite, legislative, executive, and judicial structure of many state constitutions. In other respects, state constitutions
C. Differences in Political Accountability and Traditions of Political Morality

The most serious questions concerning the legitimacy of invalidating tort reform are raised when state courts utilize the due process and equal protection provisions of state constitutions to invalidate tort reform legislation. This is because these textual provisions essentially track the language of the federal constitutional text and there is a surprising consensus among courts and students of the constitution that the anti-majoritarian function of constitutional review is not warranted under federal due process or equal protection provisions with respect to this type of legislation. Although the interventionist philosophy reflected in the concept of "substantive due process and equal protection" has been thoroughly repudiated, there is considerable disagreement as to exactly why such a philosophy was wrong. Much of the criticism focuses on the inappropriateness of courts substituting their judgment for that of the legislature on economic policy. This criticism involves two separate, but interrelated complaints. One is that basic policy choices on distribution of wealth are for the politically accountable branch of government in our democracy. The other is that the federal courts are not equipped to deal with the entangling and complex problems of economic regulation both in terms of competence and resources.\textsuperscript{116}

Do these concerns of judicial accountability, competence, and economy transport cleanly to those state courts that have utilized dramatically from that of the federal constitution. State constitutions are generally much longer, more detailed and address more discrete topics than the federal constitution. See Developments, \textit{supra} note 55, at 1553-56. An analogous area of distinct development under state constitutions under separation of powers is in respect to the delegation doctrine. \textit{Id.} at 1475-78 (discussing the divergence of state and federal courts with respect to the principle that separation of powers restricts the power of legislatures to delegate law making authority to agencies).

Federal court authority to determine rights as part of a "federal general common law" was rejected by the Supreme Court in \textit{Erie v. Thompkins}, 304 U.S. 64, 78 (1938); federal courts have developed a more limited sense of federal common law as part of the exercise of their judicial function in federal question cases. \textit{See, e.g.}, \textit{Clearfield Trust Co. v. United States}, 318 U.S. 363, (1943). \textit{Cf.} \textit{Bivens v. Six Unknown Agents}, 403 U.S. 388 (1971).

\textsuperscript{116} See generally \textit{Griswold v. Connecticut}, 381 U.S. 479, 514-16 (1965) (Black, J., dissenting) (economic substantive due process improperly involved subjective natural law interpretation of constitution); \textit{McCloskey}, \textit{Economic Due Process and the Supreme Court}: \textit{An Exhumation and Reburial}, 1962 \textit{SUP. CT. REV.} 34; \textit{Strong}, \textit{The Economic Philosophy of Lochner: Emergence, Embrasure and Emasculation}, 15 \textit{ARIZ. L. REV.} 419 (1975) (improper for \textit{Lochner} court to "fasten on the country . . . a pattern of economic regulation believed by the Court to be essential to the fullest development of the nation's economy").
lized state economic substantive due process and equal protection principles to review tort reform legislation? Two features of state constitutional law and constitutional review by state judges strongly suggest that they do not. State court judges and their interpretations of state constitutions are much more politically accountable than those of their federal counterpart. This is because unlike federal judges who are appointed for life, by and large, state court judges are elected to office and for limited terms. In addition, state constitutions are much easier to amend than the federal constitution; many are amendable by referendum.¹¹⁷

Beyond that, the Supreme Court sits atop the pyramid of our federal court system and has to consider the practical consequences of committing the federal judiciary to constitutional review of the economic regulatory policies of the fifty states, as well as of the federal government. The scope of legislative and regulatory enactments that would potentially be reviewable by state courts is considerably less than the regulatory policies of the federal government and fifty states. Concerns over judicial economy are therefore somewhat less in the context of state constitutional review of economic policies.

Even assuming that differences in political accountability dramatically alter the evaluation of the legitimacy of judicial intervention at the state court level, state courts ought to think carefully before entering upon such a course. Tort reform involves intricate and imponderable economic judgments on which there appears to be little agreement by even the most thoughtful legal scholars and economists.¹¹⁸

State courts and juries deal with complex and confounding questions in many areas of both the common law and constitutional adjudication. In products liability actions, complex technical and damages questions are often considered. Some of the most profound and brutal choices between conflicting values, and most difficult determinations about medical technology, are dealt with in the law of death and dying.¹¹⁹ Therefore, the concern

¹¹⁷. See Developments, supra note 55 at 1351-56 (summarizing process for amending state constitutions and selecting appellate court judges).

¹¹⁸. Compare Mooney, supra note 105 (suggesting that legislative proposals should “improve the efficiency and justice of the liability system”) with Priest, The Current Insurance Crisis and Modern Tort Law, 96 YALE L.J. 1521, 1588 (1987) (arguing that tort reforms are “helpful, [but] only partial contributions” toward solution).

about judicial competence does not, by itself, provide a compelling reason for non-intervention.

Many high state courts have followed federal precedent and chosen not to intervene when tort reform legislation has been challenged under state equal protection and due process claims. The interventionist posture of those states which find that tort reform violates state equal protection or due process provisions appear to reflect both dissatisfaction with the rigidity of federal precedent and judicial recognition that the political morality of the state views certain economic liberties as important enough to warrant meaningful constitutional protection.\textsuperscript{120} Decisions in Rhode Island and New Hampshire clearly dramatize this. Non-intervention under the federal constitution bluntly fails to distinguish between property or economic liberties. The high state courts of these two states were persuaded that the bundle of liberties and interests that are involved with seriously injured tort plaintiffs were sufficiently protected under traditions of justice embodied in state equal protection principles for that state to have to demonstrate both that important public good was furthered by tort reform and that the loss of important liberties for the public good was distributed evenhandedly. These decisions reflect judicial recognition that current tort reform is basically incompatible with the deep-seated cultural commitment to the values of accountability that Professor White writes about.\textsuperscript{121}

**IX. CONCLUSION**

State legislative responses to a perceived liability insurance crisis in many areas of commercial and professional activity have been ensconced in the term “tort reform” by the media, scholars, lawyers and the public. Tort reform legislation has been challenged in state and federal courts as unconstitutional. These efforts have been unsuccessful when the claim was based upon some provision of the United States Constitution. This is a consequence of the non-interventionist philosophy clearly stated in

\textsuperscript{120} Cf. Sager, \textit{supra} note 113 at 973-76. Sager suggests that state courts might engage in activism under state constitutions in areas of economic policy because of their different views about strategies of turning political morality into constitutional rules. He submits that differences in judicial management responsibilities might move a state court to not find the rigid approach of the Supreme Court in treating all property and economic liberties as subject to deference controlling. I think this might well explain much of what is happening in the employment of heightened scrutiny under state equal protection provisions in the tort reform area.

\textsuperscript{121} See White, \textit{supra} note 1, at 1292-98 & 1288 n.79.
federal court precedent governing judicial review of liberty and property interests which are the basis of many of the claims asserted by lawyers and personal injury plaintiffs. Many high state courts have followed federal precedent and also chosen not to intervene when tort reform legislation has been challenged under state constitutional provisions.

In a substantial number of states, courts have gone off on their own and invalidated portions or all of tort reform legislation under their state constitution. I have suggested that this development reflects both recognition of the special political morality and values represented by the specific and unique textual language of the state constitution, and dissatisfaction with the rigidity of the non-interventionist approach of federal precedent. Differences in the political accountability of state court judges who are generally elected for a term of years and the structure and function of state constitutions and state courts provide a basis for strong arguments supporting the legitimacy of constitutionalizing tort reform.

As a result of judicial activism in reviewing tort reform legislation, several states are in the process of revising tort reform legislation to respond to the constitutional deficiencies that have been identified by state appellate courts. Other states, especially with respect to damage caps and abrogation of the collateral source rule may have to amend state constitutions to preserve these features of tort reform.