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Amy Widman

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Introduction

Over the past few decades, there have been repeated proposals to remove medical malpractice claims from the civil justice system entirely. These claims, most of which are negligence claims, are traditionally brought in state courts and appear before a jury. The proposals typically focus on removing the claims from the jury and creating alternate tribunals for adjudication. Often, vague promises that an alternative system will be more fair to plaintiffs and/or will provide more compensation accompany such proposals. To date, the proposals have all been struck down. However, the current administration has made tort reform a priority and once again the topic of specialized health courts is up for discussion.

The most recent proposals have a strong public relations spin attached to them: Americans are promised a faster, more reliable system of resolving medical malpractice claims. Constitutional worries are brushed aside with misleading comparisons to other alternative compensation systems like worker's compensation. However, attacks on claimants' rights to access the court system and to have a jury hear their complaints should not be sold to the public with slick and ultimately groundless promises. These rights, and their obstruction, deserve close constitutional scrutiny. So far the discussion has not included such analysis. This article examines current administrative compensation schemes and alternative tribunals, and exposes the important ways health courts would differ from them. These differences will make the health courts unconstitutional under most state constitutions. Congress should not

* Attorney/Policy Analyst, Center for Justice and Democracy. Former law clerk to the Hon. Theodore H. Katz, U.S. Magistrate Judge, Southern District of New York. J.D., *cum laude*, New York University, 2002; B.A., Northwestern University, 1996. The author would like to thank Joanne Doroshow for her editorial assistance. Also, thanks to Basel Hamdan and Patrick Buckley for their research assistance.

waste valuable time and money with such an unworkable proposal.

On June 29, 2005, Senator Enzi (R- Wyoming) introduced legislation that would grant federal money to states in order for the states to implement specialized health courts.[1] This legislation, the "Fair and Reliable Medical Justice Act," outlines four models for the states to use as templates in order to devise a tort alternative for medical malpractice.[2] The first model includes any proposal that fulfills the goal of being an "alternative to current tort litigation" and meets the following criteria: "(A) makes the medical liability system more reliable through prompt and fair resolution of disputes; (B) encourages the early disclosure of health care errors; (C) enhances patient safety; and (D) maintains access to liability insurance."[3] In the second model, the "Early Disclosure and Compensation Model," the state "require[s] that health care providers or health care organizations notify a patient . . . of an adverse event that results in serious injury."[4] Such notification is not "an admission of liability."[5] Once notification is complete, the health care provider or organization must make an offer of compensation within a limited period of time and with certain caps based on, as yet, undetermined payment schedules. If the offer meets the requirements, the health care provider or organization is immune to tort liability.[6] The third model, the "Administrative

1. The Fair and Reliable Medical Justice Act, S. 1337, 109th Cong. (2005).
2. *Id.* § 3(d).
3. *Id.* § 3(c)(2).
4. *Id.* § 3(c)(3).
5. *Id.* § 3(d)(2)(A).
6. *Id.* § 3(d)(2)(B). This model is very much the same as the Medical Error Disclosure and Compensation (MEDiC Act) Program, also known as "Sorry Works!" which is described in legislation recently introduced by Senators Clinton and Obama. *See* The National MEDiC Act, S. 1784, 109th Cong. (2005). The MEDiC Act creates an Office of Patient Safety and Healthcare Quality within the Department of Health and Human Services. *Id.* § 933(a). The Director of this Office will administer the MEDiC program, along with monitoring patient safety. *Id.* The Program offers support to hospitals and doctors willing to implement safety plans. Under this support, the hospital or doctor is aided in disclosing errors and offering compensation. There are terms for negotiating compensation, which allows for a third party mediator. *Id.* § 935 (d)(2). Under the MEDiC Act, the patient retains the right to legal counsel and the right to proceed to the judicial system if no agreement is reached after six months. *Id.* § 935(d)(1)(C). It does not appear that the model proposed in the Enzi legislation contemplates such judicial redress, however.

Determination of Compensation Model," creates an administrative entity that is responsible for setting up lists of injuries that are compensable and a procedure whereby providers and patients volunteer to participate in this administrative scheme.[7]

The fourth model proposed by this legislation is known as the "Special Health Care Court Model."[8] It is this model that has generated the most interest and is being strongly encouraged by groups like Common Good and the Progressive Policy Institute.[9] This model is the focus of the article. Part I of this article will examine the proposed Special Health Care Courts Model in detail. Part II will examine current alternative adjudication/compensation schemes like worker's compensation, the Vaccine Injury Compensation Program, the birth injury programs in Florida and Virginia, other compensation schemes, and specialized courts. Part III will compare the health court proposal to these existing schemes and examine the centrality of the quid pro quo doctrine in the existing schemes. Part IV delves further into the constitutional implications of the health court proposal and how the lack of a quid pro quo magnifies the underlying Seventh Amendment, Due Process, and Equal Protection problems. Finally, Part V concludes that the proposals are unconstitutional and unworkable relics of an old political agenda and need to finally be put to rest.

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7. The Fair and Reliable Medical Justice Act § 3(d)(3).

8. *Id.* § 3(d)(4).

9. "Common Good" was founded by Philip K. Howard, Vice-Chairman of the corporate law firm Covington & Burling, one of the principal architects of the so-called "tort reform" movement as counsel for Big Tobacco. Common Good's contempt for the jury system is contrary to the views of most judges, and the American public who, according to polls, believe that juries are the best arbiters of disputes that we have in this country. *See* Carl Deal & Joanne Doroshow, Executive Summary, *The CALA Files – The Secret Campaign by Big Tobacco and Other Major Industries to Take Away Your Rights* (Center for Justice & Democracy & Public Citizen), http://www.centerjd.org/lib/cala.htm (last visited Oct. 4, 2006). Progressive Policy Institute is a research and education institute that is a project of the Third Way Foundation Inc. and connected to the Democratic Leadership Council. The authors of the PPI pamphlet, Nancy Udell & David B. Kendall, are the director of policy and general counsel for Common Good, respectively. *See infra* note 12.

I. The Special Health Courts Model

The Fair and Reliable Medical Justice Act describes a model where a state creates an alternative "court" staffed by judges who are experts in health care.[10] The court will commission expert witnesses and the judges will rely on these experts in order to make binding determinations as to causation, compensation, standards of care, and related issues.[11] This skeletal model has since been fleshed out by Common Good, the Progressive Policy Institute, and researchers at the Harvard School of Public Health.[12] The proposal that is taking shape has the following key features: specialized judges with an expertise in health care; experts hired by the health court; a modified form of negligence (termed "avoidability"); a compensation schedule; no juries; and no access to civil court review.[13]

Who are these judges? In Progressive Policy Institute's plan, the judges are lawyers appointed by governors.[14] Candidates would have a background in science and/or medicine.[15] Common Good and the Harvard team looked at two possible systems—what they term the "early offer model" and the "administrative law judge plus" model.[16] The early offer model is a Bush Administration proposal that puts the decision-making authority in the hands of the individual insurer or hospital.

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10. *See* The Fair and Reliable Medical Justice Act, S. 1337, 109th Cong., § 3(d)(4)(A) (2005).

11. *Id.* § 3(d)(4)(C).

12. Symposium, Troyen Brennen et al., Transcript, *Administrative Approaches to Compensating for Medical Injuries: National and International Perspectives* (Harvard School of Public Health & Common Good, Oct. 31, 2005), *available at* http://cgood.org/assets/attachments/Transcript_—_October_31st_Event.pdf [hereinafter *Transcript*]; NANCY UDELL & DAVID B. KENDALL, HEALTH COURTS: FAIR AND RELIABLE JUSTICE FOR INJURED PATIENTS (Progressive Policy Institute Feb. 2005), *available at* http://www.ppionline.org/documents/healthcourts_0217.pdf [hereinafter *PPI pamphlet*]; AN URGENT CALL FOR SPECIAL HEALTH COURTS: AMERICA NEEDS A RELIABLE SYSTEM OF MEDICAL JUSTICE (Common Good), http://cgood.org/assets/attachments/130.pdf (last visited Oct. 10, 2006) [hereinafter *Common Good Pamphlet*].

13. *See* Transcript, *supra* note 12; *see* PPI pamphlet, *supra* note 12; *see* Common Good Pamphlet, *supra* note 12.

14. PPI pamphlet, *supra* note 12, at 9.

15. *Id.*

16. MICHELLE M. MELLO ET AL., HEALTH COURTS: SYSTEM OVERVIEW AND CURRENT RESEARCH (Harvard School of Public Health 2006), http://cgood.org/assets/attachments/HSPH_Presentation_revisedt.pdf.

This model purportedly creates incentives for such key industry players to make early offers of compensation. The "administrative law judge plus" model takes specialized judges and guides them in their decision-making through additional input of medical experts.[17]

To date, Common Good has not elaborated on exactly how one could combine these two models, but it appears that both the insurers' and the hospitals' viewpoints will heavily aid some form of specialized judge in his decision-making. In one proposal, the insurer or the hospital convenes a panel to screen claims and renders the preliminary decision.[18] A dissatisfied claimant may then choose to take his claim to health court for a second review by a specialized judge, appointed by a "nonpartisan screening commission," who would determine whether or not the claim is compensable.[19] This determination would be based on information "gather[ed] . . . from the facility, through queries to the patient and . . . in some cases through an independent medical examination of the patient. The health court would then render a decision drawing heavily on the independent expert input . . . ."[20] This decision may be appealed outside the health court system, but only on an arbitrary and capricious standard.[21]

According to these proposals, the experts, then, would play a very large role in advising the specialized judge. A fact which begs the questions: Who are the experts and what are the procedures by which they are chosen? It is not clear that these details have been examined as closely as they must; at this point the most anyone has proposed is that the experts be "neutral" and commissioned by the court.[22]

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17. *See* Transcript, *supra* note 12, at 9.

18. *Id.* at 10-11.

19. *Id.* at 9.

20. *Id.* at 10-11.

21. In deciding on this standard of review for appeals outside the health court system, Troyen Brennan states, "[w]e think there would probably be less appeals, or less successful appeals, from an arbitrary and capricious standard. But we feel that is necessary." *Id.* at 11.

22. *See* The Fair and Reliable Medical Justice Act, S. 1337, 109th Cong. § 3(d)(4)(C) (stating "reliance on independent expert witnesses commissioned by the court"); *see also* PPI pamphlet, *supra* note 12, at 9 ("Access to impartial, unbiased expert testimony on the standards of care is essential for a reliable system"). Practically every time health courts are discussed the importance of neutral ex-

As for the standard of liability, the proposal being discussed most recently and fervently is a new standard entitled "avoidability."[23] Avoidability appears to draw from a standard applied in Sweden and lies somewhere between negligence and strict liability.[24] It is definitely not a "no-fault" standard.[25] In fact, contrary to many glossy press releases, the same people designing the current model and often describing it as "no-fault" have written in legal journals that "the tag 'no-fault' is somewhat misleading because the central notion of 'avoidability' is actually interpreted quite differently."[26] In studying the results of Sweden's avoidability standard, it is clear that this standard creates a higher standard for compensation than no-fault.[27] In addition, similar studies have found a "non-trivial failure rate of claims" under this approach.[28]

The avoidability standard states that an injured person is eligible for compensation if the injury would not have happened

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perts is addressed. The problem is the experts "neutrality" is assumed based on the court's commission; however it remains unclear who the judges are and how they will be appointed. Without more understanding of the decision-makers, it is impossible to evaluate the "neutrality" of any experts. The ultimate goal is to reduce the use of "hired guns" but there is no mechanism yet in place to remove the possibility of the health courts just hiring "hired guns" for the industry. The nature of our adversarial system is to allow a truth to emerge from two sides arguing zealously. The "neutral" experts in these proposals are quite suspect.

23. David M. Studdert et al., *Can the United States Afford a 'No-Fault' System of Compensation for Medical Injury?* 60 LAW & CONTEMP. PROBS. 1 (Spring 1997).

24. *Id.* Also, note that Sweden, which is often cited as the model for the current health court proposal, allows for tort remedies to co-exist alongside their health courts. *See* Transcript, *supra* note 12, at 17. Moreover, Sweden has an array of other public benefits that offset costs of injuries regardless of any claims. *Id.* In the U.S., however, where there are very few public benefits, the proponents of health courts are adamant about the exclusivity of health courts and removal of all access to the court system. *Id.* at 10-11. This can only result in injured people having to shoulder much more of the cost of the injury, without any accountability mechanisms being placed on the health care industry. Once the details are examined, the reality of this proposal is a frightening deviation from the Swedish model it claims to emulate.

25. *See* Transcript, *supra* note 12, at 10 (stating that the avoidability standard has "some similarities to the negligence standard").

26. *See* Studdert, *supra* note 23, at 8. If the term "no-fault" is "somewhat misleading," why is it the main descriptive term aligned with health court proposals? This article posits that it is because the proponents of health courts recognize the insurmountable Constitutional hurdle associated with removing long-standing common law remedies from the civil justice system without any compromise.

27. *Id.*

28. *Id.*

had optimal care been given.[29] It is unclear how this alters a traditional negligence standard, which is often described as "but, for." However, an avoidability standard contemplates some element of fault in that there is a judgment that care was somehow sub-optimal and this lower level of care resulted in injury. This element of fault is one of the most suspect parts of the proposal, and will be explored throughout the article.

Once a patient has filed a claim with the insurance panel, appealed it to the special health court and the administrative judge rules in his favor based on the advice and expertise of experts, picked by some unaccountable screening board, the patient is eligible for compensation. The non-economic compensation will be based on a schedule.[30]

Since these proposals are still very much in a planning stage, many of the accountability problems may be addressed in future discussions. Political capture of specialized courts is a well-researched phenomenon and clearly there are many opportunities for capture in these proposed schemes.[31] Such political realities, however, are outside the scope of this article. This article is limited in scope to the problematic fault scheme and its constitutional implications.

II. Alternative Programs

The one element of the proposed health court that is most constitutionally troubling is the avoidance standard of fault coupled with the absences of juries. Proponents of health courts wave away the jury question by citing to worker's compensation, vaccine injury compensation, tax courts, and even the Na-

29. *See* Transcript, *supra* note 12, at 11.

30. The compensation schedule is an extremely contentious part of any specialized administrative compensation scheme and outside the scope of this article. However, for more on this issue, see DANIEL MONT ET AL, WORKERS' COMPENSATION: BENEFITS, COVERAGE AND COSTS, 2000 NEW ESTIMATES (Nat'l Acad. of Soc. Ins. 2002); ROBERT T. REVILLE ET AL., TRENDS IN EARNINGS LOSS FROM DISABLING WORKPLACE INJURIES IN CALIFORNIA: THE ROLE OF ECONOMIC CONDITIONS (2002); *Workers Comp.: Falling Down on the Job 2000*, 65 CONSUMER REPORTS 28 (Feb. 2000) [hereinafter *Falling Down*].

31. *See generally* Richard L. Revesz, *Specialized Courts and the Administrative Lawmaking System*, 138 U. PA. L. REV. 1111 (1990) (analyzing specialized courts and arguing for a presumption against establishing such courts).

tional Labor Relations Board.[32] Although each of these programs was built on a different authorizing structure, they all share an adjudication function without the aid of juries. They are also all distinguishable from health courts. The compensation schemes are all based on no-fault models, and the remaining alternative schemes adjudicate public, federally-created rights, not private long-standing state common law rights.[33]

The academic literature has not clearly addressed the different forms of administrative adjudication and the public debate around health courts further muddles this area. Administrative schemes like worker's compensation, the vaccine injury compensation program and the Florida and Virginia Birth Injury Compensation Programs are compensation schemes created by Congress and/or state legislatures and built on a no-fault system.[34] Tax court, bankruptcy court and agency tribunals like the National Labor Relations Board are created by Congress for the purpose of interpreting agency rules and

32. This comparison is made repeatedly. *See, e.g.*, PPI pamphlet, *supra* note 12, at 5; Common Good pamphlet, *supra* note 12, at 4; Postings of Philip K. Howard to Legal Affairs, *The Debate Club - The Doctor's Court?*, http://www.legalaffairs.org/webexclusive/debateclub_medmal0305.msp (Mar. 14, 2005, 09:03 EST); Paul Barringer, *Let's Create Health Courts*, NAT'L L.J., May 2, 2005, at 22.

33. The Supreme Court discusses the significance of this difference in a line of Seventh Amendment cases. *See, e.g.*, Tull v. U.S., 481 U.S. 412 (1987); Granfinanciera, S.A. v. Nordberg, 492 U.S. 33 (1989); Markman v. Westview Instruments, Inc., 517 U.S. 370 (1996). Moreover, although the Court has held that the Seventh Amendment is not applicable to administrative proceedings, *see* Atlas Roofing Co. v. Occupational Safety & Health Review Comm'n, 430 U.S. 442, 454 (1977), this was in reference to public rights. The distinction between public and private rights remains an important one in this case. Negligence is a long-standing common law cause of action and as such makes the jury requirement a stronger consideration. *See* Margaret L. Moses, *What the Jury Must Hear: The Supreme Court's Evolving Seventh Amendment Jurisprudence*, 68 GEO. WASH. L. REV. 183 (2000).

34. These strict liability compensation systems function to provide compensation to injured persons while creating very little deterrence function. This concept is more relevant to some situations than others. For example, the 9/11 Victim Compensation Fund is a better example of when a strict liability compensation system can work, because there is a limited class of claimants and the Fund had a dedicated funding stream. Although the current health courts proposals do not even fall into the category of a strict liability compensation system, one is hard-pressed to understand how medical malpractice claims could ever fit into a no-fault compensation scheme due to the limitless class and injuries, as well as the need for deterrence.

regulations.[35] This article attempts to categorize these different alternative schemes and at the same time expose why health courts do not fit in to any established model. Instead, health courts represent a new model that draws from both the administrative and specialized court models, while neglecting to incorporate the constitutional safeguards within each of those models. The end result is a very troubling, and, this article posits, unconstitutional, coup of power away from the juries.

A. *Worker's Compensation*

Worker's compensation programs are run by states and vary between jurisdictions.[36] Generally, however, the program compensates employees, injured in the scope of their employment and protects fellow employees and employers from liability for employment-related injuries.[37] Employers are required to obtain insurance to cover workplace injuries and also contribute to the compensation fund.[38] The injured employee files a claim and receives compensation based on a schedule of benefits; there is no adjudication of fault required.[39]

Worker's compensation came about in the early part of the twentieth century, notably as a social justice initiative by worker advocates.[40] Moreover, at the time worker's compensa-

35. *See, e.g.*, United States Tax Court, About the Court, http://www.ustaxcourt.gov/about.htm (last visited Oct. 28, 2006); U.S. Courts, United States Bankruptcy Courts, http://www.uscourts.gov/bankruptcycourts.html (last visited Oct. 28, 2006); *see generally* National Labor Relations Act, 29 U.S.C. §§ 151-169 (2006).

36. For general information on workers' compensation systems, see ARTHUR LARSON, WORKMAN'S COMPENSATION LAW (2006). *See also* AMY WIDMAN, WORKERS' COMPENSATION: A CAUTIONARY TALE (Center for Justice & Democracy 2006), *available at* http://centerjd.org/Workers'Comp(National).pdf.

37. *Id.*

38. *Id.*

39. Worker's Compensation programs have been subjected to much criticism. A Consumer Reports investigation in 2000 was highly critical of worker's compensation, finding that these laws "have generated profit for insurers and savings for employers mainly at the expense of injured workers. Those laws clamped down on benefits, raised eligibility requirements, and put medical treatment mainly in the hands of insurance companies, which can delay or deny medical care or income payments." Falling Down, *supra* note 30, at 28. *See also* U.S. DEP'T OF LABOR, REPORT ON THE NATIONAL COMMISSION ON STATE WORKMEN'S COMPENSATION LAWS 136 (1972) (declaring "in recent years serious questions have been raised concerning the fairness and adequacy of present workmen's compensation laws . . . .").

40. ARTHUR LARSON, WORKMAN'S COMPENSATION LAW § 2.00 (2006) ("The necessity for worker's compensation arose out of the coincidence of a sharp increase

tion was proposed, employers already enjoyed complete immunity from claims by injured workers. In other words, worker's compensation created new statutory rights that did not exist at common law. This is a very important difference from the health courts proposal.

Proponents of the health court models quickly play down the lack of juries in the new system by citing to worker's compensation.[41] Such a comparison is not a fair analogy. Worker's compensation is a no-fault scheme. This is the compromise the courts have upheld.[42] If there is no fault to be litigated, then an alternative administrative tribunal is not as troubling. The determination of fault is the quintessential jury function. As the court states in one of the seminal cases upholding worker's compensation: "Indeed, the criterion which is thought to be free from constitutional objection, the criterion of fault, is the application of an external standard, the conduct of a prudent man in the known circumstances, that is, in doubtful cases, the opinion of the jury . . . ."[43]

Finally, as explained above, the rights gained through worker's compensation programs were not rights that employees had at common law at the time of the program's formulation. This means that when worker's compensation was created, legislators were creating new rights and choosing to compensate injured workers through an alternative administrative system rather than removing existing common law rights from the jury. The Supreme Court has pointed to this differ-

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in industrial accidents attending the rise of the factory system and a simultaneous decrease in the employee's common law remedies for his or her injuries."). This is not the case with tort reform laws, where the protection is being extended to the tortfeasor rather than the injured. *See* Jane R. Ward, *Virginia's Birth-Related Neurological Injury Compensation Act: Constitutional and Policy Challenges*, 22 U. RICH. L. REV. 431, 437 (1988).

41. *See* sources cited *supra* note 32.

42. *See* N.Y. Cent. R.R. Co. v. White, 243 U.S. 188, 201 (1917) ("The statute under consideration sets aside one body of rules only to establish another system in its place. If the employee is no longer able to recover as much as before in case of being injured through the employer's negligence, he is entitled to moderate compensation in all cases of injury, and has a certain and speedy remedy without the difficulty and expense of establishing negligence or proving the amount of damages.").

43. Ariz. Copper Co. v. Hammer, 250 U.S. 400, 432 (1918) (Holmes, J. concurring).

ence as a determining factor when assessing the constitutionality of removing common law claims from civil courts.[44]

B. *Vaccine Injury Compensation Program*

The Vaccine Injury Compensation Program—created by federal statute as the National Childhood Vaccine Injury Act of 1986—went into effect on October 1, 1988.[45] Like worker's compensation, it is a no-fault compensation system. In other words, if you or your child receives a covered vaccine and then presents a covered injury from the vaccine, you or your child is entitled to compensation.[46] A table, created and modified by the Secretary of Health and Human Services, sets the covered vaccines, the covered injuries, and the amount of compensation.[47]

Critics contend that the process is heavily weighted against the injured parties, the process takes too long, and the Secretary has removed too many injuries from the table.[48] There have been extreme problems with access and compensation for victims under the current Vaccine Injury Compensation Program.[49] Although originally proposed as a no-fault model that would be efficient and provide for quick compensation, many ar-

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44. In its Seventh Amendment jurisprudence, the Court has consistently relied on a public right/private right distinction, stating that the Seventh Amendment does not allow Congress to assign adjudication of a private right that is legal in nature to an administrative agency or specialized court without juries. *See* Granfinanceria, S.A. v. Nordberg, 492 U.S. 33, 42 n.4 (1989). Private rights are defined as "the liability of one individual to another." Crowell v. Benson, 285 U.S. 22, 51 (1932). *See also* Atlas Roofing Co. v. Occupational Safety & Health Review Comm'n, 430 U.S. 450, 458 (1977) ("Our prior cases support administrative factfinding in only those situations involving 'public rights,' e.g., where the Government is involved in its sovereign capacity under an otherwise valid statute creating enforceable public rights. Wholly private tort, contract, and property cases, as well as a vast range of other cases, are not at all implicated."). Although the Seventh Amendment is not necessarily applicable to state health court programs, the distinction between the type of right at issue is informative.

45. National Childhood Vaccine Injury Act of 1986, 42 U.S.C. § 201 (2000).

46. *See generally* U.S. DEP'T OF HEALTH & HUMAN SERVICES, NATIONAL VACCINE INJURY COMP. PROGRAM FACT SHEET (2002), http://www.hrsa.gov/osp/vicp/fact_sheet.htm [hereinafter *National Vaccine Fact Sheet*].

47. *Id.*

48. *See* sources cited *infra* note 52 and 54.

49. *See* Elizabeth C. Scott, *The National Childhood Vaccine Injury Act Turns Fifteen*, 56 FOOD & DRUG L.J. 351, 359 (2001) (stating that, as of 2001, 75% of claims were denied after long and contentious legal battles taking an average of 7 years to resolve).

gue that the Program has been co-opted by political forces and turned into a victim's nightmare.[50] This has occurred by the agency determinations to remove certain injuries from the covered table, and limit the statute of limitations in such a way as to foreclose many claims.[51] Once a claim is removed from the table, the element of no-fault is also removed. The claimant is then left with the frustrating task of litigating fault in an administrative setting without the full procedural safeguards of civil courts to guide the litigation. Personal anecdotes of those who have attempted to utilize the system describe waits of more than ten years and an increasingly adversarial nature to the "no-fault" proceedings.[52] Even with the morphing of the Program into an increasingly fault-based standard, the Vaccine Program still contemplates a no-fault arena for certain injuries. The Program's slow political capture and subsequent demise as an adequate alternative for victims should, if anything, serve as a loud warning as to the vulnerability of a fault-based alternative tribunal to address injured medical consumers.

C. *Virginia and Florida Birth Injury Courts*

At first glance, it may appear as if the Florida and Virginia Birth Injury Compensation Funds are most analogous to the proposed health courts.[53] These two states created programs

50. *Id.*; *see also Compensating Vaccine Injury: Are Reforms Needed?: House Oversight Hearing Before the H. Subcomm. on Criminal Justice, Drug Policy and Human Resources*, 106th Cong. (Sept. 28, 1999) (statement of Barbara Loe Fisher, Co-Founder & President, National Vaccine Information Center) (discussing the unilateral power that the Department of Health & Human Services has to change the burdens of proof and other restrictions); Derry Ridgway, *No-Fault Vaccine Insurance: Lessons from the National Vaccine Injury Compensation Program*, 24 J. HEALTH POL'Y & L. 59, 69 (1999) (describing how the program originally awarded many more claims, until the Department of Justice decided to aggressively argue against claimants) [hereinafter *Lessons*].

51. *See, e.g.*, Lessons, *supra* note 43, at 86.

52. *See* Scott, *supra* note 49, at 358 (discussing "horror stories about the length of time it takes them to process the case and receive compensation . . . [and] families who've gone bankrupt trying to meet their children's medical and emotional needs while going through the system."). Scott also notes the adversarial nature of these "combative mini-trials," where, even after the decision to compensate is made, veteran DOJ litigators "fight over minutia like the future cost of diapers in a certain state." *Id.* at 361-63.

53. *See generally* The Birth-Related Neurological Injury Compensation Act, FLA. STAT. §§ 766.301-.316 (2006); The Birth-related Neurological Injury Compensation Act, VA. CODE ANN. §§ 38.2-5000 to 5021 (2006).

similar to the Vaccine Injury Compensation Program to handle a very small subcategory of birth injury cases. Again, there are important differences between these models and what is now being proposed. First, and most important, is that these programs are no-fault models. As with worker's compensation and vaccine injury, the no-fault aspect is the touchstone of the model.[54] These models all purport to remove the burden of proof in exchange for removing claims from civil court.

Florida's model has another important procedural safeguard: it allows claimants to opt-out of the administrative scheme and proceed in civil court under normal litigation rules, provided the claimants were not given notice prior to delivery of participation in the alternative compensation plan.[55] The Florida statute also provides for civil remedies "where there is clear and convincing evidence of bad faith or malicious purpose or willful and wanton disregard of human rights, safety, or property, provided that such suit is filed prior to and in lieu of payment of an award under" the alternative compensation plan.[56] Some commentators have lamented this limited safeguard because many claimants continue to choose their civil justice rights over the administrative model.[57] However, this may in itself provide a reason to retain access to courts, because it provides empirical proof that, from the injured person's point of view, the civil justice system is often a better process.

Although the Florida Birth Injury Program has never been challenged on constitutional grounds, its opt-out provisions would clearly play a large determinative role in assessing its

54. At least one commentator has noted that even so, the birth injury courts are not analogous to worker's compensation because the background against which the program was passed was such where injured persons had many more rights that the program removed, in contrast to worker's compensation, which was an effort to expand the rights of the injured. Therefore, according to this view, just making the system no-fault is not enough of a quid pro quo from the injured person's viewpoint. *See* Ward, *supra* note 40, at 441 ("The quid pro quo rationale underlying worker's compensation laws cannot justify the Act. The Act takes much from and gives little to injured children.").

55. *See* Univ. of Miami v. Ruiz, 916 So. 2d 865, 868-70 (Fla. Dist. Ct. App. 2005).

56. FLA. STAT. § 766.303(2) (2006).

57. *See, e.g.*, Sandy Martin, *NICA-Florida Birth-Related Neurological Injury Compensation Act: Four Reasons Why This Malpractice Reform Must be Eliminated*, 26 NOVA L. REV. 609 (2002).

constitutionality.[58] Florida caselaw applies a heightened standard, known as the *Kluger* test, to legislative attempts to circumvent a claimant's right to access the courts.[59] This standard has allowed legislation only where a right to recourse in civil court with a jury remains as an alternative option.[60] The health courts as proposed, with a quasi-fault standard and no opt-out provision or even a meaningful right of review in civil court, would most likely be constitutionally suspect in Florida under the *Kluger* test.

Virginia's Birth Injury Program was enacted after the Supreme Court of Virginia ruled that Virginia's cap on damages in medical malpractice cases did not violate state constitutional guarantees.[61] Attorneys and scholars generally agree that the Virginia administrative scheme suffers from administrative

58. Florida courts have repeatedly upheld the right to redress of an injury and the opt-out provision in Florida preserves that right by continuing to allow claimants to access the civil justice system. The Florida courts apply a similar test to the quid pro quo analysis discussed below to determine the boundaries of legislation affecting access to the courts. *See* Smith v. Dep't of Ins., 507 So. 2d 1080 (Fla. 1987) (finding caps on non-economic damages unconstitutional under the right to access the courts); Kluger v. White, 281 So. 2d 1 (Fla. 1973) (finding a legislative restriction on the right to sue for claims under $550 for economic damages unconstitutional). The court upheld a cap if the parties choose to arbitrate, however this statute did not affect claimant's rights to access the civil justice system where there remain no caps. *See* Univ. of Miami v. Echarte, 618 So. 2d 189 (Fla. 1993).

59. *See Kluger*, 281 So. 2d at 4 ("Where a right of access to the courts for redress for a particular injury has been provided by statutory law predating the adoption of the Declaration of Rights of the Constitution of the State of Florida, or where such a right has become part of the common law of the State . . . the Legislature is without power to abolish such a right without providing a reasonable alternative to protect the rights of the people of the State to redress for injuries, unless the Legislature can show an overpowering public necessity for the abolishment of such right, and no alternative method of meeting such public necessity can be shown.").

60. *See Echarte*, 618 So. 2d at 189.

61. *See* Pulliam v. Coastal Emergency Servs. of Richmond, Inc., 509 S.E.2d 307 (Va. 1999); Etheridge v. Med. Ctr. Hosps., 376 S.E.2d 525 (Va. 1989). It must be noted that the program was enacted under direct fiat from the insurance companies. The state's main insurance provider stopped providing obstetrical insurance. When asked what would be needed to make them provide insurance again, the provider responded: "If the legislature passes legislation which takes the 'birth-related neurological injury' out of the tort system, we will lift the moratorium . . . ." David G. Duff, *Compensation for Neurologically Impaired Infants: Medical No-Fault in Virginia*, 27 HARV. J. ON LEGIS. 391, 405 (1990) (citing Letter from Gordon D. McLean, Executive Vice-President, The Virginia Insurance Reciprocal to Ronald K. Davis, Virginia Surgical Associates, Chairman of MSV's Professional Liability Committee dated Jan. 13, 1987).

problems,[62] however, the Birth Injury Program has never been challenged on constitutional grounds, most likely because the upholding of caps in Virginia creates a presumption that the Birth Injury Program would stand.

However, the Virginia courts' approval of caps, and the Birth Injury Program's continued use, does not translate into automatic approval of all administrative health injury schemes, including the proposed health courts. In upholding the caps, the court was very clear that because caps are awarded after the fact-finding process, they do not impinge upon the state right to access courts and trial by jury.[63] The court even stated, "The province of the jury is to settle questions of fact and . . . [o]nce the jury has ascertained the facts and assessed the damages . . . the constitutional mandate is satisfied."[64] This precedent may be one reason that the Birth Injury Compensation Fund has not been challenged in Virginia. Arguably the Virginia birth injury scheme does not apply any fact-finding process since it is a no-fault standard and this might lean toward its constitutionality. However, the sweeping vision of the health courts proposal, combined with its rejection of a no-fault standard, should be enough for Virginia courts to strike such a proposal down as unconstitutional under its state constitution.

D. *Other Compensation Schemes*

The Price-Anderson Act was enacted in 1957 as an amendment to the Atomic Energy Act.[65] It set up a system of private insurance and government indemnity in the case of a nuclear accident.[66] The ultra-hazardous nature of nuclear power meant that this was an area of tort law already covered by strict liability standards. The Act did not originally preempt state tort law

62. *See, e.g.*, Richard A. Epstein, *Market and Regulatory Approaches to Medical Malpractice: The Virginia No-Fault Statute*, 74 VA. L. REV. 1451 (1988); Bill McElway, *Study Faults Program for Brain-Injured; Shortcomings Found in Care for Children*, RICH. TIMES-DISPATCH, Nov. 13, 2002, at A1 (citing a study by the Joint Legislative Audit and Review Commission criticizing many aspects of the program, including the lack of accountability. "Because there is no oversight of this program, at a minimum it presents the appearance that the program and board do not have to account for their actions."); *see also* Ward, *supra* note 40.

63. *Etheridge*, 376 S.E.2d at 525.

64. *Id.* at 529.

65. *See* 42 U.S.C. § 2210-14 (2000).

66. *Id.*

claims,[67] but later amendments created an exclusive federal cause of action for these claims.[68]

More recently, in the weeks immediately following the terrorist attacks of September 11, 2001, Congress passed the Air Transportation Safety and System Stabilization Act of 2001.[69] This legislation simultaneously removed any possibility of liability claims against the airlines and, in exchange, provided compensation to families of victims of the attacks.[70] Again, this was a scheme where one was automatically awarded compensation, another no-fault scheme. The 9/11 Victim Relief Fund was also generously funded at the outset and covered a very limited class of claimants.[71] While generally thought of as a more successful use of compensation funds because of its narrow scope and dedicated funding, the 9/11 Fund is not without its own unfair realities.[72]

There is another compensation scheme currently being debated in Congress that would create a compensation fund for victims of asbestos.[73] Although at this point the legislation is being debated, it is notable that the legislation contains a clear statement of its no-fault standard: "An asbestos claimant shall not be required to demonstrate that the asbestos-related injury for which the claim is being made resulted from the negligence or other fault of any other person."[74] The statute authorizing this asbestos compensation fund also provides for judicial re-

67. *See, e.g.*, Silkwood v. Kerr-Mcgee Corp., 464 U.S. 252-53 (1984); Duke Power Co. v. Carolina Envtl. Study Group, 438 U.S. 59, 89 (1978).

68. *See In re* TMI Litig. Cases Consol. II, 940 F.2d 832 (3rd Cir. 1991). The Price-Anderson Act, although cited by health court proponents as a similar model, is not really comparable because it contains such highly improbable criteria in order to apply.

69. Air Transportation Safety and System Stabilization Act of 2001, 49 U.S.C.A. § 40101 (West 2001).

70. *Id.*

71. *Id.* §§ 405(c), 406.

72. *See* RAND INST. FOR CIVIL JUSTICE, RESEARCH BRIEF, Compensating the Victims of 9/11 (2004), *available at* http://www.rand.org/pubs/research_briefs/RB9087/index1.html.; Press Release, Office of the Attorney General, New York State, Governor, Attorney General Object to 9/11 Compensation Fund Rules (Jan. 23, 2002) (arguing that the fund unfairly excludes many victims, and inadequately compensates others).

73. *See* The Fairness in Asbestos Injury Resolution Act of 2005, S. 852, 109th Cong. (2005).

74. *Id.* § 112. The author makes no comment as to the constitutionality of this proposed legislation.

view of awards, albeit limited to filing in the resident United States Court of Appeals.[75] Consumer advocates are sounding preliminary cautions, noting that a compensation fund in this area would grossly under-compensate injured claimants; however such discussions are outside the scope of this article.[76]

E. *National Labor Relations Board*

At least a few times, advocates of the health court proposals have pointed to the constitutionality of the National Labor Relations Board (NLRB) as support for the constitutionality of health courts.[77] This is confounding, as the NLRB is a completely different administrative model. The NLRB, formed in 1935 by Congressional statute, the National Labor Relations Act, was created to adjudicate administrative rights created by this act.[78] In other words, these were what the Supreme Court has termed "public rights" created by statutory law.[79]

The Constitution envisions a system whereby Congress may create rights and, upon doing so, may also limit those rights. It is clear that administrative tribunals are constitutionally acceptable forums in which to interpret administratively created rights.[80] Moreover, administrative decisions rendered by the NLRB are subject to review in a United States Court of Appeals.[81] It is clear, however, that the NLRB model is in no way analogous to the health courts proposal and, although informative in terms of the institutional problems faced by the NLRB, the constitutionality and general acceptance of the

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75. *Id.* § 302.

76. *See, e.g.*, PETER S. BARTH, COMMENTARY ON THE CREATION OF A FUND FOR VICTIMS OF ASBESTOS CAUSED DISEASES (U.S. ACTION Feb. 15, 2005), *available at* http://www.usaction.org/atf/cf/%7BB61F1B77-C265-416B-83EA-800FB44717CB%7D/Report%20by%20Professor%20Peter%20Barth%20on%203%20federal%20programs.pdf; *see also* S. REP. NO. 109-97, *The Fairness in Asbestos Injury Resolution Act of 2005*, at 187 (2005) (minority views of Senators Kennedy, Biden, Feingold, and Durbin).

77. *See* sources cited *supra* note 32.

78. The National Labor Relations Act ("NLRA"), 29 U.S.C. §§ 151-169 (2006), created a statutory right for employees to organize and to bargain collectively with their employers.

79. *See supra* Part II.A discussion and footnotes.

80. *See* Atlas Roofing Co. v. Occupational Safety & Health Review Comm'n, 430 U.S. 442, 458 (1997).

81. *See* NLRA, 29 U.S.C. § 160(f).

NLRB bears no weight on an assessment of a health court proposal.

F. *Other Specialized Courts*

Health court advocates also cite to specialized courts created by Congress to handle tax, patent or bankruptcy matters in an effort to support their proposal.[82] At the outset, some clarification is needed. There are no specialized patent courts; patent claims are brought in federal district court.[83] Bankruptcy court is situated within federal court and, although bankruptcy judges are not Article III judges, all of their rulings are subject to review in the district court.[84] Therefore, these "specialized courts" are branches of the federal judicial system rather than legislative or administrative courts providing alternative tribunals. Tax Court is an Article I court established by Congress as a forum to dispute tax deficiencies, however it coexists as a remedy with the district courts and is also subject to review by the United States Court of Appeals.[85]

Tax court has been recognized as judicial in character, but it only hears matters arising between a taxpayer and the Federal Government. In reviewing both the origin and the constitutionality of these courts, the Supreme Court has formulated and refined the public rights doctrine.[86] This doctrine began

82. *See, e.g.*, *Scalpel, Scissors, Lawyer*, THE ECONOMIST, Dec. 14, 2005 ("The idea is partly modeled on the specialist courts that deal with other complex technical issues, such as patent disputes and bankruptcy."); Mike Norbut, *Thinking Outside the Jury Box: Another Tort Reform Answer*, AM. MED. NEWS, Nov. 14, 2005 (claiming that the legal process has already "established special courts for bankruptcy, tax and patent disputes"); Postings of Philip K. Howard to Legal Affairs, *The Debate Club - The Doctor's Court?*, http://www.legalaffairs.org/webexclusive/debateclub_medmal0305.msp (Mar. 14, 2005, 03:03 EST) (Mr. Howard, in arguing for health courts, says "America has a long tradition of special courts . . . . Today there are patent courts, bankruptcy courts and a wide range of administrative courts, including worker's compensation, Social Security, and vaccine liability.").

83. The U.S. Court of Appeals for the Federal Circuit is sometimes colloquially referred to as "patent court" because it hears a majority of patent cases. This is an Article III federal appeals court. *See, e.g.*, U.S. Court of Appeals for the Federal Circuit, About the Court, http://www.fedcir.gov/about.html (last visited Oct. 28, 2006).

84. *See, e.g.*, U.S. Courts, United States Bankruptcy Courts, http://www.uscourts.gov/bankruptcycourts.html (last visited Oct. 28, 2006).

85. *See, e.g.*, United States Tax Court, About the Court, http://www.ustaxcourt.gov/about.htm (last visited Oct. 28, 2006).

86. *See supra* note 33 and accompanying text.

with the premise that there are certain matters "which, from [their] nature, [are] the subject of a suit at the common law, or in equity, or admiralty," known as private rights.[87] On the contrary, public rights "may be presented in such a form that the judicial power is capable of acting on them, and which are susceptible of judicial determination, but which [C]ongress may or may not bring within the cognizance of the courts of the United States, as it may deem proper."[88] In other words, where Congress creates rights by statute, it may also establish administrative courts to handle disputes arising out of the statute.[89] After years of refining these descriptions, it is clear that Congress may not circumvent the Seventh Amendment right to a jury trial in civil cases by merely removing wholly private tort, contract, or property cases from civil court and placing these matters in administrative or legislative tribunals.[90]

In any case, the rhetoric espoused by proponents of health courts is seriously misleading. The proposed health courts are in no way analogous to worker's compensation and other alternative compensation schemes, nor bankruptcy or tax courts for the reasons explained above. Rather than adjudicating public rights, health courts propose to remove long-standing common law rights between private citizens from the civil justice system, thereby circumventing all judicial safeguards embodied within the current system, the most important of which are impartial judges and juries.

87. Murray v. Hoboken Land & Improvement Co., 59 U.S. 272, 284 (1855).

88. *Id.* at 284.

89. Tax court is a quasi-administrative court, although it has always been recognized as judicial in character and does not perform the policy-making, investigatory or regulatory duties usually performed by administrative tribunals like the NLRB. Tax court judges are appointed by the President with the advice and consent of the Senate, but they do not enjoy lifetime tenure as Article III judges would. *See* United States Tax Court, About the Court, http://www.ustaxcourt.gov/about.htm (last visited Oct. 28, 2006).

90. Granfinanceria, S.A. v. Nordberg, 492 U.S. 33, 51 (1989). Although the Seventh Amendment would not be implicated in state constitutional claims arising out of state pilot health programs, the doctrine is useful in terms of delineating how the lines are drawn between administrative and judicial tribunals.

III. Comparison and the Issue of Quid Pro Quo

A. *Comparison of Health Court Proposal to Current Alternative Tribunals*

The proponents of the health court model often cite to the existence of administrative compensation schemes and other alternative tribunals where juries are not employed.[91] Such reliance is misplaced and misleading, as the cursory descriptions above begin to detail. The main differences are that health courts propose to remove long-standing common law state rights from the civil justice system and place them in an alternative system without juries, without any accountability mechanisms, without procedural safeguards, and without any meaningful appeals process. These hardships, coupled with the burden of having to prove fault, render the injured claimant virtually powerless and at the mercy of the insurance and hospital industries. There is no other system out there that does what these proposals posit. In a legal landscape where much more subtle tort reforms are found unconstitutional by many state courts,[92] it is inconceivable that a state court would uphold such a blatant attempt to remove power from juries.

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91. *See* sources cited *supra* note 32.

92. For example, the following is a non-exhaustive list of state courts that have found caps on damages unconstitutional: Smith v. Schulte, 671 So. 2d 1334 (Ala. 1995); Henderson v. Ala. Power Co., 627 So. 2d 878 (Ala. 1993); Moore v. Mobile Infirmary Assoc., 592 So. 2d 156 (Ala. 1991); Smith v. Dep't of Ins., 507 So. 2d 1080 (Fla. 1987); Best v. Taylor Mac. Works, 689 N.E.2d 1057 (Ill. 1997); Wright v. Cent. Du Page Hosp. Ass'n, 347 N.E.2d 736 (Ill. 1976); Kan. Malpractice Victims Coal. v. Bell, 757 P.2d 251 (Kan. 1989); Chamberlain v. State, 624 So. 2d 874 (La. 1993), *superseded by statute*, LA. CONST. Art. XII; Brannigan v. Usalito, 587 A.2d 1232 (N.H. 1991); Carson v. Mauer, 424 A.2d 825 (N.H. 1980); Trujillo v. City of Albuquerque, 965 P.2d 305 (N.M. 1998); Arneson v. Olson, 270 N.W.2d 125 (N.D. 1979); State *ex rel.* Ohio Acad. of Trial Lawyers v. Sheward, 715 N.E.2d 1062 (Ohio 1999); Zoppo v. Homestead Ins. Co., 644 N.E.2d 397 (Ohio 1994); Morris v. Savoy, 576 N.E.2d 765 (Ohio 1991); Lakin v. Senco Prods., 987 P.2d 463 (Ore. 1999); Knowles v. U.S., 544 N.W.2d 183 (S.D. 1996); Lucas v. U.S., 757 S.W.2d 687 (Tex. 1988); Condemarin v. Univ. Hosp., 775 P.2d 349 (Utah 1989); Sofie v. Fibreboard Corp., 771 P.2d 711 (Wash. 1989); Ferdon v. Wis. Patients Comp. Fund, 701 N.W.2d 440 (Wis. 2005). For more cases striking down other tort reforms, see Center for Justice & Democracy, *"Tort Reforms" are Unconstitutional*, *available at* http://www.centerjd.org/free/mythbusters-free/MB_Unconstitutional.htm (last visited on Oct. 15, 2006).

B. *Quid Pro Quo*

In the compensation programs discussed above, the trade-off is clear: remove the dispute from the jury but relieve the plaintiff of the burden of proving fault. The plaintiff is left with guaranteed compensation if certain conditions are met.[93] Whether such a system is adaptable to medical malpractice law generally is a matter outside the scope of this article.[94] However, the only models being discussed to date incorporate some form of fault. This stacks the process against the plaintiff. More importantly, the fault standard means that there is no reasonably just substitute for removing the common law claims from civil courts with juries. The token benefits being offered to offset the serious breach of individual liberty are neither factually nor legally sufficient.[95]

The concept of a reasonably just substitute, or a quid pro quo, was a common rationale for both worker's compensation programs and nuclear power accident cases.[96] While a handful

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93. The Supreme Court first alluded to this concept in a 1917 case upholding New York's workmen's compensation law. *See* N.Y. Cen. R.R. Co. v. White, 243 U.S. 188, 201 (1917). The court stated:

> Nor is it necessary, for the purposes of the present case, to say that a State might, without violence to the constitutional guaranty of 'due process of law,' suddenly set aside all common-law rules respecting liability between employer and employee, without providing a reasonably just substitute . . . . It perhaps may be doubted whether the State could abolish all rights of action on the one hand, or all defenses on the other, without setting up something adequate in their stead. No such question is here presented, and we intimate no opinion on it. The statute under consideration sets aside one body of rules only to establish another system in its place. If the employee is no longer able to recover as much as before in case of being injured through the employer's negligence, he is entitled to moderate compensation in all cases of injury, and has a certain and speedy remedy without the difficulty and expense of establishing negligence.

Id. at 201. The same reasoning was applied by the Supreme Court again in 1931 to uphold the Longshoreman's and Harbor Worker's Compensation Act. *See* Crowell v. Benson, 285 U.S. 22, 41 (1931).

94. A true no-fault health court would be cost-prohibitive. *See also* Studdert, *supra* note 23, at 1 (arguing that cost is a prohibitive factor in creating a true no-fault system for medical malpractice).

95. It is important to supplement a due process rational basis test with a quid pro quo analysis because the rational basis test looks at society benefit but quid pro quo goes further to require individual benefit to compensate for the loss of right.

96. After the appearance of this analysis in the early worker's compensation cases, quid pro quo remained relatively unexplored until Duke Power Co. v. Caro-

of state courts have alluded to and revived the quid pro quo analysis in other areas of medical malpractice "reforms" – using the analysis to strike down caps on damages,[97] the establishment of medical review panels,[98] compulsory arbitration,[99] and other limitations on plaintiffs' rights, how this quid pro quo analysis fits into a typical constitutional challenge of a medical malpractice proposal is a bit less clear.[100]

State courts apply the concept rather loosely, sometimes incorporating it into a clear due process or equal protection rational basis analysis and other times alluding to the idea in dicta. The United State Supreme Court, while applying a functional quid pro quo analysis and discussing the theory in dicta, has yet to affirmatively incorporate it into a due process analysis. In fact, when the Court denied certiorari on a California case upholding a non-economic cap on medical malpractice damages in 1985, Justice White dissented and urged the Court to review the issue of "whether due process requires a legislatively enacted compensation scheme to be a quid pro quo for the

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lina Envtl. Study Group, 438 U.S. 59 (1978). In *Duke Power*, the Court, in *dicta*, stated that in the particular case of a nuclear accident, at which time there had never been, would cause so much damage that a guaranteed funding stream of $560 million was a reasonable substitute for state common law claims which had never been utilized and for which their existed no precedent. *Id.* at 88. However, the Court did not rely on this quid pro quo analysis for its holding. *See also* Howard Alan Learner, *Restrictive Medical Malpractice Compensation Schemes: A Constitutional 'Quid Pro Quo' Analysis to Safeguard Individual Liberties*, 18 HARV. J. ON LEGIS. 143 (1981).

97. *See, e.g.*, Wright v. Cent. Du Page Hosp. Assoc., 347 N.E.2d 736 (Ill. 1976).

98. *Id.*

99. Simon v. St. Elizabeth Med. Ctr., 355 N.E.2d 903 (Ohio Ct. Com. Pl. 1976).

100. States adopting some form of quid pro quo analysis within a due process claim are: Kansas (Kan. Malpractice Victims Coal. v. Bell, 757 P.2d 251, 262 (Kan. 1988), *overruled on other grounds by* Bair v. Peck, 811 P.2d 1176 (Kan. 1991)); Florida (Smith v. Dep't of Ins., 507 So. 2d 1080 (Fla. 1987)); Texas (Lucas v. U.S., 757 S.W.2d 687 (Tex. 1988)); Illinois (Wright v. Cent. Du Page Hosp. Assoc., 347 N.E.2d 736, 742 (Ill. 1976)); Utah (Condemarin v. Univ. Hosp., 775 P.2d 348, 357-60 (Utah 1989)); New Hampshir (Carson v. Hitchcock Clinic, 424 A.2d 825, 837-38 (N.H. 1980)); and Ohio (Simon v. St. Elizabeth Med. Ctr., 355 N.E.2d 903, 910 (Ohio 1976)). Other states that have alluded to a quid pro quo analysis in some form are: Nebraska (Pendergast v. Nelson, 256 N.W.2d 657 (Neb. 1977)); Indiana (Johnson v. St. Vincent Hosp., 404 N.E.2d 585 (Ind. 1980)); California (Fein v. Permanente Med. Group, 695 P.2d 665, 681 n.18 (Cal. 1985); and South Dakota (Knowles v. U.S., 544 N.W.2d 183 (S.D. 1995) (relying on the "commensurate benefit" required by Florida courts in order for the legislature to restrict a constitutional right to jury)). Even so, each state court justifies and applies the analysis differently.

common-law or state-law remedy it replaces, and if so, how adequate it must be."[101] It is likely that health court pilot programs will force the issue to be addressed directly by the Supreme Court. Until then, the state courts provide some guidance.

In *Samsel v. Wheeler Transport Services, Inc.*, the Supreme Court of Kansas discussed the history of quid pro quo analysis, concluding that

> [s]tatutory modification of the common law must meet due process requirements and be reasonably necessary in the public interest to promote the general welfare of the people of the state. Due process requires that the legislature substitute the viable statutory remedy of quid pro quo (this for that) to replace the loss of the right."[102]

Kansas may very well be the state with the most judicial ink spilt over the finer points of a quid pro quo analysis. However, this type of reasoning has been applied in other states as well.[103]

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101. Fein v. Permanente Med. Group, 474 U.S. 892, 894 (Cal. 1985) (White, J., dissenting). Justice White went on to correctly predict, "[i]t is likely that more States will enact similar types of limitations, and that the issue will recur." *Id.*

102. Samsel v. Wheeler Transp. Serv., Inc., 789 P.2d 541, 555 (Kan. 1990) (finding a quid pro quo was achieved with the particular reform at issue in that case), *overruled on other grounds by* Bair v. Peck, 811 P.2d 1176 (Kan. 1991).

103. *See* Smith v. Dep't of Ins., 507 So. 2d 1080, 1089 (Fla. 1987) (striking down a cap on non-economic damages). The court reasoned that:

> We are dealing with a constitutional right which may not be restricted simply because the legislature deems it rational to do so. Rationality only becomes relevant if the legislature provides an alternative remedy or abrogates or restricts the right based on a showing of overpowering public necessity and that no alternative method of meeting that necessity exists. Here, however, the legislature has provided nothing in the way of an alternative remedy or commensurate benefit and one can only speculate, in an act of faith, that somehow the legislative scheme will benefit the tort victim. We cannot embrace such nebulous reasoning when a constitutional right is involved.

Id. at 1089. *See also* Lucas v. U.S., 757 S.W.2d 687 (Tex. 1988) (using quid pro quo analysis to strike down medical malpractice damage caps as violations of the open courts provision of the state constitution); Wright v. Cent. Du Page Hosp. Assoc., 347 N.E. 2d 736, 742 (Ill. 1976). The court reasoning that:

> Defendants argue that there is a societal quid pro quo in that loss of recovery potential to some malpractice victims is offset by 'lower insurance premiums and lower medical care costs for all recipients of medical care, . . .' This quid pro quo does not extend to the seriously injured medical malpractice victim and does not serve to bring the limited recovery provision within

A few states have specifically emphasized that the quid pro quo must benefit the individual, not the more vague societal benefits that are often deferred to in a rationality test.[104] In essence, these states use the quid pro quo analysis to ratchet up the level of scrutiny from a rationality test to an intermediate level of scrutiny. Only one state, California, has alluded in dicta that a societal benefit would be enough to satisfy a quid pro quo requirement.[105] This was in response to legislative reforms that capped non-economic damages to $250,000.[106]

Even assuming arguendo that there is a public good to removing a select group of common law tort claims from civil courts, something must be offered as compensation for that right. Otherwise, as at least one scholar has noted, "the individual could be subject to a collusive scheme between business and the state, justified by '"public benefit'" concerns, that would leave him with even less structural protection than his prior weak common-law tort remedy."[107]

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the rationale of the cases upholding the constitutionality of the Workmen's Compensation Act.

Id. at 742; Simon v. St. Elizabeth Med. Ctr., 355 N.E.2d 903, 910 (Ohio 1976), holding that

> [i]n short, there is simply no quid pro quo given by the Ohio Medical Malpractice Act for seriously injured malpractice victims in limiting the amount of recoverable damages. This Court rejects, as did the Illinois Supreme Court, the societal quid pro quo argument that some must give up their rights to damages so that all can achieve cheaper medical care.

Id. at 910; Condemarin v. Univ. Hosp., 775 P.2d 348, 357-60 (Utah 1989) (identifying a separate due process approach, the "quid pro quo" or "substitute remedy" test); Carson v. Hitchcock Clinic, 424 A.2d 825, 837-38 (N.H. 1980) (explaining that the plain language of the New Hampshire constitution requires a satisfactory substitute if the legislature abolishes a right).

104. *See Wright*, 347 N.E. at 736; *Simon*, 355 N.E.2d at 903; Arneson v. Olson, 270 N.W.2d 125 (N.D. 1978); *Carson*, 424 A.2d at 825; *Bell*, 757 P.2d at 251; *Smith.*, 507 So. 2d at 1080; *Lucas* S.W.2d at 687.

105. *Fein*, 695 P.2d at 681 n.18 ("Indeed, even if due process principles required some 'quid pro quo' to support the statute, it would be difficult to say that the preservation of a viable medical malpractice insurance industry in this state was not an adequate benefit for the detriment the legislation imposes on malpractice plaintiffs.") It should also be noted that, even though California courts have to date applied a rational basis analysis without any consideration of a quid pro quo to tort reforms, this does not mean that the health courts will necessarily survive a challenge in California.

106. *Id.*

107. *See* Learner, *supra* note 96, at 171.

Proponents of the health court model have pointed to benefits such as "free legal representation," "efficiency," and "quicker resolution," as reasonably just substitutes for a plaintiff's right to open access of the courts and right to trial by jury.[108] At the outset, it is worth noting that there is no free legal representation being offered as part of the health courts model. An attorney is not mandatory, but neither is this true for our civil justice system. Plaintiffs feel that they fare better with an attorney representing them and it is safe to assume the same will be true for the health courts, if not even more so as the administrative tribunal will have less procedural safeguards in place to assure fairness.[109] Although it is true that a plaintiff is given access to free "experts," these are experts picked by a panel heavily weighted toward industry.[110] Moreover, claims of efficiency and speed of process are belied by almost every other alternative compensation system, each of which is plagued with a host of bureaucratic and political capture problems.[111]

Even so, the main point is that these sorts of offerings do not in any way equal the magnitude of what the plaintiff is being asked to relinquish. Other more vague societal "benefits" being promised (greater access to healthcare, lower insurance premiums) are both factually problematic and beside the point.[112] Many studies have concluded that the civil justice system is not what is behind insurance premium and access problems.[113]

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108. *See* Kirk B. Johnson et al., *A Fault-Based Administrative Alternative for Resolving Medical Malpractice Claims*, 42 VAND. L. REV. 1365, 1401 (1989).

109. Although attorneys are not needed in the alternative compensation schemes discussed in Part II, the majority of claimants employ one. *See, e.g.*, National Vaccine Fact Sheet, *supra* note 46 (stating that claimants are often represented by an attorney).

110. *See* discussion *supra* Part I and accompanying notes.

111. *See, e.g.*, discussion *supra* Part II and accompanying notes.

112. Indeed, some states employing a straight rational basis analysis to medical liability reforms have held the reforms unconstitutional under state equal protection clauses because the state legislature's claims of greater access, etc. are belied by the facts. *See, e.g.*, Ferndon v. Wis. Patients Comp. Fund, 682 N.W.2d 866 (Wis. 2005); Boucher v. Sayeed, 459 A.2d 87 (R.I. 1983); Hoem v. State, 756 P.2d 780 (Wyo. 1988).

113. *See, e.g.*, Katherine Baicker & Amitabh Chandra, *Defensive Medicine & Disappearing Doctors?*, REGULATION, Fall 2005, at 31 ("First, increases in malpractice payments do not seem to be the driving force behind increases in premiums.

Societal benefits are part of the rational basis review under traditional due process analysis. However, they do not and should not affect the quid pro quo analysis, which focuses on a reasonably just substitute for an individual's right.[114] As the Illinois court wrote:

> Defendants argue that there is a societal [q]uid pro quo in that the loss of recovery potential to some malpractice victims is offset by 'lower insurance premiums and lower medical care costs for all recipients of medical care.' This [q]uid pro quo does not extend to the seriously injured medical malpractice victim and does not serve to bring the limited recovery provision within the rationale of the cases upholding the constitutionality of the Workmen's Compensation Act.[115]

The Illinois court struck down caps on non-economic damages in this case, but the same elements apply to health courts. Not only will the health courts cap the damages as well, but the process of an alternative system in itself is a further limitation

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Second, increases in malpractice costs do not seem to affect the overall size of the physician workforce, although they may affect some subsets of the physician population more severely."); Bernard Black et al., *Stability, Not Crisis: Medical Malpractice Claim Outcomes in Texas, 1988-2002*, 2 J. EMPIRICAL LEGAL STUD. 207 (2005) (stating that the rapid changes in insurance premiums that sparked the crisis appear to reflect insurance market dynamics, largely disconnected from claim outcomes.); *Medical Malpractice Insurance: Stable Losses/Unstable Rates 2004* (Ams. For Ins. Reform, New York, N.Y), Oct. 2004, at 8, *available at* http://www.insurance-reform.org/StableLosses04.pdf. The study found that:

> While insurer payouts directly track the rate of medical inflation, medical insurance premiums do not. Rather, they rise and fall in relationship to the state of the economy. Not only has there been no 'explosion' in lawsuits, jury awards or any tort system costs at any time during the last three decades, but the astronomical premium increases that some doctors have been charged during periodic insurance "crises" over this time period are in exact sync with the economic cycle of the insurance industry, driven by interest rates and investments . . . . In other words, insurance companies raise rates when they are seeking ways to make up for declining interest rates and market-based investment losses and reduction in interest rates.

Id. at 8; *see also* Amitabh Chandra et al., *The Growth of Physician Medical Malpractice Payments: Evidence from the National Practitioner Data Bank*, HEALTH AFFAIRS, May 31, 2005.

114. Another example of quid pro quo analysis is seen in labor cases, where courts have upheld mandatory arbitration clauses as a reasonably just substitute for the right to strike. *See* Nat'l Labor Relations Bd. v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937).

115. *See* White v. Cent. Du Page Hosp. Ass'n, 347 N.E.2d 736, 742 (Ill 1976); Arneson v. Olson, 270 N.W.2d 125, 136 (N.D. 1978).

on plaintiff's remedy. A vague promise of lower premiums and greater access to care, especially where such promises are belied by numerous studies, does not establish a quid pro quo.

IV. Other Constitutional Implications

As was made clear in Part III, the health court proposal suffers from an insurmountable defect – it attempts to strip the right to redress in the courts without offering anything up in return. This quid pro quo is a long-recognized idea under constitutional analyses whenever a legislature attempts to narrow the right to jury trial and remove a common law cause of action from the civil justice system. Moreover, it is clear that the nature of the rights at issue, private common law tort rights, have existed since the state constitutions were drafted and are therefore much harder to legislate away. The proposal is clearly constitutionally suspect for these reasons. The following sections highlight state court reasoning on other tort reform measures and why the health court proposal pushes the legislature's power just too far.

The radical wholesale removal of plaintiff's common law rights to redress in the state courts and the segregating of these claims into alternative tribunals without procedural protections and the right to a jury while retaining the requirement that plaintiff prove fault will obviously not survive a constitutional challenge in states that have already adopted a form of due process analysis that requires a quid pro quo. Arguably the health court proposal is so egregious that some states that haven't needed to delve into quid pro quo analyses in the past may begin to explore this theory. More states will strike down the health courts based on regular due process or equal protection analysis. A great majority of states that have addressed reforms in the past have indicated that a plan like health courts would violate state constitutional rights to jury.

A. *Due Process*

Having established the importance of a right to redress for private rights, as well as the long-standing tradition of a right to a jury in civil matters (whether protected by the federal constitution or one of the many state constitutional provisions), it

is clear that when the legislature attempts to change the nature of these rights the courts are justified in applying something akin to intermediate scrutiny.[116] This level of scrutiny asks whether the elimination of such a strong right is proportionate to, and advances, the ends sought.

Some scholars have posited that a due process analysis that combines a rationality test with a quid pro quo inquiry creates a particular type of intermediate scrutiny that should apply to medical malpractice reforms.[117] Since the Supreme Court has yet to state definitively whether a quid pro quo determination is part of a due process challenge to a legislative amendment of a common law right, the states have been left to devise their own understandings, based on state constitutions. This has resulted in slight theoretical differences. The majority of states employing a quid pro quo analysis do so as part of a due process analysis, with the result being that suggested above: a level of scrutiny higher than rational basis. Other states apply a heightened level of scrutiny without reference to a quid pro quo determination.[118] Wisconsin recently applied a "rational basis with bite test" to strike down caps on non-economic damages.[119] In any of these states, health courts will have a near-impossible

116. Some states analyze these claims under state constitutional provisions requiring open access to the courts or a right to a remedy.

117. *See* Learner, *supra* note 96.

118. Arguably, the addition of a "fairness" prong to a rational basis test often comes from the same impulse as quid pro quo. *See, e.g.*, Carson v. Thompson, 424 A.2d 825, 837 (N.H. 1980); *Arneson*, 270 N.W.2d at 134-35.

119. Ferndon v. Wis. Patients Comp. Fund, 701 N.W.2d 440, 460-61 (Wis. 2005). The court stated:

> Constitutional law scholar Professor Gerald Gunther wrote, however, as follows that rational basis with teeth 'is *not* the same as 'intermediate scrutiny': [Rational basis with teeth] does not take issue with the heightened scrutiny tiers of 'strict' and 'intermediate' review. Instead, it is solely addressed to the appropriate intensity of review to be exercised when the lowest tier, that of rationality review, is deemed appropriate . . . . What the [rational basis with teeth model] asks is that some teeth be put into that lowest level of scrutiny, that it be applied 'with bite,' focusing on means without second-guessing legislative ends. (Evaluating the importance of the ends is characteristic of all higher levels of scrutiny.) In short, [rational basis with teeth raises] slightly the lowest tier of review under the two- or three-tier models; but it does *not* seek to raise the 'mere rationality' level appropriate for run-of-the-mill economic regulation cases all the way up to the level of 'intermediate' or of 'strict' scrutiny.

Id. (quoting GERALD GUNTHER, CONSTITUTIONAL LAW 605 n.5 (11th ed. 1985)).

hurdle to pass constitutional muster because of the combination of the long-standing common law nature of the cause of action, negligence, and the wholesale removal of this cause of action from review by a jury. Moreover, the health courts offer no quid pro quo to mitigate removal of such an important right. Instead they merely shift plaintiffs into a new forum without any procedural safeguards or constitutional oversight.

B. *Equal Protection*

Analytically, due process and equal protection challenges often parallel each other. Once the level of scrutiny is determined, the assessment of the legislation is generally the same. This separate section is included in order to clarify which state courts have relied more heavily on equal protection grounds when assessing previous tort reform proposals. The practical effect of this determination would forecast which states may strike down health courts without even engaging in a quid pro quo analysis.

States that have struck down previous medical liability reforms on equal protection grounds often apply a means-end test. This is sometimes described as rational basis scrutiny, and some states have invalidated reforms even under such a deferential level of scrutiny.[120] Other courts have applied traditional intermediate scrutiny, asking whether the legislation is "reasonable, not arbitrary, and . . . rest[s] upon some ground of difference having a fair and substantial relation to the object of the legislation."[121] These cases have usually found that the medical liability reforms under scrutiny are not responsive to the perceived problems, but rather serve only to disadvantage some population unreasonably. The Wyoming court went even further, stating:

> The continued availability and vitality of * * * causes of action [against health care providers] serve an important public policy –

120. *Id.*; Boucher v. Sayeed, 459 A.2d 87 (R.I. 1983); Hoem v. State, 756 P.2d 780 (Wyo. 1988).

121. *Carson*, 424 A.2d at 831 (applying intermediate scrutiny to an omnibus medical malpractice statute and striking down a variety of limitations on litigants' rights). Arizona actually applies strict scrutiny, *see* Kenyon v. Hammer, 688 P.2d 961, 975 (Ariz. 1984) (finding right to access the court for a negligence claim is a fundamental right and therefore three-year statute of limitations was unconstitutional).

> the preservation of quality health care for the citizens of this state . . . . Constitutional protections exist for litigants regardless of market conditions for insurance companies and the medical industry; concerns about the latter cannot be allowed to overrun the former at the expense of those injured by malpractice.[122]

C. *Right to Jury / Open Access to Courts*

In discussing the role of the jury, the United States Supreme Court has stated: "Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care."[123] All states except Colorado and Louisiana have provisions in their state constitutions guaranteeing the right to a jury in civil trials and/or the right to access the courts for civil matters.[124] Litigants often use these provisions to challenge tort reforms. At least eight states have invalidated damage caps based on their state constitutional provisions of a right to a

122. *Hoem*, 756 P.2d at 783-84 (quoting Greenwood v. Wierdsma, 741 P.2d 1079, 1088 (Wyo. 1987) and Waggoner v. Gibson, 647 F. Supp. 1102, 1107 (N.D. Tex. 1986)).

123. Dimick v. Schiedt, 293 U.S. 474, 486 (1935).

124. ALA. CONST. art. I, § 11; ALASKA CONST. art. I, § 16; ARIZ. CONST. art. II, § 23; ARK. CONST. art. II, § 7; CAL. CONST. art. I, § 16; CONN. CONST. art. I, § 19; DEL. CONST. art. I, § 4; FLA. CONST. art. I § 22; GA. CONST. art. I, § 1; HAW. CONST. art. I, § 13; IDAHO CONST. art. I, § 7; ILL. CONST. art. I, § 13; IND. CONST. art. I, § 20; IOWA CONST. art. I, § 9; KAN. CONST. B. of R. § 5; KY. CONST. § 7; ME. CONST. art. I, § 20; MD. CONST. DECL. OF RIGHTS, art. V; MASS. CONST. Pt. I, art. XV; MICH. . CONST. art. I, § 14; MINN. CONST. Art. I § 4; MISS. CONST. art. III, § 31; MO. CONST. art. I, § 22(a); MONT. CONST. art. II, § 26; NEB. CONST. art. I, § 6; NEV. CONST. art. I, § 3; N.H. CONST. Pt. 1, art. XX; N.J. CONST. art. I, ¶ 9; N.M. CONST. art. II, § 12; N.Y. CONST. art. VI, § 18; N.C. CONST. § 1A-1, R. 38; N.D. CONST. art I, § 13; OHIO CONST. art. I, § 5; OKLA. CONST. art. II, § 19; OR. CONST. art. I, § 17; PA. CONST. art. I; § 6; R.I. CONST. art. I, § 15; S.C. CONST. art. I, § 14; S.D. CONST. art. VI, § 6; TENN. CONST. art. I, § 6; TEX. CONST. art. I, § 15; UTAH CONST. art. I, § 10; VT. CONST. Ch. 1, art. XII; VA. CONST. art. I, § 11; WASH. CONST. art. I, § 21; W.VA. CONST. art. III,, § 13; WISC. CONST. art. I, § 5; WYO. CONST. art. I, § 9.

jury.[125] A few more states have invalidated other medical liability reforms under their right to jury provisions.[126]

Even where state courts have previously upheld tort reforms against such challenges, it is very likely that the health court proposal is too radical an encroachment upon these rights and many state courts will be inclined to find the health courts unconstitutional. For example, in Virginia, the court upheld caps on damages by stressing the importance of the jury in assessing facts, but distinguishing the decision as to amount of damages from a factual inquiry.[127] A similar rationale is found in Delaware, where the court upheld a medical review panel against a right to jury trial challenge.[128] The Delaware court repeatedly stressed that the statute in question was constitutional because it did not remove any question of fact from the jury.[129]

This type of analysis is seen in almost every state that has upheld tort reforms against challenges based on state constitutional provisions safeguarding a right to jury trial.[130] It is likely

125. *See, e.g.*, Moore v. Mobile Infirmary Ass'n, 592 So. 2d 156 (Ala. 1992); Smith v. Schulte, 671 So. 2d 1334 (Ala. 1995); Kan. Malpractice Victims Coal. v. Bell, 757 P.2d 251 (Kan. 1988); Duren v. Suburban Cmty. Hosp., 495 N.E.2d 51 (Ohio Ct. Com. Pl. 1985); Lakin v. Senco Prods., 987 P.2d 463 (Ore. 1999); Knowles v. U.S., 544 N.W.2d 183 (S.D. 1996); Lucas v. U.S., 757 S.W.2d 692 (Tex 1988); Sofie v. Fibreboard Corp., 771 P.2d 711 (Wash. 1989).

126. Lloyd Noland Hosp. v. Durham, 906 So. 2d 157 (Ala. 2005) (periodic payment schedules); Wright v. Cent. Du Page Hosp. Ass'n, 347 N.E.2d 736, 741 (Ill. 1976) (medical review panels); Condemarin v. Univ. Hosp., 775 P.2d 348, 357-60 (Utah 1989) (liability limit for state hospitals); Boucher v. Sayeed, 459 A.2d 87, 91 (R.I. 1983) (striking down Reform Act under EPC, but in dicta doubting it would pass muster under jury trial challenge).

127. Etheridge v. Med. Ctr. Hosps., 376 S.E.2d 525 (Va. 1989); *see also* Pulliam v. Coastal Emergency Servs. of Richmond, 509 S.E.2d 307 (Va. 1999).

128. Lacy v. Green, 428 A.2d 1171 (Del. Super. Ct. 1981) ("The parties remain free to call, examine and cross-examine witnesses as if the pretrial panel opinion had not been made . . . [the statute in question] cuts off no defenses, interposes no obstacle to full consideration of all the issues, and takes no question of fact from the jury.").

129. *Id.*

130. Adams v. Children's Mercy Hosp., 832 S.W.2d 898 (Mo. 1992); Kirkland v. Blaine County. Med. Ctr., 4 P.3d 1115 (Idaho 2000); Murphy v. Edmonds, 601 A.2d 102 (Md. 1992); Peters v. Saft, 597 A.2d 50 (Me. 1991) (noting that even some damage caps may go to far by eliminating the remedy altogether); English v. New. England Med. Ctr., 541 N.E.2d 329 (Mass. 1989); Wright v. Colleton County. Sch. Dist., 391 S.E.2d 564 (S.C. 1990); Robinson v. Charleston Area Med. Ctr., 414 S.E.2d 877 (W. Va. 1991); Evans *ex rel.* Kutch v. State, 56 P.3d 1046 (Alaska 2002);

that these courts will find the health courts to be violations of the right to jury because the proposal removes the entire proceeding from a jury. Each of these courts upholding previous tort reforms wrote language strongly reaffirming the importance of the jury as a fact-finding body. The same courts will have a hard time justifying the wholesale removal of facts from the jury.

This article analyzes the possible application of state constitutional rights to jury trials because to date the main push for health courts has been on the state level. However, the Progressive Policy Institute has proposed that in five years, the Department of Health and Human Services should be required to reassess the performance of the state pilot programs and "[s]pecifically, the president and Congress may need to preempt state and medical malpractice laws and establish federal health courts in states that choose to forgo federal start-up funds and avoid creating health courts on their own."[131]

Such a plan would encounter serious Seventh Amendment problems, as the Supreme Court has repeatedly limited Congress' ability to abolish a jury trial remedy for common law private rights.[132]

V. Conclusion

To listen to the health court advocates, one would think that segmenting off certain claims into parallel "court" systems is benign and commonplace. Anyone reading this article knows that this simply is not true. We do not have separate courts for criminal and civil matters even though these areas differ completely. We trust that our judges and juries can adapt easily between civil and criminal matters. More than this, we need judges who can understand common law in its varied forms in order for our system to thrive. Medical malpractice is not a sep-

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Barret v. Baird, 908 P.2d 689 (Nev. 1995); Wiley v. Henry Ford Cottage Hosp., 668 N.W.2d 402 (Mich. 2003).

131. PPI pamphlet, *supra* note 12, at 14. A federal system is also mentioned in the transcript from Common Good's October 31, 2006 panel discussion, *see* Transcript, *supra* note 12, at 7 (mentioning that a federal system would "represent[ ] a deviation from the historical locus of control over malpractice law, which has been the states."). This, of course, has larger federalism concerns that this article does not focus on.

132. *See* Seventh Amendment jurisprudence discussed *supra* note 27.

arate body of law; it is part and parcel of ordinary tort law that has been enshrined in the common law since the beginning of our civil justice system.

The common law is built upon a generalist system. It is this concept that first year law students struggle to understand when they try to find other cases based on subject matter rather than legal principle. The legal principle at issue may jump across subject matters and specialty areas. Indeed, negligence law is found in many subject areas, not just medical malpractice. Segmenting out medical cases does not make a more coherent and unified body of law; on the contrary, it makes a body of law that is unanswerable to centuries of procedural and substantive precedents. This is a legislative attempt to weaken the judicial system.

This article examines state court analyses of previous legislative attempts to curb plaintiff's' access to the civil justice system and, by doing, provides a reasoned prediction for how the proposed health courts might fare against constitutional challenges. The results are clear – the health court proposal as currently designed will most likely be found unconstitutional by a great majority of states.[133] Given the fact that many states will find such proposals unconstitutional, should Congress really be spending valuable time debating and passing a pilot-funding program? Moreover, although the Supreme Court has yet to define the parameters of a quid pro quo test, the current health courts proposal will very likely push the Court toward such a ruling.

The public relations spin on these health courts is based on misinformation: that they are "no-fault" and similar to other specialized court systems and/or administrative compensation

133. Of the thirty-nine states that have written decisions based on previous constitutional challenges to medical liability reforms, at least thirty-three of them are constrained by their own precedent to strike down health courts as proposed. Arguably, the remaining six states (Louisiana, Missouri, California, New Mexico, New Jersey, and Colorado) might also deem health courts unconstitutional, however their precedents are not quite as strongly written. In the ten states (Connecticut, Hawaii, Iowa, Minnesota, Mississippi, Montana, New York, Oklahoma, Tennessee, and Vermont, including the District of Columbia) that either have never imposed limits to the tort system or have never challenged their limits in court, we of course have no way to predict how their courts will interpret their state constitutions. Regardless, a clear majority of states will most likely strike these courts down.

schemes. The truth is that these health "courts" are an industry-sponsored attempt to weaken the civil justice system; and because the industry players aligned with such an agenda know entirely how undemocratic such an agenda is, they have spent very little time rebutting the serious constitutional issues with actual legal arguments. Instead, the public is redirected and calmed by analogies to long-standing (albeit problematic and inefficient) programs like worker's compensation. Meanwhile corporations remain one step closer to creating an America where the average person has no recourse for injury caused by negligent or unsafe practices.