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Legislative Response to the Medical Malpractice Insurance Crisis: Constitutional Implications

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The medical malpractice insurance crisis—marked by increasing insurance rates and decreasing availability of insurance coverage—has spawned extensive legislative discussion of procedural reform measures designed to alleviate the crisis. In this article, Professor Redish examines the constitutionality of the major reform proposals under consideration in the state legislatures, concluding that most of the constitutional objections are insubstantial, and that the wisdom of the proposals as a matter of public policy is a controversial issue appropriately left for legislative determination.

Introduction: The Development of a Crisis

The current crisis in the provision of medical malpractice insurance has reached proportions of such magnitude that few commentators doubt its seriousness. Dramatic increases in medical malpractice insurance rates accompanied by the decreasing availability of malpractice insurance coverage are the most visible aspects of the crisis.[1] Between 1960 and 1970, for example, insurance rates for surgeons rose 949.2 percent; rates for nonsurgical physicians increased 540.8 percent; and hospital premiums in-

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1. All Indus. Medical Malpractice Ins. Comm., The Problems of Insuring Medical Malpractice 1 (1975) [hereinafter cited as Problems], *reprinted in Hearing on Examination of the Continuing Medical Malpractice Insurance Crisis Before the Subcomm. on Health of the Senate Comm. on Labor and Public Welfare*, 94th Cong., 1st Sess. 184 (1975) [hereinafter cited as *Hearing*]; *see* U.S. DEP'T OF HEALTH, EDUC. & WELFARE, PUB. NO. (OS) 73-88, MEDICAL MALPRACTICE: REPORT OF THE SECRETARY'S COMM'N ON MEDICAL MALPRACTICE 22, 38-40 (1973) [hereinafter cited as HEW REPORT]. *See generally* Comment, *Recent Medical Malpractice Legislation—A First Checkup*, 50 TUL. L. REV. 655, 655-60 (1976).

creased 262.7 percent.[2] The situation has worsened considerably since 1970. Premiums paid by physicians in some states rose more than 100 percent between 1974 and mid-1975 alone.[3] One irony of the situation is that doctors faced with skyrocketing insurance rates may, in the not-too-distant future, be considered comparatively lucky; many doctors may be unable to obtain any insurance coverage at all.[4]

The effects of the malpractice insurance crisis are not limited to physicians; the crisis affects the entire health care system.[5] To the extent that physicians are forced to avoid high-risk specialties[6] or to relocate in areas with lower insurance rates,[7] patients are seriously prejudiced by the resulting maldistribution of medical care. Patients who remain able to obtain adequate medical care also pay for the insurance crisis in the form of higher costs passed on to them by the physicians.[8] It therefore does not seem to be an overstatement to suggest that the medical malpractice insurance problem is "one of the nation's most visible social and political issues."[9]

Although all of the causes of the malpractice insurance crisis are not identifiable,[10] it is generally agreed that the rapid increase in the number and amount of malpractice claims and awards[11] is a substantial—perhaps the primary—factor in the dramatic increase in medical malpractice insurance

2. HEW REPORT, *supra* note 1, at 13.

3. Problems, *supra* note 1, at 2, *reprinted in Hearing, supra* note 1, at 185. *See also* A. Murray, The Medical Malpractice Situation in California 5 (Sept. 1976) (Health Policy Program Discussion Paper, University of California—San Francisco School of Medicine): "In 1974 . . . physicians spent $73 million in malpractice premiums; in 1975, they spent $122.9 million. Hospital premiums in 1975 totaled about $155 million . . . ."

4. The number of insurance carriers writing medical malpractice insurance nationally has decreased from approximately 85 to 5. Oregon Medical Ass'n v. Rawls, No. 421-496, slip op. at 1 (Ore. Cir. Ct. May 4, 1976), *rev'd on other grounds*, 276 Or. 1101, 557 P.2d 664 (1976) (remanded for further factual findings). *But cf.* HEW REPORT, *supra* note 1, at 38-39 (Commission finds malpractice insurance currently available, but recommends that insurance industry and medical groups develop contingency plans in the event that insurance becomes unavailable in the normal market); Comment, *supra* note 1, at 660-66 (a majority of states have passed legislative plans to provide for liability insurance in the event that it becomes unavailable in the open market).

5. HEW REPORT, *supra* note 1, at 18:

> The impact of medical malpractice on the health-care system is great. It contributes to the rising costs of health care; it causes alterations in the practice and delivery of health care in the form of "defensive medicine," and reluctance to act in emergencies, and in attitudes toward emerging forms of allied health personnel.

6. Note, *Introduction: The Indiana Act in Context*, 51 IND. L. J. 91, 93 (1975).

7. Halpern v. Gozan, 85 Misc. 2d 753, 255, 381 N.Y.S.2d 744, 746 (Sup. Ct. 1976).

8. *See* HEW REPORT, *supra* note 1, at 12-13; Note, *supra* note 6, at 93.

9. Problems, *supra* note 1, at 1, *reprinted in Hearing, supra* note 1, at 184.

10. "[T]here is no uniquely identifiable 'malpractice problem,' but rather, a complex of problems involving interacting medical, legal, sociological, psychological, and economic factors." HEW REPORT, *supra* note 1, at 4.

11. *See* HEW REPORT, *supra* note 1, at 6-12; Gray, *The Insurer's Dilemma*, 51 IND. L. J. 120, 121 (1975).

rates.[12] The relationship between the claims history and the increasing rates appears to be a logical one. "Because of the unpredictability of soaring jury awards and increasing frequency of claims, many insurers today are unwilling to accept the tremendously high risk associated with this type of coverage."[13]

The apparent connection between the increasing number of malpractice claims and rising malpractice insurance rates has prompted many state legislatures to consider the adoption of sweeping changes in the substantive and procedural rules governing the adjudication of medical malpractice claims.[14] The most common legislative proposals include:[15] (1) limiting either the amount of recovery by plaintiffs or the liability of individual health care providers; (2) reducing the statute of limitations applicable to medical malpractice actions; (3) abrogating the collateral source rule in medical malpractice actions; (4) establishing medico-legal screening panel plans; and (5) establishing either compulsory or voluntary arbitration plans.

In theory, if the legislative proposals can reduce the number and amount of malpractice awards, the insurance industry will be in a better position to predict recoveries and to maintain premiums within reasonable bounds. Nonetheless, even though a large number of states have already adopted one or more of the malpractice proposals, insurance premiums

12. Note, *RX for New York's Medical Malpractice Crisis*, 11 COLUM. J. L. & SOC. PROB. 467, 469 (1975); Note, *Medical-Legal Screening Panels as an Alternative Approach to Medical Malpractice Claims*, 13 WM. & MARY L. REV. 695, 703 (1972); A. Murray, *supra* note 3, at 2.

13. Problems, *supra* note 1, at 2, *reprinted in Hearing*, *supra* note 1, at 185. "The increasing frequency of claims and the unpredictability of jury awards are said to render intelligent ratemaking impossible. Insurers are rushing to abandon the professional liability field." Note, *supra* note 6, at 94. The California Insurance Department found that approximately 46% of the average medical malpractice premium is consumed by litigation-related costs. A. Murray, *supra* note 3, at 10.

14. As of October 1975, at least 39 states had commissioned studies of the medical malpractice problem, and 22 states had revised civil practice laws or rules to remedy the malpractice problem. Grossman, The Medical Malpractice Crisis: State Legislative Activities in 1975, at 6-7 (1975), *reprinted in Hearing, supra* note 1, at 21, 24.

Not all the remedial measures considered or adopted by state legislatures relate to the procedural rules of adjudication. In the words of one commentator:

> There are two general approaches which [legislative] action can take. The first is to establish joint underwriting groups or reinsurance schemes through which health care providers can more easily obtain malpractice insurance. The second is to alter the substantive and procedural rules relating to medical malpractice actions to decrease the liability of health care providers and thereby to make the malpractice risk insurable at a price the health care profession is willing to pay.

Comment, *An Analysis of State Legislative Responses to the Medical Malpractice Crisis*, 1975 DUKE L. J. 1417.

15. For an overview of various legislative proposals, see Comment, *supra* note 14. Some legislatures have also considered or adopted revisions of the doctrines of *res ipsa loquitur* and informed consent. *Id.* at 1426-42. Because no serious constitutional problems are raised by these two proposals, this article will not discuss them.

continue to increase.[16] According to one commentator, "[t]he increases in premiums reflect the refusal of insurance companies and state insurance commissioners to lower premiums until the constitutional issues raised by the new legislation are resolved."[17] A number of state courts have already invalidated legislative malpractice proposals on the basis of federal and state constitutional objections.[18] The continuing threat of invalidation because of unconstitutionality impairs the success of existing malpractice legislation and impedes the passage of similar proposals in states where the constitutional issues remain unresolved.[19]

The presence of serious constitutional questions as well as the tremendous societal impact that will result from their answers necessitate a careful examination of these issues. This article seeks to add clarity to public debate over the constitutionality of legislation aimed at redressing the malpractice insurance crisis by providing such an analysis. The first section of the article briefly outlines major malpractice proposals under consideration in the state legislatures.[20] In the sections that follow, the legislative proposals are analyzed to assess their susceptibility to challenge under various federal and state constitutional provisions. Section two discusses the issue pervading nearly every reform proposal—whether setting medical malpractice apart from all other torts violates the federal equal protection clause or state constitutional prohibitions on special legislation. The remaining sections examine the constitutional problems peculiar to specific legislative proposals. Section three examines whether provisions limiting recovery or health

16. Ludlam, *Malpractice: Funding Emerges as a Critical Issue*, TRUSTEE, Apr. 1976, at 12.

17. *Id.*

18. *See, e.g.*, Wright v. Central Du Page Hosp. Ass'n, 63 Ill. 2d 313, 347 N.E.2d 736 (1976); Graley v. Satayatham, 74 Ohio Op. 2d 316, 343 N.E.2d 832 (C.P. 1976); Simon v. St. Elizabeth Medical Center, — Ohio Op. 3d —, 355 N.E.2d 903 (C.P. 1976); *cf.* Jones v. State Bd. of Medicine, 97 Idaho 859, 555 P.2d 399 (1976) (remanded for further factual findings), *cert. denied*, 45 U.S.L.W. 3749 (U.S. May 17, 1977) (No. 76-972); *see* text accompanying notes 124-48 *infra*.

19. It is by no means universally agreed that even as a policy matter—wholly apart from constitutional questions—these measures are advisable. *See, e.g.*, A.B.A. COMM'N ON MEDICAL PROFESSIONAL LIAB., INTERIM REPORT (1976).

> Attempts to restrict "the tort" remedy are usually attempts to limit the patient's ability to obtain full payment for damages resulting from medical negligence. In reality, they are attempts to make the injured patient provide the subsidy which reduces the provider's costs. If some providers require subsidies, these subsidies should not be extracted from the group least able to pay and most requiring public protection—innocent injured victims.

Id., app. at 60 (separate statement of Richard M. Markus). "[O]n the whole [recent malpractice legislation] is somewhat shortsighted and designed to have only a palliative effect upon the very serious problem of medical malpractice." Comment, *supra* note 1, at 688.

20. This article does not purport to be a definitive description of all relevant state legislation dealing with medical malpractice. The rapidly changing legislative scene makes futile any such attempt. For thorough discussions of state legislation currently under consideration, or recently enacted, see Comment, *supra* note 14, and Comment, *supra* note 1.

care provider liability violate the federal due process or equal protection clauses, or impair state constitutional rights of access to the courts. Section four discusses whether drastic reductions in the applicable statute of limitations period violates the due process clause or state right of access provisions. Screening panel plans are examined in section five to determine whether they result in the denial of an effective right to jury trial, violate state constitutional concepts of separation of powers, or impair the state constitutional right of access to the courts. Finally, in section six, compulsory arbitration plans are examined to determine whether they result in the denial of the right to a jury trial, or impair the state constitutional right of access to the courts.

The intricacies of these constitutional problems warn against any attempt to summarize in several sentences the conclusions reached on these questions. With this caveat, however, it can be stated safely that courts should find most of the constitutional difficulties presented by these measures easily surmountable.[21] Indeed, the courts that have invalidated or questioned these laws to date seem to have strained the meaning of the relevant constitutional provisions beyond all legitimate bounds. Whether these measures are advisable as a policy matter[22] is not the issue properly before the courts, for in a democracy it is vitally important that the judiciary separate questions of social wisdom from questions about constitutionality. Questions of wisdom are more appropriately retained for decision by the more representative legislative organs of government.

I. The Nature of the Legislative Response: A Brief Outline

A. Limits on Recovery or Liability

Several states have imposed limits on the amount of damages recoverable by injured patients or on the potential liability of individual health care providers.[23] Indiana has adopted one of the most publicized of these plans.[24] Under the Indiana plan, a plaintiff's total recovery for injury or death in a medical malpractice case may not exceed $500,000.[25] In exchange for filing proof of financial responsibility in the amount of at least $100,000 per occurrence and paying a surcharge into a "Patient's Compensation Fund,"

21. The one significant exception appears to be the constitutional problems raised by compulsory binding arbitration. However, though such an option has been recognized, no state has, as yet, adopted such a proposal. *See* text accompanying notes 238-52 *infra*.

22. *See* note 19 *supra*.

23. *See* Comment, *supra* note 1, at 667-70.

24. IND. CODE ANN. §§ 16-9.5-1-1 to .5-9-10 (Burns Supp. 1975), *as amended by* 1976 Ind. Acts, Pub L. No. 65, §§ 1-11. *See generally Symposium: The 1975 Indiana Medical Malpractice Act*, 51 IND. L. J. 91 (1975).

25. IND. CODE ANN. § 16-9.5-2-2(a) (Burns Supp. 1975), *as amended by* 1976 Ind. Acts, Pub. L. No. 65, § 3.

individual health care providers[26] have their potential liability limited to $100,000 per malpractice claim.[27] The fund compensates patients who suffer injuries exceeding the $100,000 ceiling on individual health care provider liability, up to the $500,000 statutory maximum.[28] Thus, the legislation accomplishes two goals: it ensures that victims actually will receive compensation, and it spreads the cost among health care providers in the state. Although several other states have enacted similar plans,[29] many of them impose recovery or liability limits without establishing the corresponding patient compensation fund.[30]

Several jurisdictions have attempted to reduce damage recoveries more indirectly by abrogating or limiting the collateral source rule in medical malpractice cases.[31] The collateral source rule precludes the jury from considering the amount of compensation received by a plaintiff from outside health insurance policies when it assesses the amount of compensatory damages to be paid by the defendant.[32] Although in a sense the rule provides plaintiffs with a windfall recovery and disregards the compensatory rationale for awarding damages, its asserted justification is to avoid penalizing plaintiffs for purchasing health care protection and to prevent rewarding defendants because of the plaintiff's foresight.[33] State legislatures that reject the collateral source rule in medical malpractice cases apparently believe that a reduction in malpractice insurance rates is attainable without causing the injured patient to go uncompensated.[34] Two alternatives to total abroga-

26. The term "health care provider" is defined to include a person, corporation, facility or institution licensed by the state to provide health care or professional services of a physician, psychiatric hospital, hospital, dentist, registered or licensed practical nurse, optometrist, podiatrist, chiropracter, physical therapist, a psychologist or one of their agents, or a blood bank, community mental health or mental retardation center or clinic, or a college providing health care. IND. CODE ANN. § 16-9.5-1-1(a) (Burns Supp. 1975), *as amended by* 1976 Ind. Acts, Pub. L. No. 65, § 1.

27. IND. CODE ANN. §§ 16-9.5-2-1, .5-2(b), .5-4-1 (Burns Supp. 1975), *as amended by* 1976 Ind. Acts, Pub. L. No. 65, §§ 3, 4, 7.

28. IND. CODE ANN. § 16-9.5-2-2 (Burns Supp. 1975), *as amended by* 1976 Ind. Acts, Pub. L. No. 65, § 4.

29. FLA. STAT. § 768.54 (Supp. 1977); LA. REV. STAT. ANN. §§ 40: 1299.42B(2), .44 (West Supp. 1977); 1976 N.M. Laws, ch. 2, §§ 6, 25; 1975 Or. Laws, ch. 796, §§ 14, 21; *see* Comment, *supra* note 1, at 667.

30. *See, e.g.*, IDAHO CODE §§ 39-4204, -4205 (Supp. 1976); OHIO REV. CODE ANN. § 2307.43 (Page Supp. 1975); 1976 S.D. Sess. Laws, ch. 154; VA. CODE §§ 8-629.2, -654.8 (Cum. Supp. 1976); *see* Comment, *supra* note 1, at 667. *See also* CAL. CIV. CODE § 3333.2 (West Supp. 1977) (limiting recovery for noneconomic losses—pain, suffering, inconvenience, physical impairment, and disfigurement).

31. *See* Comment, *supra* note 1, at 669.

32. *See generally* 2 F. HARPER & F. JAMES, THE LAW OF TORTS § 25.22 (1956); Comment, *supra* note 14, at 1447.

33. Comment, *supra* note 14, at 1447-48.

34. *Id.* at 1448-50. States statutes rejecting the collateral source rule include: IOWA CODE ANN. § 147.136 (West Supp. 1976); KAN. STAT. § 60-471 (1976); 1976 Neb. Laws, L.B. 434, § 19;

tion of the collateral source rule include proposals to credit plaintiffs for any costs incurred in providing collateral sources of income and to allow presentation of evidence of collateral sources to the jury, without imposition of a direct offset.[35]

B. Statutes of Limitation

Revision of the statutes of limitation applicable in medical malpractice actions has also received considerable legislative attention.[36] The problem arises partially because malpractice insurance has traditionally been sold on an "occurrence" basis.[37] In other words, health care providers are protected against claims that may arise in the future from incidents that occur during the effective policy year.[38] The HEW Commission on Medical Malpractice found that "[t]he rate-determining process is dependent upon knowing with some degree of certainty the total potential losses for a policy year, and any extension of the statutory period makes rate-setting that much more difficult."[39] Thus, the longer the relevant statute of limitations period is, the longer the period of risk (or "long tail") extends for the insurance company.

The rate-setting problem is further aggravated by two related doctrines employed by certain states: the discovery rule and special disability provisions for minors. The discovery rule provides that the statute of limitations will not begin to run until the victim discovers or should have discovered his injury, rather than from the time the injury was inflicted.[40] The purpose of the discovery rule is to prevent the statute of limitations from depriving injured patients of their causes of action before the harmful effects arising from treatment become manifest.[41] Although the discovery rule prevents unfair procedural denial of malpractice claims, it is inconsistent with the policies that the statute of limitations is designed to foster—repose and the avoidance of stale claims[42]—and thus may impose severe hardship on the health care provider.

1976 N.M. Laws, ch. 2, § 11; 40 PA. CONS. STAT. ANN. § 1301.602 (Purdon Cum. Supp. 1976-1977); TENN. CODE ANN. § 23-3418 (Cum. Supp. 1976); 1975-1976 Wash. Laws, ch. 56, § 13.

35. *See, e.g.*, KAN. STAT. § 60-471 (1976); R.I. GEN. LAWS § 9-19-34 (Supp. 1976). *See generally* American Hosp. Ass'n, Summary of the Proceedings of the American Hospital Association - American Medical Association National Invitational Conference on Professional Liability 9-10 (July 28, 1975).

36. *See* Comment, *supra* note 14, at 1429-36.

37. Problems, *supra* note 1, at 8-9.

38. *Id.*

39. HEW REPORT, *supra* note 1, at 30.

40. 1 D. LOUISELL & H. WILLIAMS, MEDICAL MALPRACTICE ¶ 13.07 (rev. ed. 1973).

41. *See* HEW REPORT, *supra* note 1, at 30; Comment, *supra* note 14, at 1432.

42. *See* HEW REPORT, *supra* note 1, at 30.

The special disability period for minors is also intended to prevent the unfair loss of claims.[43] Under this practice a minor is considered disabled, tolling the statute of limitations, until he reaches the age of majority, apparently on the theory that until that time there is no assurance that the child's interests will be protected.[44] Because of this rule, however, injured young children retain viable claims for periods of time greatly in excess of the traditional limitations period. The extended period of liability exposure resulting from application of the discovery rule and special disability provisions has prompted passage of statutes of limitation that reject or modify these doctrines.[45]

C. Screening Panels

Many jurisdictions view the adoption of plans for medico-legal screening panels as a partial answer to the malpractice insurance problem.[46] The concept for statutory plans derives largely from earlier private panels voluntarily adopted by local medical societies.[47] Although many varieties of these plans exist, "[a]ll of them, to varying degrees, share the common goal of encouraging or requiring settlement of meritorious claims and the abandonment of claims which, in the opinion of the panel, are not supported by sufficient evidence of professional negligence to merit bringing an action at law."[48] Private plans could not compel plaintiffs to submit their claims to a panel, but they sought to encourage such submission by providing the plaintiff with an expert witness at a later trial if the panel found in his favor.[49] In return, it was hoped that a losing plaintiff, either voluntarily after the panel's decision or by prior agreement, would abandon his claim.[50]

43. *See generally* 1 D. LOUISELL & H. WILLIAMS, *supra* note 40, ¶ 13.12.

44. *Id.*

45. *See, e.g.*, IND. CODE ANN. § 16-9.5-3 (Burns Supp. 1975) (statute runs two years from date of occurrence, minor under age of six has until eighth birthday); IOWA CODE ANN. § 614.1(9) (West Supp. 1976) (modified discovery rule with six-year limit and exception for foreign objects left in patient); KAN. STAT. § 60-513(c) (1976) (modified discovery rule with four-year limit); MO. ANN. STAT. § 516.105 (Vernon Supp. 1977) (modified discovery rule with ten-year limit; minor under ten years of age has until twelfth birthday); 1976 N.M. Laws, ch. 2, § 13 (statute runs three years from occurrence; minor under six has until ninth birthday); TENN. CODE ANN. § 23-3415 (Cum. Supp. 1976) (one-year statute from time of occurrence with outside limit of three years from occurence, absent fraudulent concealment). *See also* 1 D. LOUISELL & H. WILLIAMS, *supra* note 40, ¶ 13.06, at 370.

46. *See* Comment, *supra* note 14, at 1456-63.

47. *See* C. Baird, G. Munsterman & J. Stevens, Alternatives to Litigation, I: Technical Analysis, *reprinted in* HEW REPORT, *supra* note 1, app. at 214, 224-25; Note, *The Montana Plan for Screening Medical Malpractice Claims*, 36 MONT. L. REV. 321 (1975); Note, *Medical-Legal Screening Panels as an Alternative Approach to Medical Malpractice Claims*, *supra* note 12, at 704-05.

48. C. Baird, G. Munsterman & J. Stevens, *supra* note 47, app. at 224.

49. *Id.* at 224, 293. *See also* Mallor, *A Cure for the Plaintiff's Ills?*, 51 IND. L. J. 103, 106-07 (1975).

50. *See* HEW REPORT, *supra* note 1, at 91.

The purposes of these plans are evident. To the extent that they successfully encourage settlement of cases without formal trial, litigation costs invariably will be reduced. Moreover, settlement avoids submission of the damages issue to a jury, which, it is thought, often return substantially higher verdicts than the settlement figure.[51] Out-of-court settlements also minimize publicity that might adversely affect the professional reputation of the defendant.

In 1970, the Minnesota Supreme Court extolled the virtues of private screening plans and recommended their formal adoption.[52] Since 1970 many states have followed this suggestion by adopting statutory screening plans that differ from one another in several respects.[53] Most of the recent statutory plans require the submission of all malpractice claims to a panel prior to filing suit.[54] The plans sometimes differ on the subsequent use and effect of the panel's findings. Although many jurisdictions authorize the admission of panel findings into evidence at a subsequent trial, several do not.[55] The formality of the proceedings and the composition of the screening panel are other variables. The Indiana plan, which is generally representative of pending legislative proposals in other states, uses a four-member panel.[56] Each party to the hearing selects one physician member; the two physicians so chosen then select a third physician member.[57] An attorney

51. Note, *RX for New York's Medical Malpractice Crisis*, *supra* note 12, at 493-94.

52. The public's vital interest in the just and efficient disposition of medical malpractice claims might best be advanced by a method beyond the province of our role and function as a reviewing court. The interrelated problems of spurious claims and the failure of just claims could be ameliorated if an interprofessional screening committee were established in this state to which could be referred all questionable malpractice claims.

Anderson v. Florence, 288 Minn. 351, 365, 181 N.W.2d 873, 881 (1970) (footnote omitted).

53. *See* Comment, *supra* note 14, at 1456-63.

54. Comment, *supra* note 1, at 680. Many of the existing nonstatutory plans have optional submission policies. *See* Comment, *supra* note 14, at 1458 & n.204; Note, *Medical-Legal Screening Panels as an Alternative Approach to Medical Malpractice Claims*, *supra* note 12, at 705. Although submission to a panel is voluntary under the New Jersey plan, in exchange for a prior written agreement not to pursue further legal action if the panel finds adversely to him, the claimant will be provided medical experts at a reasonable cost to testify in his behalf should the panel find in his favor. N. J. CIV. PRAC. R. 4:21-3, -7.

55. *See, e.g.*, Act of Sept. 12, 1975, P.A. No. 79-960, § 1, ILL. ANN. STAT. ch. 110, § 58.8(8) (Smith-Hurd Supp. 1977). The act was held unconstitutional in Wright v. Central Du Page Hosp. Ass'n, 63 Ill. 2d 313, 347 N.E.2d 736 (1976), *see* text accompanying notes 214-24 *infra*. The practical argument against admitting the panel's findings is that the parties will then view the screening panel procedure as another part of the adversary process, which undermines the panel's intended mediating function. *See* Note, *Ohio's RX for the Medical Malpractice Crisis: The Patient Pays*, 45 U. CIN. L. REV. 90, 102 (1976). On the other hand, if the panel findings are inadmissible at trial, the party losing at the screening panel stage will have little incentive to settle prior to trial.

56. IND. CODE ANN. § 16-9.5-9-3 (Burns Supp. 1975), *as amended by* 1976 Ind. Acts, Pub. L. No. 65, §§ 10, 11; *see* Comment, *supra* note 14, at 1456.

57. IND. CODE ANN. § 16-9.5-9-3(b) (Burns Supp. 1975), *as amended by* 1976 Ind. Acts, Pub. L. No. 65, § 10.

serves as a non-voting advisor and chairman of the panel.[58] Several states include a judge, as well as physicians and attorneys, on the panel.[59]

The use of screening panel plans may be a mixed blessing. Because screening panels are inherently incapable of *requiring* plaintiffs to forgo a court trial, they do not necessarily achieve their intended results. To the extent that plaintiffs are not deterred from proceeding, the screening panel system will increase litigation costs for both plaintiffs and defendants.

D. Binding Arbitration

A more certain method of reducing costs and publicity is through arbitration, defined by one commentator as "any nonjudicial mechanism which is binding upon the parties."[60] The difference between screening panels and arbitration is significant: the former is a proceeding held prior to an actual trial to encourage or induce settlement, rendering a later trial unnecessary; the latter avoids a trial by vesting full decisionmaking power in the hands of nonjudicial arbitrators selected by the parties.[61]

A state that attempts to foster arbitration of medical malpractice suits has two basic alternatives: statutory imposition of compulsory arbitration or enforcement of voluntary arbitration agreements between the parties.[62] The first option assures arbitration between the parties; the second only encourages or facilitates it. Nevertheless, state-imposed compulsory arbitration has not been a popular alternative,[63] probably because of doubts about its constitutionality.[64] A number of states have adopted legislation providing for enforcement of voluntary arbitration agreements.[65] Ohio's statute, for example, provides that:

> A written contract between a patient and a hospital or physician to settle by binding arbitration any dispute or controversy arising out of the diagnosis, treatment, or care rendered by a physician or

58. IND. CODE ANN. § 16-9.5-9-3 (Burns Supp. 1975), *as amended by* 1976 Ind. Acts, Pub. L. No. 65, § 10. The attorney is chosen by the parties, or if no agreement is reached, selected by lot from the attorneys on the rolls of the Indiana Supreme Court.

59. *E.g.*, Act of Sept. 12, 1975, P.A. No. 79-960, § 1, ILL. ANN. STAT. ch. 110, § 58.3 (Smith-Hurd Supp. 1977); *see* notes 214-24 *infra* & accompanying text. New Hampshire's plan also applies to malpractice claims against attorneys. The panel consists of a state judge, a member of the public, and a member of the relevant profession. N.H. REV. STAT. ANN.§§ 519-A:1a, 2 (Supp. 1973).

60. Comment, *supra* note 14, at 1463 (footnote omitted).

61. *Cf.* Comment, *supra* note 1, at 679 (screening panels eliminate weak suits and allow valid claims to proceed to trial; arbitration resolves both good and bad claims short of trial).

62. C. Adams & A. Bell, Alternatives to Litigation, II: Constitutionality of Arbitration Statutes, *reprinted in* HEW REPORT, *supra* note 1, app. at 315, 316.

63. *See* Comment, *supra* note 14, at 1467: "The number of legislative proposals which include binding, compulsory arbitration is relatively small and, as yet, none has been enacted."

64. *See* Part VI *infra*.

65. *See generally* Comment, *supra* note 14, at 1464-65.

> hospital, entered into prior to or subsequent to the rendering of such diagnosis, treatment, or care is valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for revocation of any contract.[66]

A subsequent section in the statute, however, imposes several restrictions on the enforceability of voluntary agreements.[67] The most significant qualification requires the agreement to state that the continued provision of medical care is not predicated on the patient's agreement to submit his claims to arbitration.[68] Even with limitations, however, laws providing for the enforcement of voluntary arbitration agreements encourage arbitration in jurisdictions that would otherwise remain reluctant to enforce agreements to arbitrate medical malpractice claims.[69]

II. Special Treatment for Medical Malpractice: Equal Protection Issues

Virtually all the proposals described in the previous section apply only to causes of action alleging medical malpractice. States that have set up screening panels, abrogated the collateral source rule, or modified the statute of limitations have not generally done so for all torts, nor even for other forms of professional malpractice. Similarly, even though medical malpractice victims are forced to limit their damage recoveries, neither plaintiff recovery nor defendant liability is limited in, for example, negligent construction, products liability, or architectural malpractice suits. Quite clearly, these statutes discriminate among classes of injured tort claimants. It is equally clear, however, that not all forms of discrimination violate the equal protection clause of the fourteenth amendment; on the contrary, virtually any piece of legislation discriminates in one sense or another. Only unreasonable or invidious classification schemes are subject to invalidation under the fourteenth amendment.[70] The relevant inquiry is whether special legislative treatment of medical malpractice claims constitutes an unreasonable or invidious classification.

Until recently, there would have been little doubt about the constitutionality of medical malpractice legislation. Under traditional two-tier equal protection analysis, the courts evaluate legislative classifications using either the strict scrutiny standard, which, according to one commentator,

66. OHIO REV. CODE ANN. § 2711.22 (Page Supp. 1975).
67. *Id.* § 2711.23.
68. *Id.* § 2711.23(A).
69. *See generally* Henderson, *Contractual Problems in the Enforcement of Agreements to Arbitrate Medical Malpractice*, 58 VA. L. REV. 947 (1972).
70. *See, e.g.*, McLaughlin v. Florida, 379 U.S. 184 (1964) ("invidious discrimination"); McGowan v. Maryland, 366 U.S. 420 (1961) ("unreasonable classification").

"has been 'strict' in theory and fatal in fact,"[71] or the rational basis standard, the use of which traditionally has indicated that the court would uphold the classification.[72] Courts employ the strict scrutiny standard whenever a statute contains a "suspect" classification, or limits a so-called "fundamental right."[73] Classifications are considered "suspect" when the "class is . . . saddled with such disabilities or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process."[74] Even though a suspect classification will be upheld under strict scrutiny if it furthers a "compelling state interest," classifications that discriminate against racial minorities or on the basis of alienage invariably are held unconstitutional.[75] Courts also employ a strict scrutiny analysis if a "fundamental right" is affected, even if the classification is not directed at a downtrodden minority.[76] Although the phrase "fundamental right" is anything but self-defining, the Supreme Court has limited the fundamental rights category to rights "explicitly or implicitly guaranteed by the Constitution."[77]

All other classification schemes traditionally have been tested under the rational basis test, described by the Supreme Court in its oft-cited decision in *McGowan v. Maryland*:[78]

> The constitutional safeguard [of equal protection] is offended only if the classification rests on grounds wholly irrelevant to the achievement of the state's objective. State legislatures are pre-

71. Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972).

72. Redish, *Preferential Law School Admissions and the Equal Protection Clause: An Analysis of the Competing Arguments*, 22 UCLA L. REV. 343, 351 (1974).

73. *See, e.g.*, Shapiro v. Thompson, 394 U.S. 618 (1969).

74. San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 28 (1973). *Cf.* McLaughlin v. Florida, 379 U.S. 184 (1964) (Florida statue prohibiting only unmarried interracial couples from cohabiting held unconstitutional). Mr. Justice Stone referred to this standard in his famous *Carolene Products* footnote concerning discrimination against a "discrete and insular" minority. United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938).

75. The Japanese exclusion cases occurred during wartime and are the only apparent exceptions to the Court's "fatal in fact" scrutiny of racial or alienage classifications. *See* Korematsu v. United States, 323 U.S. 214 (1944); Hirabayashi v. United States, 320 U.S. 81 (1943). In Frontiero v. Richardson, 411 U.S. 677, 686 (1973), Justice Brennan argued that the suspect classification doctrine applies not only to historically mistreated minorities, but also to any classification that is based on "an immutable characteristic determined solely by the accident of birth." The current status of the "immutable characteristics" test is unclear. *See generally* Craig v. Boren, 429 U.S. 190, 211-14 (1976) (Stevens, J., concurring).

76. *See, e.g.*, Shapiro v. Thompson, 394 U.S. 618 (1969) (right to travel).

77. San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 33-34 (1973). *Cf.* Carr v. United States, 422 F.2d 1007, 1011-12 (4th Cir. 1970) (federal employee's common-law right of action against co-worker for injuries sustained in automobile accident not a fundamental right). *See* Barrett, *Judicial Supervision of Legislative Classifications—A More Modest Role for Equal Protection?*, 1976 BRIGHAM YOUNG L. REV. 89, 111-12.

78. 366 U.S. 420 (1961). *See also* Dandridge v. Williams, 397 U.S. 470 (1970).

> sumed to have acted within their constitutional power despite the fact that, in practice, their law results in some inequality. A statutory discrimination will not be set aside if any statement of facts may be reasonably conceived to justify it.[79]

The primary theoretical basis for wide-ranging deference to the legislature is that "in a democracy it is for the political bodies most responsive to the electorate to experiment and allocate the state's often limited resources in the manner they deem fit."[80]

This description of traditional equal protection analysis is likely familiar to the average first-year law student, and is restated only for the purpose of completeness. If the two-tier analysis were as well established in the law as it is well-known by law students and scholars, however, legislation selecting medical malpractice for special regulation and limitation would no doubt be upheld. Certainly, it could not persuasively be argued that any basis exists for finding a suspect classification involved in such legislation. Nor could a successful case be made for the presence of a "fundamental right," at least since the Court has limited such rights to those found in the Constitution. Therefore, under traditional two-tier equal protection analysis medical malpractice legislation would be analyzed under the rational basis test, an all but certain indication of validity.[81]

Malpractice reform legislation has not fared as well in the courts as this analysis might suggest.[82] One reason is that several years ago the Supreme Court seemed to waver in its rigid adherence to the traditional equal protection dichotomy. Without explicitly rejecting the standard tests, the Court appeared to impose a more stringent review under the rubric of the rational basis test.[83] This tendency prompted Professor Gerald Gunther to discern a shift away from the Court's use of the inflexible two-tier analysis and a movement toward application of what he labeled a "means-oriented scrutiny test."[84] Under this standard the Court does not question the legiti-

79. 366 U.S. at 425-26.

80. Redish, *supra* note 72, at 351.

81. As the Court has stated in applying the rational basis test, "[i]t is no requirement of equal protection that all evils of the same genus be eradicated or none at all." Railway Express Agency v. New York, 336 U.S. 106, 110 (1949). Professor Hans Linde, referring to Mr. Justice Douglas' opinion for the Court in *Railway Express*, has written: "That approach is not judicial review but dismissal of a claim of review." Linde, *Due Process of Lawmaking*, 55 NEB. L. REV. 197, 210 (1976).

82. *See, e.g.*, Jones v. State Bd. of Medicine, 97 Idaho 859, 555 P.2d 399 (1976), *cert. denied*, 45 U.S.L.W. 3749 (U.S. May 17, 1977) (No. 76-972); Simon v. St. Elizabeth Medical Center, — Ohio Op. 3d —, 355 N.E.2d 903 (C.P. 1976); Graley v. Stayatham, 74 Ohio Op. 2d 316, 343 N.E.2d 832 (C.P. 1976). *Cf.* Wright v. Central Du Page Hosp. Ass'n, 63 Ill. 2d 313, 347 N.E.2d 736 (1976) (statute violated state constitutional prohibition on special legislation).

83. *See, e.g.*, Eisenstadt v. Baird, 405 U.S. 438 (1972); Reed v. Reed, 404 U.S. 71 (1971).

84. Gunther, *supra* note 71, at 20-24.

macy of the legislative rationale for the challenged classification.[85] Instead, the Court merely inquires whether the classification substantially furthers the asserted purpose for the classification. Although the means scrutiny standard accords the legislature more flexibility than does the strict scrutiny test, it also requires the state to provide a greater justification for its classification than, in practice at least, is required by the rational basis test. Legislation is unconstitutional under the *McGowan* Court's rational basis standard only "if the classification rests on grounds *wholly irrelevant*" to the achievement of a conceivably legitimate purpose.[86] Under the Gunther means scrutiny standard, however, a "*substantial* relationship" must be established between the means and ends of the challenged legislation.[87] Thus, although Professor Gunther, in defining the scope of his newly found standard, does not emphasize the point,[88] it appears that a court applying the rational basis test will generally defer to a legislative determination that the chosen means will actually accomplish its purpose;[89] a court employing the means scrutiny standard appraises more carefully the factual assumptions that underlie the asserted connection between legislative means and ends.[90]

85. *Id.* at 21.

86. 366 U.S. at 425 (emphasis added).

87. Gunther, *supra* note 71, at 20 (emphasis added). Although the substantiality requirement historically was an element of the rational basis test, it "received little more than lip service" under the version of the rational basis test that evolved during the Warren Court years. *Id.* at 21.

88. The difference between the rational basis and means scrutiny tests emphasized by Professor Gunther is that under the latter, unlike the former, the reviewing court will not hypothesize conceivable purposes for the classification that were not previously asserted. *See* Gunther, *supra* note 71, at 21.

89. *See, e.g.*, Hughes v. Alexandria Scrap Corp., 426 U.S. 794, 812 (1976) ("[t]he State is not compelled to verify logical assumptions with statistical evidence"). In *McGowan*, the Court stated in a frequently quoted sentence, that "[a] statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it." 366 U.S. at 426.

90. Dandridge v. Williams, 397 U.S. 471 (1970), illustrates the two tests' differing depth of judicial scrutiny of the link between means and ends. The Maryland Department of Public Welfare had placed an absolute limit of $250 per month on the amount of grant available under the Federal Aid to Families With Dependent Children Program, regardless of family size or actual need. Applying the rational basis test to the alleged equal protection violation, the majority held the classification valid because of "the State's legitimate interest in encouraging employment and in avoiding discrimination between welfare families and the families of the working poor." *Id.* at 486. The majority's only inquiry into the actual connection between the classification and attainment of these purposes is contained in the following excerpt:

> By combining a limit on the recipient's grant with permission to retain money earned, without reduction in the amount of the grant, Maryland provides an incentive to seek gainful employment. And by keying the maximum family AFDC grants to the minimum wage a steadily employed head of a household receives, the State maintains some semblance of an equitable balance between families on welfare and those supported by an employed breadwinner.

Id. (footnote omitted).

In contrast, dissenting Justice Marshall, who, while not explicitly proposing a means scrutiny test, did argue for application of a more flexible method of review to the *Dandridge* facts, *id.* at 520, was unwilling to accept the factual connection without a closer look at the

The trend toward use of the means scrutiny standard discerned by Professor Gunther raises the only serious question about the constitutionality of medical malpractice legislation under the equal protection clause. Under this test, the courts presumably would not question the asserted legislative goal of ameliorating the crisis in medical malpractice, but would inquire whether a crisis does in fact exist and whether the legislation in question substantially alleviates that crisis.[91]

Serious questions exist, however, concerning the continued viability of the means scrutiny standard. First, it is not apparent that such a standard exists,[92] and if it does, to what categories of cases the Court intends to apply the standard. Professor Gunther acknowledged that in the same term in which the means scrutiny standard was allegedly developed, the Court continued to apply the traditionally relaxed review of the rational basis test.[93] An examination of the Court's use of the means scrutiny test reveals that it has been limited to "twilight zone" cases—those in which a quasi-fundamental right or an "almost" suspect classification is present.[94] If this is the unarticulated basis for use of the doctrine, it appears unlikely that the means scrutiny test is the proper standard of review in cases challenging medical malpractice legislation. No "almost" suspect classification is pre-

realities of the situation. "[W]hether elimination of the maximum would produce welfare incomes out of line with other incomes in Maryland," he wrote, "is itself open to question on this record." *Id.* at 524 (footnote omitted). Justice Marshall was equally suspicious of the work incentive rationale for the classification:

> The District Court found that of Maryland's more than 32,000 AFDC families, only about 116 could be classified as having employable members, and, of these, the number to which the maximum grant regulation was applicable is not disclosed by the record. . . . In short, . . . the State [has] failed to establish that there is a substantial or even a significant proportion of AFDC heads of households as to whom the maximum grant regulation arguably serves as a viable and logical work incentive . . . .

Id. at 526-27. For a thorough discussion of *Dandridge*, see A. LA FRANCE, M. SCHROEDER, B. BENNETT & W. BOYD, LAW OF THE POOR 316-19 (1973).

91. *See* Jones v. State Bd. of Medicine, 97 Idaho 859, 555 P.2d 399 (1976), *cert. denied*, 45 U.S.L.W. 3749 (U.S. May 17, 1977) (No. 76-972), *discussed in* text accompanying notes 124-36 *infra*.

92. None of the cases relied upon by Professor Gunther explicitly employed the phrase "means scrutiny." Rather, the cases represented non-strict scrutiny situations in which the Court apparently applied a more stringent standard of review than was traditionally employed in rational basis cases. Moreover, it is not clear that the Court's intermediate standard of equal protection review has always comported with Professor Gunther's dictate that the standard apply only to review of means, not ends. *See, e.g.*, Craig v. Boren, 429 U.S. 190 (1976), *discussed in* note 111 *infra*.

93. Gunther, *supra* note 71, at 25.

94. Redish, *supra* note 72, at 354 n.57. *See, e.g.*, United States Dep't of Agriculture v. Moreno, 413 U.S. 528 (1973) (food stamps); Jackson v. Indiana, 406 U.S. 715 (1972) (pretrial commitment of incompetent criminal defendants); Eisenstadt v. Baird, 405 U.S. 438 (1972) (use of contraceptives); Reed v. Reed, 404 U.S. 71 (1971) (sex-based classification). Note, however, that Professor Gunther did not acknowledge any limitation of the means scrutiny test to "twilight zone" cases.

sent. A stronger argument for imposing means scrutiny, however, might be that discrimination against persons with medical malpractice claims resembles discrimination affecting the enjoyment of a fundamental right, since the right of compensation for bodily injury is arguably of great significance. During the same term in which the Court purportedly adopted means scrutiny, however, the Court used a pure rational basis standard of review in a case challenging a classification that allegedly infringed upon the right of privacy to choose one's own lifestyle.[95] Whether an individual's interest in compensation for bodily injury is more fundamental than his privacy interest in determining his lifestyle is debatable; without further judicial guidance on use of the means scrutiny doctrine, however, further consideration of the issue appears unprofitable.

Further consideration of the issue may also be unnecessary, because in recent years the Supreme Court apparently has returned to widespread use of the traditional rational basis standard without any further significant evolution of the means scrutiny test,[96] except in an extremely narrow area consisting primarily of sex-based classifications.[97] For example, in its 1974 decision in *Marshall v. United States*,[98] the Court relied on two of the best known "rational basis" decisions[99] in holding that Congress' decision to exclude addicts with two or more felony convictions from the provisions allowing rehabilitative commitment in lieu of a jail sentence pursuant to

95. Village of Belle Terre v. Boraas, 416 U.S. 1 (1974). The Court upheld a local ordinance restricting use of land to one-family dwellings while defining the term "family" to include not more than two unrelated persons, despite the claim that the ordinance discriminated against unmarried individuals wishing to live in groups in excess of two.

96. Several lower courts, taking their lead in part from Professor Gunther, have concluded that the Supreme Court has adopted this standard. In Green v. Waterford Bd. of Educ., 473 F.2d 629, 633 (2d Cir. 1973), for example, the court stated: "[T]he [Supreme] Court's definition of what constitutes the necessary rational relationship between a classification and a legitimate governmental interest seems to have become slightly, but perceptibly, more rigorous." *See also* City of New York v. Richardson, 473 F.2d 923, 931 (2d Cir.), *cert. denied*, 412 U.S. 950 (1973); Gay Students Organization v. Bonner, 367 F. Supp. 1088, 1096-97 (D.N.H.), *aff'd on other grounds*, 509 F.2d 652 (1st Cir. 1974).

97. In recent years the Court has continued to apply something akin to means scrutiny when reviewing sex-based classifications. *See, e.g.*, Califano v. Goldfarb, 97 S. Ct. 1021 (1977); Craig v. Boren, 429 U.S. 190 (1976); Weinberger v. Wiesenfeld, 420 U.S. 636 (1975). Since four Justices in Frontiero v. Richardson, 411 U.S. 677 (1973), stated that sex should be considered a suspect classification, the *Goldfarb, Craig, and Wiesenfeld* decisions may well indicate that in substance, if not in name, the Court has rendered sex a suspect classification. In any event, the decisions are consistent with the limitation of means scrutiny analysis to "twilight zone" cases. *See* text accompanying notes 93-94 *supra*. More recently, the Court has applied a type of intermediate review (though not quite means scrutiny) to a classification based on illegitimacy. Trimble v. Gordon, 97 S. Ct. 1459 (1977). This decision, too, is consistent with the "twilight zone" limitation.

98. 414 U.S. 417 (1974).

99. Dandridge v. Williams, 397 U.S. 471 (1970); McGowan v. Maryland, 366 U.S. 420 (1961).

Title II of the Narcotic Addict Rehabilitation Act of 1966[100] was not "unreasonable or irrational."[101] The Court reached its decision over Justice Marshall's vigorous dissent, concurred in by Justices Brennan and Douglas, which criticized the majority for employing an "apparently rigid approach to equal protection issues."[102] Justice Marshall also argued that the Court's "analysis is so deferential as to confirm an earlier observation that, except in cases where the Court chooses to invoke strict scrutiny, the Equal Protection Clause has been all but emasculated."[103] It is significant that the majority made its decision in the teeth of this dissent.[104]

In one of its more recent decisions on the subject, *City of Charlotte v. Local 660, International Association of Firefighters*,[105] an equal protection challenge to the city's refusal to check off union dues from union members' paychecks, the Court stated:

> Since it is not here asserted—and this Court would reject such a contention if it were made—that respondents' status as union members or their interest in obtaining a dues checkoff is such as to entitle them to special treatment under the Equal Protection Clause, the city's practice must meet only a relatively relaxed standard of reasonableness in order to survive constitutional scrutiny.[106]

Interestingly, speaking for the Court was Justice Marshall, usually one of the few proponents of a more flexible constitutional standard. Yet his opinion presented the classic restatement of traditional two-tier analysis: either strict scrutiny applies, or "a relatively relaxed standard of reasonableness" is employed.[107]

100. 18 U.S.C. §§ 4251-55 (1970).

101. 414 U.S. at 428.

102. *Id.* at 432 (Marshall, J., dissenting).

103. *Id.* at 431.

104. In another post-Gunther decision the Court stated the equal protection issue to be whether "any state of facts reasonably may be conceived to justify [the legislative actions]." Salyer Land Co. v. Tulare Lake Basin Water Storage Dist., 410 U.S. 719, 732 (1973) (citing *McGowan*).

105. 426 U.S. 283 (1976).

106. *Id.* at 286 (footnote omitted).

107. *Id.* In fairness to Justice Marshall, however, it could be argued that his opinion merely represents an application of his "sliding scale" approach to equal protection. *See* San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 98-99 (Marshall, J., dissenting). Viewed in this manner, the opinion could be read as stating that even under a sliding scale approach, the interest of the union members deserved virtually no protection. The opinion, however, is ambiguous, and is certainly open to the interpretation that it contemplates only the two standards of review. The Court recently applied the rational basis standard in several other contexts. For example, in Hughes v. Alexandria Scrap Corp., 426 U.S. 794 (1976), the Court upheld a Maryland plan for ridding the state of abandoned autos, holding that "[t]he State is not compelled to verify logical assumptions with statistical evidence," *id.* at 812 (footnote omitted), and that

> a statutory classification impinging upon no fundamental interest, and especially one dealing only with economic matters, need not be drawn so as to fit with

The Court's apparent revival of the two-tier standard should not necessarily be viewed as a negative development. As Professor Hans Linde recently argued:

> [T]he famous two-tier model of equal protection analysis . . . deserves a better press than it has had in its later years . . . . The strength of this simple model is not just that its premises are manageable in practice, though that is no small advantage. Its strength is that it calls for judicial scrutiny of a law only by reference to values located somewhere in the Constitution, values external to the complex of ends and means and mere inertia that has resulted in the existing state of the law.[108]

Surely the judiciary should not default on its constitutional mandate to overturn both wholly irrational classifications and classifications discriminating against previously disadvantaged minorities.[109] Apart from these categories, however, it is dangerous for the generally unrepresentative judiciary to veto fundamental social policy judgments formulated by the representative units of government.[110]

> precision the legitimate purposes animating it. That [the state] might have furthered its underlying purposes more artfully, more directly, or more completely, does not warrant a conclusion that the method it chose is unconstitutional.

Id. at 813 (citation omitted). *See also*, City of New Orleans v. Dukes, 427 U.S. 297 (1976).

108. Linde, *supra* note 81, at 202-03.

109. Some commentators have suggested that use of any rationality test under the equal protection clause is ill-advised. *See, e.g.*, Posner, *The Defunis Case and the Constitutionality of Preferential Treatment of Racial Minorities*, 1974 SUP. CT. REV. 1, 27:

> Many public policies are better explained as the outcome of a pure power struggle—clothed in a rhetoric of public interest that is a mere figleaf—among narrow interest or pressure groups. The ability of such groups to obtain legislation derives from their money, votes, cohesiveness, ability to make credible threats of violence or other disorder if their demands are not met, and other factors totally unrelated to the abstract merit of the policy at issue.

Cf. Linde, *supra* note 81, at 232 ("[T]he means themselves are somebody's end; that alone can get a bill enacted.").

110. If it is thought that use of a rigid two-tier standard of review does not adequately protect certain minorities (*e.g.*, women and illegitimate children), the solution is to expand, albeit cautiously, the categories included under the "suspect classification" heading. Professor John Nowak has suggested an alternative modification of the traditional two-tier standard of equal protection review that might add the necessary flexibility without many of the difficulties presented by Professor Gunther's standard. Nowak, *Realigning the Standards of Review Under the Equal Protection Guarantee—Prohibited, Neutral, and Permissive Classifications*, 62 GEO L. J. 1071 (1974). Professor Nowak urges the recognition of three levels of classifications: suspect-prohibited classes ("[w]henever a classification burdens persons on the basis of their race"); neutral classifications (treating "persons in a dissimilar manner on the basis of some inherent human characteristic or status" other than race, or limiting the exercise of a fundamental right); and permissive classifications (all remaining discriminatory classifications). *Id.* at 1093-94. The first category is to be reviewed under a standard similar to the strict scrutiny test. In reviewing the second type of legislative classification, "the Court will validate it only if it has a factually demonstrable rational relationship to a legitmate state end." *Id.* at 1094. The third category will receive traditional "rational basis" treatment. *See generally id.* at 1093-94. Under Professor Nowak's tripartite analysis, medical malpractice legislation clearly falls within the third category and should be reviewed under the rational basis test.

Moreover, whether or not the two-tier standard is adequate, the means scrutiny test does not represent a satisfactory alternative. Other commentators have noted the awkwardness of a doctrine that assumes the validity of legislative ends and questions only the legitimacy of the means chosen to achieve those ends.[111] The difficulty can be illustrated by referring to the basic problem under consideration: the legislative response to the medical malpractice crisis. What if a legislature asserted that its purpose in adopting malpractice legislation was not necessarily to alleviate a preexisting insurance crisis, but merely to provide special protection to physicans? Legislators may candidly assert that they desire only to make physicians richer because physicians are a powerful electoral voice in their state. Under a strict application of the means scrutiny standard, a court would have to uphold such legislation, for there is little doubt that the legislation all too successfully achieves the legislature's goal—a goal that is immune from challenge. If, on the other hand, a court were to question the legitimacy of the legislative goal, "the litigants and the reviewing court [would be] driven to search for a constitutional issue in the legislature's aims rather that its method—the very issue that means-centered review is intended to avoid."[112] Of course, such a candid assertion of legislative purpose is unthinkable. To the extent that the legislature is forced to clothe its true purpose in what Professor Richard Posner has called "a rhetoric of public interest,"[113] however, the means scrutiny test is effectively rendered a mockery since the court must test means by examining an asserted end that is no more than a sham.

111. In developing its intermediate standard of review, the Supreme Court has not entirely eliminated review of the validity of legislative ends, as is proposed under the Gunther test. In Craig v. Boren, 429 U.S. 190 (1976), for example, the Court, in invalidating gender-based distinctions in Oklahoma's minimum age prohibitions on the sale of 3.2% beer, stated: "To withstand constitutional challenge, previous cases establish that classifications by gender must serve *important* governmental objectives and must be substantially related to achievement of those objectives." *Id.* at 197 (emphasis added). The Court thus made clear its willingness to examine the importance of the legislative end as well as the relationship of the means chosen to accomplishment of that end.

The *Craig* Court cited Reed v. Reed, 404 U.S. 71 (1971), a leading decision in Gunther's analysis, Gunther, *supra* note 71, at 29-30, as an illustration of the Court's willingness to examine ends as well as means: "[I]n *Reed*, the objectives of 'reducing the workload on probate courts' and 'avoiding intra-family controversy' were deemed of insufficient importance to sustain use of an overt gender criterion in the appointment of intestate administrators." 429 U.S. at 197-98 (citations omitted). This apparent distinction between the Court's practice and Professor Gunther's proposed model will not affect review of medical malpractice legislation since it is likely that even a court inquiring into the validity of the legislative end would find the goal—amelioration of the crisis in medical malpractice insurance rates—legitimate. *But see* note 133 *infra*. Any question that might arise would concern the relationship between the legislative means chosen to accomplish the goal and the goal itself. *See* text accompanying notes 130-37 *infra*.

112. Linde, *supra* note 81, at 209.

113. *See* Posner, *supra* note 109, at 27-28.

Thus, based upon both precedent and policy grounds, courts should not employ the means scrutiny standard in reviewing the constitutionality of medical malpractice legislation. The Supreme Court apparently has firmly rejected the test in all but a very narrow group of cases, and in any event the test ultimately may prove inadvisable. In recent years, however, various lower courts have employed an intermediate standard of review in equal protection challenges on the erroneous assumption that the Supreme Court has dictated its use.[114] The California Supreme Court's decision in *Brown v. Merlo*[115] illustrates this trend. The case presented an equal protection challenge to California's guest statute, which provided that an automobile guest could not sue his host for negligence. The classification was challenged on three grounds: that it improperly distinguished between automobile guests and other kinds of social invitees who were not barred from suing their hosts, that it irrationally discriminated between paying and nonpaying automobile guests, and that it irrationally distinguished automobile guests from others injured in automobile accidents. The case is significant because of the standard of equal protection review that the court used to invalidate the statute.[116] Quoting from *Reed v. Reed*, [117] generally thought to be one of the leading Supreme Court expressions of the means scrutiny test,[118] the court expounded its standard of review: "A classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.' "[119] In a long explanatory footnote, the court clarified its view that the Supreme Court had all but abandoned the rational basis standard:

> Although by straining our imagination we could possibly derive a theoretically "conceivable," but totally unrealistic state purpose that might support this classification scheme, we do not believe our constitutional adjudicatory function should be governed by such a highly fictional approach to purpose. We recognize that in past years several federal equal protection cases have embraced

114. *See* note 96 *supra*. *Cf.* Linde, *supra* note 81, at 204 ("The attractiveness of [the means scrutiny] approach to many reviewing courts has become increasingly evident since 1972.").

115. 8 Cal. 3d 855, 506 P.2d 212, 106 Cal. Rptr. 388 (1973).

116. The court found that the statute was designed to serve two purposes: "to promote hospitality by insulating generous drivers from lawsuits instituted by ungrateful guests who have benefitted from a free ride," and "to eliminate the possibility of collusive lawsuits." In rejecting these grounds, the court stated: "[N]either of these justifications provides a reasonable explanation for the tripartite discrimination established by the statute and thus neither provides a rational basis to uphold the section . . . ." *Id.* at 864, 506 P.2d at 218, 106 Cal. Rptr. at 394.

117. 404 U.S. 71, 76 (1971).

118. *See* Gunther, *supra* note 71, at 29-30; note 121 *infra*.

119. 8 Cal. 3d at 861, 506 P.2d at 216, 106 Cal. Rptr. at 392 (emphasis omitted).

> such an excessively artificial analysis in applying the traditional "rational basis" equal protection test. More recently, however, the United States Supreme Court has drawn back from such an absolutely deferential position and has again demanded that statutory classifications bear some substantial relationship to an actual, not "constructive," legislative purpose.[120]

In invalidating the guest statute, the California court represents a distinct minority. Most state courts that have faced the question have upheld guest statutes against constitutional attack.[121] Nevertheless, it is significant that a highly respected court would purport to employ a standard considerably tougher than rational basis in a non-strict scrutiny case.[122] It is important, therefore, to underscore that whatever the Supreme Court's attitude at the time of the *Brown* decision in 1973, the Court apparently [123] has halted the growth of the means scrutiny test in most situations and has returned to the traditional categories of equal protection review.

In a recent decision, the Idaho Supreme Court held that an equal protection challenge to medical malpractice legislation is to be measured by the means scrutiny test, and not by the rational basis standard. *Jones v. State Board of Medicine*[124] decided a constitutional challenge to Idaho's limitation of health care provider liability to $150,000 per claim and $300,000 per occurrence, or $10,000 multiplied by the total number of beds in a hospital,[125] as well as its abrogation of the collateral source rule in medical

120. *Id.* at 865 n.7, 506 P.2d at 219 n.7, 106 Cal. Rptr. at 395 n.7 (citations omitted).

121. *See, e.g.*, Botsch v. Reisdorff, 193 Neb. 165, 226 N.W.2d 121 (1975); Duerst v. Limbocker, 269 Or. 252, 525 P.2d 99 (1974); Cannon v. Oviatt, 520 P.2d 883 (Utah), *appeal dismissed*, 419 U.S. 810 (1974). In Thompson v. Hagan, 96 Idaho 19, 523 P.2d 1365 (1974), the Idaho Supreme Court invalidated that state's guest statute, purportedly using the rational basis test. *Id.* at 21, 523 P.2d at 1367. The court relied on the *Reed* decision, however, which was previously noted as a leading case applying means scrutiny analysis. *See* notes 83 & 111 *supra*.

122. The California Supreme Court recently retreated dramatically from its position in *Brown*. In Schwalbe v. Jones, 16 Cal. 3d 514, 546 P.2d 1033, 128 Cal. Rptr. 321 (1976), the court upheld another portion of that state's guest statute. The court explicitly employed the rational basis test, denying that the language in *Brown* dictated use of a stricter standard. "We are persuaded," said the court, "that to elevate [the language in *Brown*] into doctrinal concept, and thus to dilute the traditional standard which we have here expressed, would result in the substitution of judicial policy determination for established constitutional principle." *Id.* at 518 n.2, 546 P.2d at 1035 n.2, 128 Cal. Rptr. at 323 n.2. Justice Tobriner, author of the *Brown* opinion, dissented. He agreed "that in this case the appropriate equal protection standard of review is the traditional 'restrained' review, with the judiciary affording the challenged legislation a presumption of constitutionality and placing a heavy burden of persuasion on the party attacking the statutory provision." *Id.* at 526, 546 P.2d at 1041, 128 Cal. Rptr. at 329. He found, however, that the differences among the suggested non-strict scrutiny tests were "more superficial than real," *id.* at 528, 546 P.2d at 1043, 128 Cal. Rptr. at 331, and continued to assert that the court should not look to "theoretically conceivable" purposes to justify legislation, *id.*

123. *See* note 97 *supra*.

124. 97 Idaho 859, 555 P.2d 399 (1976).

125. IDAHO CODE § 39-4205 (1977).

malpractice cases.[126] On the equal protection question[127] the court, while noting that it had previously "recognized and followed the utilization of a two-tier examination,"[128] indicated that the Supreme Court's statement in *Reed*

> poses a different and higher standard than the traditional restrained analysis of equal protection. The standard set forth in *Reed* focuses upon the relationship between the subject legislation and the object or purpose to be served thereby. This new intermediate standard of equal protection review has been described as "means-focus" because it tests whether the legislative means substantially furthers some specifically identifiable legislative end.[129]

The court remanded the case for further factual findings to determine whether the legislation would withstand means scrutiny analysis. The court failed to consider, however, whether the means scrutiny test should be limited to "twilight zone" strict scrutiny cases like *Reed*, which involved a sex-based classification, or whether the Supreme Court has retreated from means scrutiny in the years since *Reed*. It is therefore unfortunate that the leading decision to date considering an equal protection challenge to medical malpractice legislation employed the supposed intermediate standard of review.

Of course, it is by no means entirely clear that medical malpractice legislation will fall under a means scrutiny analysis.[130] Unlike the strict scrutiny test, which the *Jones* court specifically rejected,[131] the means scrutiny standard still permits the legislature considerable freedom. The major difference between means scrutiny and the rational basis test is that using the former, courts attempt to determine whether some real connection exists between the legislation and the accomplishment of the goal of reduced malpractice insurance rates. While using the latter, the court quite probably would accept the legislative determination that a connection exists.[132] Pre-

126. *Id.* § 39-4210. The statute also required all physicians and hospitals in Idaho to obtain malpractice insurance as a condition of receiving a license. *Id.* §§ 39-4206, -4208, -4209.

127. Note that the equal protection challenge in *Jones* was not premised on the selection of medical malpractice claims for preferred treatment over other causes of action. The attack instead was aimed solely at the limits on liability, on the ground that the limits discriminate against those with claims in excess of the statutory limits. 97 Idaho at 870, 555 P.2d at 410. Since the Idaho court recognized no limits to the application of the means scrutiny test, the court presumably would have employed the same standard in ruling on the validity of the broader equal protection issue.

128. 97 Idaho at 866, 555 P.2d at 406.

129. *Id.* at 867, 555 P.2d at 407.

130. The *Jones* court clearly stated that "the burden of showing the absence of a reasonable relationship under the means-focus test remains with the one who assails the classification." *Id.*

131. *Id.* at 870, 555 P.2d at 410.

132. The *Jones* court stated that:

sumably a court employing means scrutiny must determine the extent of the alleged crisis,[133] to what extent increases in the number and amount of malpractice awards have given rise to that crisis, and to what extent the legislation in question successfully reduces the number and amount of malpractice awards. The showing of each element is a necessary but not a sufficient condition for validating the legislation. Although it is certainly conceivable that each of these criteria could be satisfied, application of the means scrutiny test might embroil malpractice legislation in extended litigation in each state, since the judicial inquiry naturally would be limited to a factual showing of the extent of the medical malpractice crisis in that particular state. More significantly, it is difficult to predict how courts will resolve these issues. Probably the most difficult element to establish is the causal connection between a decrease in the number and amount of awards and the hoped-for reduction in malpractice insurance rates.[134] Although sufficient evidence exists linking the increase in malpractice awards to the insurance crisis,[135] various other possible causes exist that are unaffected by

> While we are as aware as any other member of the public of assertions of growing problems in the medical malpractice insurance field, the record here presents no factual basis for understanding the nature and scope of the alleged medical malpractice crisis nationally or in Idaho. It is thus impossible for this Court to assess the necessity for this legislation and whether or not the limitations on medical malpractice recovery set forth in the Act bear a fair and substantial relationship to the asserted purpose of the Act.

Id. at 873-74, 555 P.2d at 413-14. The court therefore remanded for the taking of additional evidence. *Id.* at 876, 555 P.2d at 416. Under application of the rational basis test, by contrast, the mere existence of a rational probability—surely present in *Jones*—that the classification would reduce malpractice insurance rates would probably satisfy the reviewing court. *See* notes 88-90 *supra* & accompanying text. Thus, if the Idaho court had employed the rational basis standard, it probably would have upheld the classification without the need for further factual inquiry.

133. If a reviewing court employed a strict means scrutiny test, *but see* note 111 *supra*, arguably this element would be irrelevant to the inquiry since it concerns ends rather than means. In one sense, however, the issue depends upon how the legislative "end" is defined. If, as seems reasonable, the asserted end is characterized as the avoidance of harms associated with the alleged "crisis" that has resulted from rapid and significant increases in insurance rates, *see* text accompanying notes 1-13 *supra*, rather than the mere reduction of malpractice insurance rates, then existence of the crisis would be a valid issue of inquiry even under a pure means analysis test.

134. Perhaps the easiest element to prove is the issue of the extent to which a crisis exists, *see* text accompanying notes 1-13 *supra*, although the need to establish the existence of a crisis in each state complicates the inquiry. A more difficult question is whether the legislation will reduce the number and amount of jury awards. Although recovery or liability limits are the most straightforward ways of eliminating large recoveries, their effectiveness depends on whether the actual amounts awarded exceed the proposed statutory limits. Ironically, the higher the limit set, the lower the likelihood that the limit will accomplish its goal. Use of screening panels is perhaps the least potent remedy because there is no guarantee that their use will effectively deter subsequent resort to traditional court actions. Abrogation of the collateral source rule and revision of the statute of limitations probably are the reforms most likely to achieve this end, though the factual question remains whether large recoveries are reduced through the use of these devices.

135. *See, e.g.*, Segar, *Is Malpractice Insurable?*, 51 IND. L.J. 128, 131-32 (1975):

the reform legislation.[136] It is therefore almost impossible to predict whether reform legislation will accomplish its goal. This uncertainty underscores the inadvisability of employing means scrutiny analysis to test medical malpractice legislation. The use of means scrutiny in this situation creates all the obstacles to legislative action that the Supreme Court's rejection of strict scrutiny in all but a handful of cases is designed to avoid: social legislation developed by representative legislative bodies is seriously frustrated by judicial speculation.[137]

A constitutional difficulty related to the equal protection problem is the prohibition against "special legislation" found in many state constitutions.[138] One example is found in the Illinois Constitution: "The General Assembly shall pass no special or local law when a general law is or can be

> Insurance companies have . . . been influenced by the unpredictability of the frequency of claims made over the past year or so. Over the period of the 1960's there was a constant frequency of approximately nine percent; that is, nine claims per one hundred insured doctors. This figure was used as an actuarial basis for premium determination. While statistics in this area are not totally reliable, it now appears that, at least in the high risk categories, claims . . . are made on the basis of roughly one claim for every four insured doctors. The companies which relied on past trends at the time when they made up the premium base did not consider or predict the size of this frequency increase.

It is questionable, however, whether the legislative reforms can reduce the number of *claims*, even if they do successfully reduce the number of *awards*. *See also* sources cited in notes 12-13 *supra*.

136. *See* Jones v. State Bd. of Medicine, 97 Idaho 859, 874-75, 555 P.2d 399, 414-15 (1976), *cert. denied*, 45 U.S.L.W. 3749 (U.S. May 17, 1977) (No. 76-972). The *Jones* court cited as additional factors an increase in patient injuries and the actuarial difficulties inherent in the rate-setting process.

137. In Graley v. Satayatham, 74 Ohio Op. 2d 316, 343 N.E.2d 832 (C.P. 1976), the court held unconstitutional Ohio's rejection of the collateral source rule for medical malpractice cases. According to the court, "[t]here is no satisfactory reason for this separate and unequal treatment. There obviously is 'no compelling governmental interest' unless it is argued that any segment of the public in financial distress be at least partly relieved of financial accountability for its negligence." *Id.* at 320, 343 N.E.2d at 837. The court failed to explain, however, why the "compelling interest" (or "strict scrutiny") test was applicable, and its equal protection analysis was so superficial that the decision should not be followed. However, in Simon v. St. Elizabeth Medical Center, — Ohio Op. 3d —, 355 N.E.2d 903 (C.P. 1976), a court of the same level followed *Graley* to find an equal protection violation because "these sections confer benefits on the medical malpractice defendant unavailable to other defendants in tort cases." *Id.* at —, 355 N.E.2d at 906. The court noted that it could "add nothing of importance to the equal protection analysis of the *Graley* Opinion." *Id.* at —, 355 N.E.2d at 906.

Not all state courts considering the question have reviewed medical malpractice legislation as strictly. In Prendergast v. Nelson, No. 303-203 (Dist. Ct. Lancaster County, Neb. Nov. 29, 1976), for example, the court stated: "Although it may be debated, after reviewing the legislative history of the Act, whether a medical and hospital malpractice crisis exists in this state at the present time, such a determination is one properly to be made by the legislature and not to be interfered with by the courts." *Id.* slip op. at 4. The Colorado Supreme Court upheld that state's medical malpractice statute of limitations against equal protection attack in McCarty v. Goldstein, 151 Colo. 154, 376 P.2d 691 (1962). That case, however, was decided long before the development of the means scrutiny concept.

138. *See, e.g.*, HAWAII CONST. art. I, § 19; KY. CONST. § 59; IND. CONST. art. IV, § 22. *See generally* Cloe & Marcus, *Special and Local Legislation*, 24 KY. L. J. 351 (1936).

made applicable. Whether a general law is or can be made applicable shall be a matter for judicial determination."[139] In *Wright v. Central Du Page Hospital Association*[140] the Illinois Supreme Court struck down that state's attempt to limit recovery in medical malpractice actions to $500,000 on the ground that it violated the special legislation provision.[141] The extent to which the court's interpretation differed from an equal protection analysis is unclear.[142] In *Jones*, the Idaho Supreme Court more extensively described the special legislation concept. "The general purpose of such constitutional provisions," said the court, "was 'to prevent legislation bestowing favors on preferred groups or localities.' "[143] The court expressed the firm conclusion that Idaho's special legislation provision[144] and the equal protection clause "were adopted to serve distinctly different identifiable purposes."[145] The court attempted to elaborate on the distinction, stating that: "[w]hile it might be constitutional in the sense of equal protection for our legislature to single out persons or corporations for preferred treatment, such would nevertheless be regarded as in conflict with [the special legislation provision]."[146] Yet the Idaho court's test for determining the validity of legislation under the special legislation provision sounds strikingly similar to its equal protection standard:

> If as asserted by appellants here the Act in question is found to have been enacted in response to a problem of statewide concern in Idaho and by alleviation of that problem, is found to serve the health and welfare of the people of the state of Idaho, and the means adopted in the Act are reasonably related to the solution of those problems, then the Act will survive the challenge that it is offensive to [the special legislation provision].[147]

139. ILL. CONST. art. IV, § 13.

140. 63 Ill. 2d 313, 347 N.E.2d 736 (1976).

141. *Id.* at 329-30, 347 N.E.2d at 743.

142. The *Wright* court relied on its earlier opinion in Grace v. Howlett, 51 Ill. 2d 478, 283 N.E.2d 474 (1972), in which it had invalidated a no-fault automobile insurance plan limited to private vehicles. The court saw no basis for distinguishing *Grace*, but did indicate its willingness to allow classification when circumstances "justified the imposition of differing standards of care." *Id.* at 488, 283 N.E.2d at 479-80. This analysis resembles a simplified equal protection approach.

143. 97 Idaho at 876, 555 P.2d at 416 (quoting State *ex rel.* Idaho State Park Bd. v. City of Boise, 95 Idaho 380, 383, 509 P.2d 1301, 1304 (1973)).

144. IDAHO CONST. art. III, § 19.

145. 97 Idaho at 877, 555 P.2d at 417.

146. *Id.*

147. *Id.* The court did note that

> [i]n our constitution, local and special laws are prohibited only in regard to the matters therein specifically mentioned. In that fashion, our constitution differs from that of California in that Idaho's contains no catch-all restriction against special laws where a general law would apply. In California, the standard applicable to their special legislation clause is equated with that standard utilized under the equal protection clause of the federal constitution.

Id. (citations omitted).

A few state courts have specifically equated the special legislation provisions with the equal protection clause.[148] Thus, the standard of interpretation to be applied to the special legislation provisions must be determined on a state-by-state basis.

III. Limits on Recovery or Liability: Substantive Due Process and Right of Access Problems

In addition to the general equal protection problem that pervades all medical malpractice legislation, recovery and liability limits raise special constitutional questions. The primary concern is that by denying plaintiffs the full amount of their damages, recovery and liability limits violate concepts of substantive due process.[149] At first glance, this claim appears to have little merit because consistency with substantive due process under modern Supreme Court decisions requires only that legislation not be wholly arbitrary or capricious[150]—a test that resembles the "rational basis" equal protection standard.[151] Although commentators have argued that the choice of any recovery limit by a legislature is necessarily an arbitrary one,[152] the broad discretion afforded legislatures under modern due process analysis and the vulnerability of any line-drawing technique to similar criticism render invalidation on the basis of arbitrariness unlikely.[153]

148. *See, e.g.*, Russell v. Carleson, 36 Cal. App. 3d 334, 111 Cal. Rptr. 497 (1973); Rosenberg v. Town of North Bergen, 61 N.J. 190, 201, 293 A.2d 662, 668 (1972).

149. Recovery and liability limits may present an equal protection problem by discriminating against claimants with more serious injuries. *See* note 127 *supra*. The equal protection challenge in *Jones* was based on this ground. 97 Idaho at 870, 555 P.2d at 410. The preceding discussion about the proper standard of equal protection review of medical malpractice legislation generally, however, would seem applicable as well to a specific challenge on the basis of discrimination against claimants with serious injuries. See Part II. *supra*.

150. *See, e.g.*, West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937); Nebbia v. New York, 291 U.S. 502 (1934); Munn v. Illinois, 94 U.S. 113 (1876). The Florida Supreme Court recently applied this standard to test the constitutionality of no-fault automobile insurance legislation, stating that "[w]hat we actually are doing is presuming the existence of circumstances supporting the validity of the Legislature's action, in the absence of any evidence to the contrary." Lasky v. State Farm Ins. Co., 296 So. 2d 9, 17 (Fla. 1974). *See also* Comment, *supra* note 14, at 1420.

151. The justification for using the deferential standard is analogous to the reason for using the rational basis test in equal protection cases. Justice Traynor wrote that "[t]his court cannot invoke the due process clause to invalidate a legislative policy that it may deem unwise without exercising judicial censorship directed not at the constitutionality of legislation but at its wisdom . . . ." Werner v. Southern Cal. Associated Newspapers, 35 Cal. 2d 121, 129, 216 P.2d 825, 830 (1950), *appeal dismissed on motion of counsel for appellant*, 340 U.S. 910 (1951). *See* Daniel v. Family Security Life Ins. Co., 336 U.S. 220, 224 (1949).

152. *See, e.g.*, Comment, *supra* note 1, at 668; *cf.* Jones v. State Bd. of Medicine, 97 Idaho 859, 869, 555 P.2d 399, 409 (1976) (plaintiff argued that statutory limitation arbitrarily chosen for political convenience and bore no relationship to public interest).

153. The *Jones* court rejected the "arbitrariness" argument. *See* 97 Idaho at 869, 555 P.2d at 409; *cf.* Opinion of the Justices, 113 N.H. 205, 213, 304 A.2d 881, 887 (1973) ("The judgment of the legislature must be accepted unless it is very wide of any reasonable line of demarcation.").

A more troublesome due process difficulty is that the imposition of a ceiling on recovery or liability effectively limits a common-law right—a cause of action for malpractice[154]—without providing a "reasonable substitute," or *quid pro quo*. Although a number of lower court decisions [155] have recognized the theory that due process requires a legislature to provide a *quid pro quo* before limiting any preexisting common-law right, the origins of the theory are dubious. The rule is said to derive from the Supreme Court's decision in *New York Central Railroad v. White*,[156] which upheld the constitutionality of workmen's compensation laws. The relevant constitutional issue in *White* was the contention "that the employee's rights are interfered with, in that he is prevented from having compensation for injuries arising from the employer's fault commensurate with the damages actually sustained, and is limited to the measure of compensation prescribed by the act."[157]

In upholding the act, the Court held that "no person has a vested interest in any rule of law entitling him to insist that it shall remain unchanged for his benefit."[158] This language hardly establishes the provision of a *quid pro quo* as a due process requirement. Dictum elsewhere in the *White* opinion, however, is considered [159] to be the source of the doctrine:

> 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 as between employer and employee, without providing a reasonably just substitute . . . . The statute under consideration sets aside one body of rules only to establish another . . . .[160]

This statement is a rather slender reed on which to base the development of a doctrine so intrusive on legislative prerogatives. The *White* Court merely indicated that the "reasonable substitute" issue was not before the Court; it did not state how the issue would have been resolved had it been presented.[161]

154. *See* Note, *Medical Malpractice—Constitutionality of Limits on Liability*, 78 W. VA. L. REV. 381, 389 (1976).

155. *See, e.g.*, Ritholz v. March, 105 F.2d 937, 939 (D.C. Cir. 1939); McCain v. Travelers Ins. Co., 153 So. 2d 124, 127 (La. Ct. App. 1963).

Courts have occasionally upheld automobile no-fault insurance laws on the ground that although certain portions of the common-law cause of action for negligence are abolished by limiting recoverable damages, the laws provide a *quid pro quo* by allowing claimant to recover without a showing of fault. *See, e.g.*, Lasky v. State Farm Ins. Co., 296 So. 2d 9, 13-14, 16 (Fla. 1974); Opinion of the Justices, 113 N.H. 205, 211, 304 A.2d 881, 886 (1973).

156. 243 U.S. 188 (1917). *See* Comment, *supra* note 14, at 1421 n.21.

157. 243 U.S. at 196.

158. *Id.* at 198.

159. Comment, *supra* note 14, at 1421 n.21.

160. 243 U.S. at 201.

161. *Id.*

It is true that at another point in its opinion the Court in *White* also used stronger language implying the existence of the *quid pro quo* doctrine. Taken in context, however, that language indicates that the *quid pro quo* doctrine, if it exists, is limited to situations in which the parties have strongly relied on preexisting law to shape their relationship. In the Court's words:

> Considering the vast industrial organization of the state of New York, for instance, with hundreds of thousands of plants and millions of wage earners, each employer, on the one hand, having embarked his capital, and each employee, on the other, having taken up his particular mode of earning a livelihood, in reliance upon the probable permanence of an established body of law governing the relation, 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.[162]

It is doubtful whether many other relationships induce as much reliance upon the specific details of common-law actions as does the employment relationship with its corresponding employee right to sue the employer. For example, even if the right of a patient to sue for the negligence of his physician is treated as an interest of utmost importance, it is unlikely that patients detrimentally rely on specific aspects of their common-law right to such an extent that it is unjust to modify the right. Unlike the employer, who probably considers in his economic calculus the likelihood of legal responsibility for injuries to his workers, a patient retains no reliance interest that may be threatened by the enactment of recovery limits.

Standing in glaring opposition to the ambiguous dictum in *White* is the Supreme Court's clear statement in *Silver v. Silver*,[163] affirming the right of a legislature to abrogate common-law causes of action. In *Silver*, the Court upheld automobile guest statutes against due process attack,[164] stating that "[t]he Constitution does not forbid the creation of new rights, or the abolition of old ones . . . to attain a permissible legislative object."[165] Although there is far from universal agreement in the courts, there does exist a strong line of authority, partially derived from *Silver*, rejecting the *quid pro quo* doctrine.[166] The Fourth Circuit, for example, relied on *Silver* to

162. *Id.*

163. 280 U.S. 117 (1929).

164. *Silver* did not rule on the discriminatory nature of the classifications created by guest statutes and therefore neither affects nor is affected by later decisions reconsidering guest statutes on equal protection grounds. *See* notes 116 & 121 *supra*.

165. 280 U.S. at 122.

166. *See* notes 167-69 *infra*. These cases do not address the issue of the constitutionality of legislative attempts to abrogate or limit a cause of action that has already accrued. Such an attempt would present considerably greater constitutional problems. *Cf.* Terracciona v.

reject the *quid pro quo* argument in *Carr v. United States*[167] in upholding a statutory abrogation of a federal employee's common-law right of action against a government driver acting within the scope of his employment. The New York Court of Appeals relied on *Silver* and *Munn v. Illinois*[168] to uphold that state's no-fault automobile insurance law, stating that the legislature may "remedy defects in the common law as they are developed, and . . . adapt it to the changes of time and circumstances."[169]

Widespread use of the *quid pro quo* doctrine could severely undermine legislative power to effect social change. To require a legislature to create a "reasonable substitute" every time that it abrogates or modifies outmoded common-law actions or defenses forces state policymakers into a legislative straightjacket. Moreover, by immunizing common-law rights from total abrogation, the doctrine effectively raises common-law causes of action to the level of constitutional rights, a status they were never intended to have. The fundamental assumption of common-law development has always been that doctrines and rights could grow or recede, depending on the social needs or mores of the time.[170] To freeze common-law rights under the protection of the due process clause destroys this potential for evolution and undermines the creative potential of the common law.[171]

Magee, 53 N.J. Super. 557, 569, 148 A.2d 68, 75 (Super. Ct. Law Div. 1959) (retrospective application of statute destroys vested property right arising out of tortious conduct and violates due process clause).

167. 422 F.2d 1007 (4th Cir. 1970). The court did note "that in any event Congress provided an adequate *quid pro quo* for the common law cause of action which it abolished," *id.* at 1011, by providing Carr with protection under the Federal Drivers Act, 28 U.S.C. § 2679(b) (1970), against personal liability for on-the-job automobile accidents for which he might be responsible. The court's primary holding, however, was that "under *Silver* Carr had no interest entitled to constitutional protection." 422 F.2d at 1011.

168. 94 U.S. 113 (1876).

169. Montgomery v. Daniels, 38 N.Y.2d 41, 56, 340 N.E.2d 444, 453, 378 N.Y.S.2d 1, 14 (1975) (quoting from *Munn*, 94 U.S. at 134). Another New York decision upheld the legislature's right to abolish a common-law cause of action for alienation of affections and criminal conversation: Hanfgarn v. Mark, 274 N.Y. 22, 8 N.E.2d 47, *appeal dismissed*, 302 U.S. 641 (1937). The court specifically refused to indicate whether the legislature could, if it so desired, abolish causes of action for libel and slander. *Id.* at 26, 8 N.E.2d at 48. While many courts have refused to recognize a legislative power to modify those causes of action, *see* Annot., 13 A.L.R.2d 277 (1950), several leading decisions have recognized this power. Total abolition of the rights, however, was not involved in these cases. Werner v. Southern Cal. Associated Newspapers, 35 Cal. 2d 121, 216 P.2d 825 (1950) (Traynor, J.), *appeal dismissed on motion of counsel for appellant*, 340 U.S. 910 (1951); Holden v. Pioneer Broadcasting Co., 228 Or. 405, 365 P.2d 845 (1961), *appeal dismissed upon motion and cert. denied*, 370 U.S. 157 (1962).

170. *Cf.* Green, *The Development of the Doctrine of Stare Decisis and the Extent to Which It Should Be Applied*, 40 ILL. L. REV. 304, 318-19 (1946), *reprinted in* L. GREEN, THE LITIGATION PROCESS IN TORT LAW 35, 50-51 (1965) (judiciary's creative use of precedent and growth in the law); Green, *The Thrust of Tort Law, Part I: The Influence of Environment*, 64 W. VA. L. REV. 1 (1961), *reprinted in* L. GREEN, *supra* at 59 (judiciary's power to modify common-law doctrines in response to changing environment).

171. *See generally* note 170 *supra*.

A number of state courts have incorporated the *quid pro quo* doctrine into the right of access provisions contained in their state constitutions.[172] For example, the Florida Supreme Court upheld that state's no-fault automobile insurance law, even though the law imposes strict limits on the right to recover damages for pain and suffering, since "[i]n exchange for his previous right to damages for pain and suffering . . . , with recovery limited to those situations where he can prove that the other party was at fault, the injured party is assured of recovery of his major and salient economic losses from his own insurer."[173] The court held that the no-fault law did not violate the right of access provision in the Florida Constitution,[174] but it clearly implied that without the *quid pro quo* the statute would have been constitutionally suspect.

Many courts recognize that state right of access provisions were not intended to immunize the common law from legislative revision.[175] Examination of the general language of these provisions tends to establish that they were not intended to preserve substantive rights. Rather, they were designed to assure that citizens would retain a judicial remedy to enforce substantive rights in existence at the time.[176]

Courts considering the constitutionality of medical malpractice legislation have generally been unreceptive to arguments based on the *quid pro quo* doctrine, premised either on the due process clause or on right of access provisions. In *Jones*, the Idaho Supreme Court concluded "that the United States Supreme Court in *White* did not intend to engraft upon the traditional due process test an additional standard when the challenged statute involves alteration of some prior existing common law doctrine."[177] The *Jones* court also rejected an argument based on Idaho's right of access provision,[178] denying that "the common law as of 1890 governs the health, welfare and safety of the citizens of this state and is unalterable without constitutional

172. *See, e.g.*, Caviness v. City of Vale, 86 Or. 554, 562-63, 169 P. 95, 98 (1917).

173. Lasky v. State Farm Ins. Co., 296 So. 2d 9, 14 (Fla. 1974).

174. FLA. CONST. art. I, § 21.

175. *See, e.g.*, Vogts v. Guerrette, 142 Colo. 527, 351 P.2d 851 (1960).

176. *Cf.* Pinnick v. Cleary, 360 Mass. 1, 271 N.E.2d 592 (1971) (upholding Massachusetts' automobile no-fault insurance law). The court said that the state's right of access provision "is clearly directed toward the preservation of procedural rights and has been so construed." *Id.* at 12, 271 N.E.2d at 600.

177. 97 Idaho 859, 869, 555 P.2d 399, 409 (1976). *See also* Montgomery v. Daniels, 38 N.Y.2d 41, 56, 340 N.E.2d 444, 453, 378 N.Y.S.2d 1, 14 (1975), stating that a "[s]erious question exists as to whether 'this adequate substitute test' is any test at all." The court in Pinnick v. Cleary, 360 Mass. 1, 271 N.E.2d 592 (1971), left the *quid pro quo* issue open when ruling on the constitutionality of Massachusetts' automobile no-fault law.

178. IDAHO CONST. art. I, § 18, provides that: "Courts of justice shall be open to every person and a speedy remedy afforded for every injury of person, property or character, and right and justice shall be administered without sale, denial, delay, or prejudice."

amendment."[179] In *Oregon Medical Association v. Rawls*[180] the circuit court rejected a right of access[181] challenge to Oregon's malpractice law, holding that the provision "was not intended to freeze common law remedies into an inflexible state not subject to adaptation to changing circumstances."[182] The court proceeded to note, however, that by adopting a compensation fund system,[183] the legislature provided a "substantially equivalent substitute" for the common-law remedy.[184] The court did not make clear whether it deemed such a substitute a prerequisite to legislative alteration of the common law, though its earlier language would seem to have rejected such a conclusion.

If a *quid pro quo* were held constitutionally required, several arguments might be made to demonstrate that limits on recovery do, in fact, provide the necessary "reasonable substitute." In *Wright v. Central Du Page Hospital Association*,[185] for example, defendants argued that a "societal *quid pro quo*" results from the subsequent reduction in insurance rates and indirect reduction in medical costs.[186] The court rejected this argument, however, since the *quid pro quo* issue had somehow become enmeshed—erroneously, it would seem[187]—in an equal protection challenge alleging discrimination against victims with more serious injuries. According to the court, "[t]his *quid pro quo* does not . . . serve to bring the limted recovery provision within the rationale of the cases upholding the constitutionality of the Workmen's Compensation Act."[188] It is unclear whether the court would have accepted the argument if applied to a pure due process

179. 97 Idaho at 864, 555 P.2d at 404.

180. No. 421-496 (Ore. Cir. Ct. May 4, 1976), *rev'd on other grounds*, 276 Or. 1101, 557 P.2d 664 (1976) (remanded for further factual findings).

181. ORE. CONST. art. I, § 10.

182. No. 421-496, slip op. at 5 (Ore. Cir. Ct. May 4, 1976), *rev'd on other grounds*, 276 Or. 1101, 557 P.2d 664 (1976).

183. *See* notes 24-28 *supra* & accompanying text.

184. No. 421-496, slip op. at 5 (Ore. Cir. Ct. May 4, 1976), *rev'd on other grounds*, 276 Or. 1101, 557 P.2d 664 (1976).

185. 63 Ill. 2d 313, 347 N.E.2d 736 (1976).

186. *Id.* at 328, 347 N.E.2d at 742.

187. According to the court, defendants resisted the equal protection challenge by relying on two decisions, Hall v. Gillins, 13 Ill. 2d 26, 147 N.E.2d 352 (1958), and Cunningham v. Brown, 22 Ill. 2d 23, 174 N.E.2d 153 (1961), both of which seemed to turn solely on the right of the legislature to modify statutory rights. Without noting that the rationale for the decisions was unrelated to a claim of discrimination, the court distinguished the cases on the ground that "[u]nlike the causes of action involved in *Hall* and *Cunningham*, the right to recover damages for injuries arising from medical malpractice existed at common law . . . and was not the creature of the General Assembly." 63 Ill. 2d at 326-27, 347 N.E.2d at 742. Defendants also relied on decisions upholding the Workmen's Compensation Act, but the court again distinguished them, this time on the basis of the *quid pro quo* doctrine. The court apparently was unaware that it had strayed from the equal protection issue.

188. 63 Ill. 2d at 328, 347 N.E.2d at 742.

claim. In any event, even if a court were willing to accept the "societal *quid pro quo*" argument, the need to prove a causal connection between recovery limits on the one hand, and an ultimate reduction in malpractice insurance rates and the costs of medical care on the other, would embroil both litigants and courts in the same arduous factual inquiry that use of the means scrutiny test would require under an equal protection challenge.[189]

A more tangible *quid pro quo* might be found in legislation modeled on the Indiana plan, which, in addition to imposing limits on recovery or liability, establishes a compensation fund from surcharges imposed on health care providers.[190] The fund helps assure the successful plaintiff an actual recovery, regardless of the financial responsibility of the defendant health care provider. The mere existence of the fund does not guarantee a recovery, however, since there is the possibility that the fund could be depleted. Nevertheless, states concerned about the vitality of the *quid pro quo* doctrine might consider following Indiana's lead.[191]

IV. Reduction in the Statute of Limitations: Right of Access Problems

State legislatures traditionally are accorded broad discretion in defining statute of limitation periods.[192] As long as the period chosen is not totally arbitrary, a statute of limitations will not be held violative of due process.[193] It is unclear, however, what period of time chosen by the legislature, if any, would actually be held arbitrary by the courts. The vast majority of current malpractice statutes employ a two-year limitations period and apparently are constitutional.[194]

The more serious question concerns the modern trend away from use of

189. *See* notes 130-37 *supra* & accompanying text.

190. *See* notes 24-28 *supra* & accompanying text.

191. A number of state constitutions contain provisions explicitly barring the imposition of limits on the amount of damages recoverable in personal injury actions. *See, e.g.*, ARIZ. CONST. art. 18, § 6; KY. CONST. § 54; OKLA. CONST. art. XXIII, § 7 (pertaining to injuries causing death). No method of upholding limits on either recovery or liability is apparent in these jurisdictions.

192. Statutes of limitation have been part of the law of every civilized nation from time immemorial. Since each sovereignty may organize its judicial tribunals according to its own notions of policy, it has been recognized since the early days of this republic that statutes of limitation are within the sovereign power of each state to enact. . . . The legislative body, in enacting such legislation, may weigh the conflicting interests between one person's right to enforce an otherwise valid claim and another person's right to be confronted with any claim against him before the lapse of time has likely rendered unavailable or difficult the matter of obtaining or presenting proof. Any balance of these conflicting interests which is not arbitrary or capricious is within the legislative authority.

Hargraves v. Brackett Stripping Machine Co., 317 F. Supp. 676, 682-83 (E.D. Tenn. 1970); *see also* Saffioti v. Wilson, 392 F. Supp. 1335, 1339 n.5 (S.D.N.Y. 1975); Smith v. Allen-Bradley Co., 371 F. Supp. 698, 701 (W.D. Va. 1974).

193. *See* note 192 *supra*.

194. *See* note 45 *supra*.

the discovery rule in medical malpractice cases.[195] Because abrogation of the discovery rule denies some citizens access to the courts to vindicate their substantive right to compensation for bodily injury, these statutes could, at least conceptually, face challenge under state constitutional right of access provisions.[196] Despite this conceptual difficulty, however, it is unlikely as a practical matter that statutes rejecting the discovery rule will face serious constitutional challenge. The chief reason is that long before the development of the current medical malpractice crisis, many states did not employ the discovery rule,[197] apparently without evoking any serious constitutional challenge.

In *Clark v. Gulesian*[198] the First Circuit rejected a due process challenge to a Maine statute that computed the limitations period from the date of the wrongful act rather than from the date the injury was discovered.[199] The court held that "unfortunate as the present result may be for the plaintiff, the state may reasonably recognize that a defendant has an interest in repose, and in the avoidance of stale claims, however free from fault the claimant's delay may be."[200] Purely apart from the effect on malpractice insurance rates, the equities of the discovery rule are by no means one-sided. To the extent that the discovery rule drastically extends the liability period of a health care provider, the statutory purposes of repose and avoidance of stale claims are severely undermined. Arguably then, retention or abolition of the discovery rule should remain a policy decision for the legislature.[201]

V. Screening Panels: A Trio of Constitutional Obstacles

Proponents of medical screening panels view them "as a relatively inexpensive means of sorting out spurious claims."[202] Despite their asserted

195. Many jurisdictions now employ a modified discovery rule, with an absolute outside time limit during which the action must be brought regardless of the time of discovery. *See* note 45 *supra*.

196. *See* notes 172-84 *supra* & accompanying text.

197. *See* 1 D. LOUISELL & H. WILLIAMS, *supra* note 40, ¶¶ 13.06, 13.07.

198. 429 F.2d 405 (1st Cir. 1970), *cert. denied*, 400 U.S. 993 (1971).

199. *Id.* at 406.

200. *Id.*

201. Plaintiffs occasionally argue that the discovery rule violates their constitutional rights by allowing the statute of limitations to run even when the plaintiff has no subjective awareness of his injury. In Landgraff v. Wagner, 26 Ariz. App. 49, 546 P.2d 26 (1976), the court rejected this assertion, stating that "[t]here is no contention that the time period [six-year statutory period or two years from discovery or when discovery should have been made] . . . is unreasonable." *Id.* at 54, 546 P.2d at 31. The court further held that article 18, § 6 of the Arizona Constitution, which provides: "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," is not violated by a reasonable statute of limitations, even though the period may run prior to plaintiff's subjective awareness of the injury. *Id.* at 54-55, 546 P.2d at 31-32.

202. Comment, *supra* note 1, at 681. *Cf.* HEW REPORT, *supra* note 1, at 91 (panel "permit[s]

advantages, however, screening panel proposals raise several constitutional problems, including dilution of the right to jury trial, violation of the concept of separation of powers, and deprivation of the right of access to the courts.

On first appearances, claiming a threat to the jury trial right[203] may seem puzzling: since no jurisdictions make screening panel decisions binding upon the parties, either party may seek redress in a jury trial.[204] The difficulty, however, is that in those jurisdictions in which the findings of the screening panel are admissible into evidence at a subsequent trial,[205] the jury may be so swayed by those findings that the party who lost at the screening panel stage will—in substance, if not in form—also lose the right to jury trial. As the New York trial court in *Comiskey v. Arlen*[206] stated, the issue is "whether plaintiff will, in fact, receive a meaningful jury trial if the record of the Medical Malpractice Panel is admitted into evidence."[207] The *Comiskey* trial court concluded that admission of the panel's record violated the jury trial right,[208] reasoning persuasively that admissibility of the panel's findings would strongly influence the jury:

> Determinations of physician negligence virtually always involve the resolution of technical and complex factual issues. Couched in medical terminology and buttressed on either side by expert evidence, the burden on the petit juror to decipher and absorb such information is substantial. Enter now a recommendation with

early settlement of meritorious claims and discourage[s] frivolous litigation"). As stated by the court in Halpern v. Gozan, 85 Misc. 2d 753, 381 N.Y.S.2d 744 (Sup. Ct. 1976), the goal of these panels is to "expedite the disposition of malpractice cases at an incipient stage, thereby reducing the threat of run-away verdicts with their self-defeating sequelae." *Id.* at 756, 381 N.Y.S.2d at 746.

203. Because the Supreme Court has never incorporated the seventh amendment right to civil jury trial into the due process clause of the fourteenth amendment, whatever constitutional right to a civil jury trial exists in state courts must originate in the state constitutions. *See* D. LOUISELL & G. HAZARD, PLEADING AND PROCEDURE: STATE AND FEDERAL 931 (3d ed. 1973). All states but two, Louisiana and Colorado, provide some form of constitutional protection of the civil jury right. *See* Comment, *supra* note 14, at 1466 n.252. Most states follow the approach of the seventh amendment and define the right according to a historical test. On occasion, however, state courts differ significantly in their interpretations of the jury trial right. *See* notes 241-49 *infra* & accompanying text.

204. Some statutes provide that the parties may agree in writing to be bound by the screening panel findings. *See, e.g.*, Act of Sept. 12, 1975, P.A. No. 79-960, § 1, ILL. ANN. STAT. ch. 110, § 58.8 (Smith-Hurd Supp. 1977). Written agreements to be bound by the panel findings do not violate the right to jury trial since a party is capable of waiving that right.

205. "Eighteen states have enacted legislation providing for the mandatory review of every malpractice claim by a panel as a condition precedent to litigation, and in twelve of the states the panel's finding as to liability (and in some instances damages) is admissible in evidence in a later court proceeding." A.B.A. COMM'N ON MEDICAL PROFESSIONAL LIAB., *supra* note 19, at 24.

206. Comiskey v. Arlen (Sup. Ct. July 6, 1976), *rev'd*, 390 N.Y.S.2d 122 (1976).

207. *Id.*

208. *Id.*

> respect to liability of a panel composed of the most highly respected members of the community which has predigested the complexities and technicalities of the case. While not wishing to impute to the petit jury an active abdication of its prerogatives, one is inexorably led to the conclusion that the jurors will be passively drawn to adopt this prize panel's recommendation.[209]

The New York Supreme Court, Appellate Division, reversed the trial court and rejected "its assumption that no jury could evaluate a medical malpractice panel's recommendation with objectivity, or follow a trial court's instructions regarding the weight to be given it."[210] The court further concluded that "[i]n sum, the net effect of the statute . . . has been to furnish the jury in a malpractice action with the opinion of an expert panel."[211] The appellate court's reasoning is sound. The right to a jury trial is not denied merely because one's opponent presents overwhelmingly strong evidence in his favor. The party losing at the screening panel stage still has the opportunity to counter the evidence at the trial. The panel's recommendation is merely another piece of evidence for the jury to consider. For purposes of the constitutional right to jury trial, the jury remains the final arbiter.

A legislature troubled by the jury trial argument could follow the lead of jurisdictions that refuse to admit the panel's findings into evidence in a subsequent trial.[212] Despite its apparent advantages,[213] this approach significantly reduces the inducement for the losing party to settle the case prior to trial. Since the jury trial problem perceived by the trial court in *Comiskey* should not be considered a substantial difficulty, resort to this alternative seems to be both unnecessary and inadvisable.

Moreover, this approach does not necessarily insulate screening panels from constitutional invalidation. In *Wright v. Du Page Hospital Association*[214] the Illinois Supreme Court held that Illinois' statutorily created panel violated the right to jury trial. Because the panel findings were inadmissible at trial,[215] the obstacle to an effective jury trial foreseen by the

209. *Id.* The court in Simon v. St. Elizabeth Medical Center, — Ohio Op. 3d —, 355 N.E.2d 903 (C.P. 1976), adopted a similar approach, *id.*, at —, 355 N.E.2d at 907-09.

210. 390 N.Y.S.2d at 122 & 125. A different trial judge on the same court had previously held that the New York procedure did not violate the jury trial right. Halpern v. Gozan, 85 Misc. 2d 753, 381 N.Y.S.2d 744 (Sup. Ct. Queens County 1976). As noted previously, however, an Ohio Common Pleas decision adopted an approach similar to the *Comiskey* trial court. Simon v. St. Elizabeth Medical Center, — Ohio Op. 3d —, 355 N.E.2d 903 (C.P. 1976); *see* note 209 *supra*.

211. 390 N.Y.S.2d at 130.

212. *See* Comment, *supra* note 14, at 1461 & n.222.

213. *See* note 55 *supra*.

214. 63 Ill. 2d 313, 347 N.E.2d 736 (1976).

215. *Id.* at 321, 347 N.E.2d at 739.

trial court in *Comiskey* was not pertinent. Exactly what constitutional problem the court foresaw is unclear. Before reaching the jury trial issue, the court had already invalidated the screening panel procedure on the ground that it violated constitutional separation-of-powers requirements.[216] The decision that the review procedure violated the right to jury trial seemed to flow from the court's earlier conclusion: "Because we have held that these statutes providing for medical review panels are unconstitutional, it follows that the procedure prescribed therein as the prerequisite to jury trial is an impermissible restriction on the right of trial by jury . . . ."[217]

It is difficult to understand how the jury trial argument contributes anything to the court's earlier conclusion. If, as the court had concluded, the Illinois procedure violated separation-of-powers principles, it was unconstitutional regardless of its effect on the jury trial right. If, on the other hand, the procedure did not violate another constitutional provision, the court failed to articulate any independent basis for finding a violation of the jury trial right. It is unfortunate that the court felt it necessary to reach the jury trial question in a manner that at best causes confusion and at worst stands as a precedent that may be taken beyond its seemingly irrelevant use in *Wright*.

The *Wright* court's conclusion on the separation of powers issue is no more persuasive than is its jury trial discussion. Because the composition of the Illinois screening panel included a private physician, an attorney, and a circuit judge,[218] the court relied on article VI of the Illinois Constitution[219] to decide that the procedure improperly vested judicial power in nonjudicial officers. According to the court, "[t]he application of principles of law is inherently a judicial function."[220] One need not dispute this proposition to reject the court's conclusion that the screening panel procedure violates separation-of-powers principles. The court found that the screening panel was performing a judicial function because the statute creating the panel provided that "[t]he law of evidence shall be followed, except as the panel

216. *Id.* at 322, 347 N.E.2d at 739-40; *see* notes 218-24 *infra* & accompanying text.

217. *Id.* at 324, 347 N.E.2d at 741. The court added without explanation, however: "In so holding, however, we do not imply that a valid pretrial panel procedure cannot be devised." *Id.*

218. Act of Sept. 12, 1975, P.A. No. 79-960, § 1, ILL. ANN. STAT. ch. 110, § 58.4 (Smith-Hurd Supp. 1977); *see* 63 Ill. 2d at 319, 347 N.E.2d at 738.

219. Section 1 of article VI provides that: [t]he judicial power is vested in a Supreme Court, an Appellate Court and Circuit Courts"; § 9 provides that the circuit court shall have "original jurisdiction of all justiciable matters." ILL. CONST. art. VI, §§ 1, 9. Virtually all state constitutions provide for separation of powers in one form or another. *See, e.g.*, KAN. CONST. art. III, § 1; MASS. CONST. art. 30; N.J. CONST. art. III, § 1; OKLA. CONST. art. IV, § 1; S.D. CONST. art. V, §§ 1, 5.

220. 63 Ill. 2d at 322, 347 N.E.2d at 739.

in its discretion may determine otherwise,"[221] and that "the panel shall make its determination according to the applicable substantive law."[222] Because the two nonjudicial members of the panel could possibly outvote the circuit judge in finding the principles of substantive law, the court held that the panel was improperly performing a judicial function.[223] The court overlooked the significant point, however, that the panel's decision had no binding force beyond the agreement of the parties. Certainly the mere issuance of opinions *advising* what applicable law should control if a case is tried in court is not a "judicial function." In effect, however, this was all the Illinois screening panel was designed to do.[224] It is indeed a strained concept of separation of powers necessary to reach the *Wright* court's conclusion.

One method of circumventing the *Wright* decision, if it is thought necessary to do so, is to vest technical decisionmaking power in the hands of the judicial member of the panel, with the physician and attorney serving only in advisory capacities. This approach might diminish the panel's effectiveness, and it may not prove responsive to challenges in jurisdictions in which no judicial officer sits on the panel.[225] If a legislature decides, however, to place a judge on the panel, the screening panel procedure would probably continue to function successfully as long as the judicial member recognized an obligation to consider seriously the recommendations of the "advisors." This question is not likely to warrant consideration outside of Illinois, however, since the *Wright* court's conclusion is so lacking in merit that it is unlikely to be widely followed elsewhere.[226]

The final constitutional difficulty posed by screening panels is probably the most serious. It could be argued that requiring a plaintiff to proceed

221. Act of Sept. 12, 1975, P.A. No. 79-960, § 1, ILL. ANN. STAT. ch. 110, § 58.6 (Smith-Hurd Supp. 1977).

222. *Id.* § 58.7.

223. 63 Ill. 2d at 322, 347 N.E.2d at 739-40.

224. In Illinois, unlike a majority of jurisdictions, the court cannot admit the panel's findings into evidence at a subsequent trial. *See* note 55 *supra*. The panel's decision therefore had no relationship to any eventual trial proceedings.

225. *See* notes 56 & 57 *supra*.

226. The Mississippi Supreme Court rejected the separation of powers argument in a challenge to that state's workmen's compensation board in Walters v. Blackledge, 220 Miss. 485, 71 So. 2d 433 (1954).

> "By the great weight of authority, the creation by the compensation acts of boards or commissions having authority to pass on claims for injuries, find facts and make awards does not constitute an unwarranted delegation of judicial powers or the unwarranted creation of a judicial tribunal or court, the decisions being based on the various grounds that such boards or commissions are merely administrative agencies, although exercising quasi judicial powers, that they do not have the final authority to decide and to render enforceable judgments."

Id. at 505, 71 So. 2d at 439 (citation omitted).

through an expensive and prolonged screening process prior to an actual judicial hearing effectively denies him the right of access to the courts guaranteed by many state constitutions.[227] Justice England of the Florida Supreme Court recognized this possibility while concurring in the validation of Florida's screening panel procedure in *Carter v. Sparkman*.[228] He was troubled "that persons who seek to bring malpractice lawsuits must be put to the expense of two full trials of their claim, assuming the medical defendant chooses to put plaintiff to her proof before the panel."[229] Nevertheless, Justice England felt that he could not "in good conscience" invalidate the statute on this basis.[230] The majority expressed similar concerns about the screening process, but recognized that "reasonable restrictions prescribed by law" may be imposed on the constitutional right of access.[231] The court noted ominously, however, that "the pre-litigation burden cast upon the claimant reaches the outer limits of constitutional tolerance."[232] Despite *Carter*'s warning, courts should recognize that the preparation prior to screening panel review in most cases functions merely as an accelerated form of discovery for the actual trial. Certainly a state may provide for a variety of discovery devices and a pretrial hearing without running into constitutional trouble. If a legislature intends the screening panel procedure to function as an institutionalized attempt to encourage settlement, and the physical and financial burdens it imposes on potential plaintiffs is kept to a minimum, the constitutional obstacles should not prove insurmountable.

VI. Arbitration: Jury Trial and Right of Access Issues

Because the terms are often confused,[233] the distinction between "screening panels" and "arbitration" is important. Screening panels are pretrial devices for weeding out nonmeritorious claims and encouraging settlement; arbitration is a method of resolving conflicts wholly alternative to judicial trial.[234] Arbitration attempts to assure a comparatively rapid decisionmaking process by expert factfinders, without incurring the publicity and danger of astronomical jury awards inherent in the trial process.[235]

227. *Cf.* Comment, *supra* note 1, at 681 ("In fact, the review panel proceedings actually delay suits and add to the expense of any case that does go to trial.").
228. 335 So. 2d 802 (Fla. 1976), *cert. denied*, 45 U.S.L.W. (U.S. May 11, 1977) (No. 76-598).
229. *Id.* at 807.
230. *Id.* at 808 (England, J., concurring).
231. *Id.* at 805.
232. *Id.* at 806.
233. Several states have employed the term "arbitration" to refer to mandatory screening panels. *See, e.g.*, OHIO REV. CODE ANN. § 2711.21 (Page Supp. 1975); *see also* Ladimer, *Statutory Provisions for Binding Arbitration of Medical Malpractice Claims*, 1976 INS. L.J. 405, 406.
234. *See* Part I. D. *supra*.
235. *See* Comment, *supra* note 1, at 683.

The success of several private medical arbitration plans in speeding resolution of malpractice claims[236] has prompted states to consider adoption of their own plans to encourage arbitration.

A state wishing to promote arbitration has two basic alternatives: adoption of a compulsory arbitration plan, or enactment of legislation providing for judicial enforcement of voluntary agreements to arbitrate.[237] Few jurisdictions have seriously considered adopting a compulsory arbitration plan,[238] largely because of the serious constitutional obstacles presented by the right to jury trial[239] guaranteed by forty-eight of the fifty state constitutions.[240] Virtually all of these state provisions calculate the extent of the constitutional right by reference to the prevailing practice at common law.[241] Some jurisdictions, not following the lead of the federal courts in interpreting the seventh amendment jury trial guarantee,[242] have held that this common-law focus permits the legislature to dispense with a jury trial in any cause of action not existing at common law.[243] Thus, a legislature might relegate adjudication of certain cases to arbitration or administrative deter-

236. Experience with private plans in California indicates that "the average cost of claims has been reduced, the speed of settlements has increased, and administration of malpractice programs has been substantially improved in those hospitals participating in the program." American Hosp. Ass'n, *supra* note 35, at 14. *See also* HEW REPORT, *supra* note 1, at 94.

237. *See* C. Adams & A. Bell, *supra* note 62, app. at 316; Defense Research Inst., Medical Malpractice Position Paper (An Update), No. 3, at 15 (1976).

238. *See* Ladimer, *supra* note 233, at 406, 409.

239. *See* Simon v. St. Elizabeth Medical Center, — Ohio Op. 3d —, 355 N.E.2d 903, 907-09 (C.P. 1976).

240. *See* note 203 *supra*.

241. *See, e.g.*, N.J. CONST. art. I, § 9; OKLA. CONST. art. II, § 19.

242. The seventh amendment provides in relevant part: "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved . . . ." U.S. CONST. amend. VII. *See generally* Redish, *Seventh Amendment Right to Jury Trial: A Study in the Irrationality of Rational Decision Making*, 70 NW. U.L. REV. 486 (1975); Wolfram, *The Constitutional History of the Seventh Amendment*, 57 MINN. L. REV. 639 (1973).

243. *See, e.g.*, Grand Trunk W. Ry. v. Industrial Comm'n, 291 Ill. 167, 176, 125 N.E. 748, 751-52 (1919) (upholding absence of a jury in workmen's compensation action):

> Our constitution provides that the right of trial by jury as heretofore enjoyed shall remain inviolate, but it guarantees that right only to those causes of action recognized by law. The act here in question takes away the cause of action on the one hand and the ground of defense on the other and merges both in a statutory indemnity fixed and certain. If the power to do away with a cause of action in any case exists at all in the exercise of the police power of the state, then the right of trial by jury is therefore no longer involved in such cases. The right of jury trial being incidental to the right of action, to destroy the latter is to leave the former nothing upon which to operate.

See U-Haul Co. v. State, 294 Ala. 330, 333, 316 So. 2d 685, 688 (1975); United States Fidelity & Guar. Co. v. Spring Brook Farm Dairy, Inc., 135 Conn. 294, 297-98, 64 A.2d 39, 41 (1949); Comish v. Smith, 97 Idaho 89, 92, 540 P.2d 274, 277 (1975); Walters v. Blackledge, 220 Miss. 485, 508-09, 71 So. 2d 433, 441-42 (1954). *See generally* Note, *A Constitutional Perspective on the Indiana Malpractice Act*, 51 IND. L.J. 143, 157-58 (1975). Similar analysis supports the absence of a jury trial in automobile no-fault actions. *See, e.g.*, Manzanares v. Bell, 214 Kan. 589, 616, 522 P.2d 1291, 1312 (1974); Kane, *Civil Jury Trial: The Case for Reasoned Iconoclasm*, 28 HASTINGS L.J. 1, 26 n.106 (1976).

mination without concern for the jury trial guarantee. This approach provides no constitutional support for compulsory arbitration of medical malpractice claims, however, since it is universally acknowledged that a cause of action for malpractice, whether in tort or in contract, did exist at common law. Some courts following this approach have recognized that when a common-law cause of action has been substantially modified or recodified by the legislature, as in workmen's compensation and no-fault automobile insurance statutes, the jury trial right that attached to the cause of action in its common-law status is lost.[244] Since statutes limiting the medical malpractice cause of action do not alter its fundamental character, however, legislatures have not created a "new" cause of action for medical malpractice that is exempt from the right to a jury trial.[245]

In jurisdictions that follow the federal practice under the seventh amendment, the issue is purely academic. It is well established that under the seventh amendment the existence of the jury trial right is not dependent upon whether the cause of action existed at common law. The court instead determines by analogy to common-law practice in 1791 whether a newly created statutory cause of action would have been an action at law or in equity.[246] For example, antitrust damage actions give rise to a constitutional right to jury trial although the antitrust statutes[247] were enacted long after 1791.[248] Therefore, in states adopting this approach[249] it would make little difference whether or not a cause of action existed at common law.

Another possible means of avoiding the jury trial problems associated with compulsory arbitration plans stems from the nonjudicial character of the entire arbitration process. Under the seventh amendment, for example, the Supreme Court has held that the absence of a jury trial in administrative proceedings that concern substantive matters traditionally qualifying for a jury trial is not unconstitutional under the seventh amendment, at least partially because the statutorily created process was unknown at common

244. *See* note 243 *supra*.

245. In some jurisdictions a legislature conceivably might avoid the jury trial right by abolishing the common-law cause of action entirely (subject to due process limitations, *see* Part III. *supra*) and recodifying it as a statutory cause of action. The courts, however, might not accept such a blatant circumvention of the jury trial right.

246. Pernell v. Southall Realty, 416 U.S. 363 (1974):

> Whether or not a close equivalent to the statutory right in question existed in England in 1791 is irrelevant for Seventh Amendment purposes, for that Amendment requires trial by jury in actions unheard of at common law, provided that the action involves rights and remedies of the sort traditionally enforced in an action at law, rather than in an action in equity or admiralty.

Id. at 375. *See* Parsons v. Bedford, 28 U.S. (3 Pet.) 432, 446-47 (1870).

247. *See, e.g.*, Beacon Theatres, Inc. v. Westover, 359 U.S. 500 (1959).

248. *See* Wolfram, *supra* note 242.

249. *See, e.g.*, People v. One 1941 Chevrolet Coupe, 37 Cal. 2d 283, 299, 231 P.2d 832, 843 (1951).

law.[250] To the extent that states follow this doctrine[251] (and its adherence is not universal), arbitration plans might withstand constitutional attack. In addition to the jury trial problems, however, compulsory arbitration may undermine a party's right of access to the courts on the theory that parties are required to forgo their right to an effective judicial remedy to protect their substantive rights. While the right of access may not guarantee the preservation of a substantive cause of action,[252] it does assure that an individual will be afforded an opportunity for judicial vindication of currently existing rights.

Voluntary arbitration plans present neither jury trial nor right of access problems. The right to a civil jury trial can be waived,[253] and even when there is no express waiver, voluntary entry into a binding arbitration agreement could be readily characterized as a waiver.[254] Similarly, voluntary arbitration agreements do not violate the right of access to the courts.[255] The

250. *See* NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 48-49 (1937); Lloyd A. Fry Roofing Co. v. Pollution Control Bd., 20 Ill. App. 3d 301, 310, 314 N.E.2d 350, 357-58 (1974), *cert. denied*, 420 U.S. 996 (1975); *see also* Atlas Roofing Co. v. Occupational Safety & Health Review Comm'n, 97 S. Ct. 1261 (1977). After *Jones & Laughlin*, the Supreme Court justified absence of a jury trial right in administrative proceedings because "jury trials would be incompatible with the whole concept of administrative adjudication and would substantially interfere with the agency's role in the statutory scheme." Curtis v. Loether, 415 U.S. 189, 194 (1974). These considerations, however, should bear no relevance to the scope of the constitutional right. *See generally* Redish, *supra* note 242, at 517-30.

251. *See, e.g.*, People v. One 1941 Chevrolet Coupe, 37 Cal. 2d 283, 299, 231 P.2d 832, 843 (1951):

> The right to a trial by jury cannot be avoided by merely calling an action a special proceeding or equitable in nature. If that could be done, the Legislature, by providing new remedies and new judgments and decrees in form equitable, could in all cases dispense with jury trials and then entirely defeat the provision of the Constitution.

252. *See* notes 175-76 *supra* & accompanying text.

253. *See, e.g.*, City of St. Louis v. International Harvester Co., 350 S.W.2d 782, 785-86 (Mo. 1961). California requires that a contract to arbitrate medical malpractice disputes provide in at least 10-point bold red type, *inter alia*, that "you are giving up your right to a jury or court trial." CAL. CODE CIV. PROC. § 1295 (West Supp. 1977). Adoption of the notice requirement helps avoid constitutional right-to-jury problems and deserves consideration by states contemplating passage of arbitration plans.

254. *See* Madden v. Kaiser Foundation Hosp., 17 Cal. 3d 699, 703, 552 P.2d 1178, 1180, 131 Cal. Rptr. 882, 884 (1976). A question may arise whether an arbitration agreement is an adhesion contract. Though in and of itself the adhesion issue does not present constitutional problems, it takes on a constitutional dimension when the signing of the contract is intended to constitute a waiver of the jury trial right. The *Madden* court, while not stating that an arbitration agreement could never be one of adhesion, nevertheless rejected the adhesion contract argument because the Kaiser plan was negotiated by parties of approximately equal bargaining strength. The court also noted that plaintiff could have selected from several plans. *Id.* at 712, 552 P.2d at 1186, 131 Cal. Rptr. at 890. States enacting laws authorizing judicial enforcement of arbitration agreements should, nevertheless, impose severe limitations on the conditions that can be imposed by a physician or medical care plan. *See, e.g.*, OHIO REV. CODE ANN. § 2711.23(B) (Supp. 1975).

255. Tuschman Steel Co. v. Tuschman, 181 N.E.2d 322, 327 (Ohio C.P. 1961): "The arbitration statutes of Ohio do not oust the jurisdiction of the courts. They merely provide for an additional remedy of which the party may of his own free choice avail himself."

right of access to the courts is solely for the benefit of the individual citizen; therefore, there is no reason why a citizen should not be allowed to waive that right voluntarily.

Voluntary arbitration is not likely to result in the arbitration of as many medical malpractice claims as would occur with use of compulsory arbitration. Nevertheless, statutes encouraging voluntary arbitration appear to be the only viable alternative available to legislatures interested in fostering this approach to conflict resolution.

Conclusion

Controversy pervades the sensitive policy issues surrounding the legislative response to the medical malpractice insurance crisis. Whether the legislative proposals considered or adopted to date will significantly improve the situation remains to be seen. It is clear, however, that although disagreement over the merits of individual malpractice reform proposals persists, most of the proposed changes in malpractice claim resolution arguably will improve the existing situation. Absent the existence of a specific constitutional prohibition of a particular reform measure, the judiciary should not require more than this showing.