

# THE CONSTITUTIONAL FOUNDATION FOR FEDERAL MEDICAL LIABILITY REFORM

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## INTRODUCTION

Efforts to address soaring medical liability insurance premiums and the resulting patient access problems find their origins in landmark medical liability reform legislation adopted by California over thirty years ago.<sup>1</sup> Among other reforms, California's Medical Injury Compensation Reform Act of 1975 (MICRA) permits awards of noneconomic damages (e.g., pain and suffering) up to \$250,000 in any action against a health care provider based on professional negligence.<sup>2</sup> This limit has been upheld as constitutional.<sup>3</sup> Based on MICRA's success in stabilizing California's medical liability climate, physicians and other healthcare providers have called for similar limits on noneconomic damages in other states and at the federal level.<sup>4</sup> Noneconomic damages are a substantial part of tort costs.<sup>5</sup> Statutory

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1. See Donald J. Palmisano, *Health Care in Crisis: The Need for Medical Liability Reform*, 5 YALE J. HEALTH POL'Y L. & ETHICS 371, 379 (2005) ("The AMA supports California's reforms . . . as a model for federal and state legislation . . ."); Richard E. Anderson, *Effective Legal Reform and the Malpractice Insurance Crisis*, 5 YALE J. HEALTH POL'Y L. & ETHICS 341, 349-50 (2005) (stating that reforms embodied in California's Medical Injury Compensation Reform Act prevent a malpractice insurance crisis from occurring).

2. CAL. CIV. CODE § 3333.2 (West 2011).

3. See *Fein v. Permanente Med. Grp.*, 695 P.2d 665, 682 (Cal. 1985); *Van Buren v. Evans*, No. F054227, 2009 WL 1396235, at \*4 (Cal. Ct. App. May 20, 2009).

4. See, e.g., *Medical Liability Reform*, AM. MED. ASS'N, <http://www.ama-assn.org/ama/pub/advocacy/current-topics-advocacy/practice-management/medical-liability-reform.page> (advocating for MICRA-like reform at the federal level); AM. MED. ASS'N, MEDICAL LIABILITY

upper limits such as MICRA's cap target the detrimental effects of inherently subjective noneconomic damages on access to healthcare services.<sup>6</sup>

In addition to California, statutory limits in many states have successfully stabilized and, in some cases, significantly reduced, medical liability insurance rates.<sup>7</sup> These laws have also expanded access to physicians, particularly specialists practicing in high-risk areas and in rural communities.<sup>8</sup> State action has

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REFORM NOW! 14 (2012), available at <http://www.ama-assn.org/resources/doc/arc/mlr-now.pdf> [hereinafter MEDICAL LIABILITY REFORM NOW!] (citing to a CBO study finding financial benefits to MICRA-like reform at the federal level and noting that several states have limited the amount of noneconomic damages one can receive).

5. See *Nelson v. Keefer*, 451 F.2d 289, 294 (3d Cir. 1971) (stating that "pain, suffering, and inconvenience" is the largest single category of recovery by plaintiffs and is far greater than medical expenses or lost wages). Scholars largely attribute the historical increase in noneconomic damages to: (1) the availability of future pain and suffering damages; (2) the rise in automobile ownership and personal injuries resulting from automobile accidents; (3) the greater availability of insurance and willingness of plaintiffs' attorneys to take on lower-value cases; (4) the rise in affluence of the public and a change in public attitude that "someone should pay"; and (5) better organization by the plaintiffs' bar. See Philip L. Merkel, *Pain and Suffering Damages at Mid-Twentieth Century: A Retrospective View of the Problem and the Legal Academy's First Responses*, 34 CAP. U. L. REV. 545, 553–54, 561, 563–65 (2006) (highlighting the various factors attributable to higher jury verdict awards for personal injury lawsuits); see also Joseph H. King, Jr., *Pain and Suffering, Noneconomic Damages, and the Goals of Tort Law*, 57 SMU L. REV. 163, 170 (2004) (discussing the growth in damages for pain and suffering). This rise may also be due, in part, to increasing constitutional, statutory, and common law restrictions on punitive damage awards, which have led plaintiffs' lawyers to bolster other forms of recovery. See generally Victor E. Schwartz & Leah Lorber, *Twisting the Purpose of Pain and Suffering Awards: Turning Compensation Into "Punishment"*, 54 S.C. L. REV. 47 (2002) (discussing the evolution of pain and suffering damages and possible suggestions for reform).

6. See MEDICAL LIABILITY REFORM NOW!, *supra* note 4, at 12–14; Fred J. Hellinger & William E. Encinosa, *The Impact of State Laws Limiting Malpractice Awards on the Geographic Distribution of Physicians*, U.S. DEP'T OF HEALTH AND HUMAN SERVS. (July 3, 2003), available at <http://www.ahrq.gov/research/tortcaps/tortcaps.pdf> (discussing that many doctors have been forced out of business because of exorbitant jury awards that have increased medical malpractice premiums). One commentator noted the difficulty expressed by jurors in putting a price on pain and suffering:

Some roughly split the difference between the defendant's and the plaintiff's suggested figures. One juror doubled what the defendant said was fair, and another said it should be three times medical expenses. . . . A number of jurors assessed pain and suffering on a per month basis. . . . Other jurors indicated that they just came up with a figure that they thought was fair.

Neil Vidmar, *Empirical Evidence on the Deep Pockets Hypothesis: Jury Awards for Pain and Suffering in Medical Malpractice Cases*, 43 DUKE L.J. 217, 254–55 (1993).

7. See Mark A. Behrens, *Medical Liability Reform: A Case Study of Mississippi*, 118 OBSTETRICS & GYNECOLOGY 335, 338 (2011) (finding a reduction in lawsuits against obstetrician-gynecologist specialists after Mississippi enacted tort reform); see also MEDICAL LIABILITY REFORM NOW!, *supra* note 4, at 21–23 (finding decreases in physician liability insurance after enactment of tort reform in Mississippi, Missouri, Nevada, Ohio, Texas, and West Virginia).

8. David P. Kessler et al., *Impact of Malpractice Reforms on the Supply of Physician Services*, 293 JAMA 2618, 2624 (2005) (finding that tort reform has a positive effect on the supply of physicians in three of five specialty areas); Press Release, Am. Ctr. Emergency Physicians, *Tex. Med. Liability Reforms are a Model for the Nation* (Jan. 21, 2011) (on file with the Journal of Health Care Law & Policy) [hereinafter Press Release], <http://www.acep.org/content.aspx?id=75595> (noting an increase of emergency care physicians in rural areas after the enactment of Texas tort reform).

substantially improved the medical liability environment in many areas of the country.<sup>9</sup> The states have indeed served as laboratories for innovation.<sup>10</sup>

Many state courts have upheld noneconomic damage limits applicable to health care liability claims.<sup>11</sup> For example, the West Virginia Supreme Court of Appeals recently upheld that state's limit on noneconomic damages in medical liability cases, stating "[w]e note that our decision today is consistent with the majority of jurisdictions that have considered the constitutionality of caps on noneconomic damages in medical malpractice actions or in any personal injury action."<sup>12</sup> Several state courts have upheld laws that go further and limit total recoveries in medical liability cases.<sup>13</sup> Other courts have upheld the

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9. See, e.g., Behrens, *supra* note 7, at 336–38 (outlining the decrease in lawsuits against physicians as a result of Mississippi tort reform); Ronald M. Stewart et al., *Malpractice Risk and Cost are Significantly Reduced After Tort Reform*, 212 J. AM. COLL. SURGEONS 463, 465–66 (2011) (finding that tort reform in Texas resulted in a significant decrease in the prevalence and cost of surgical malpractice lawsuits at one academic medical center).

10. See, e.g., Alexandra B. Klass, *Tort Experiments in the Laboratory of Democracy*, 50 WM. & MARY L. REV. 1501, 1512 (2009) (explaining that states have engaged in "tort experiments" as a response to the increased costs associated with medical liability).

11. See *Fein v. Permanente Med. Grp.*, 695 P.2d 665 (Cal. 1985) (\$250,000 limit on noneconomic damages in medical malpractice actions did not violate equal protection or due process); *Stinnett v. Tam*, 130 Cal. Ct. App. 732 (2011) (noneconomic damages limit did not violate equal protection or right to jury trial); *Univ. of Miami v. Echarte*, 618 So. 2d 189 (Fla. 1993) (finding cap on noneconomic damages constitutional); *HCA Health Servs. of Fla., Inc. v. Branchesi*, 620 So. 2d 176 (Fla. 1993) (statute did not violate access to courts); *Parham v. Florida Health Sciences Ctr., Inc.*, 35 So. 3d 920 (Fla. Dist. Ct. App. 2010) (cap did not violate right to jury trial); *Zdrojewski v. Murphy*, 657 N.W.2d 721 (Mich. Ct. App. 2002) (cap limiting noneconomic loss recoveries in medical malpractice actions did not violate the right to jury trial, separation of powers, or equal protection and did not infringe on the Court's rulemaking authority); *Adams ex rel. Adams v. Children's Mercy Hosp.*, 832 S.W.2d 898 (Mo. 1992) (medical liability limit on noneconomic damages did not violate equal protection, open courts, right to remedy, due process, or right to jury trial); *Rose v. Doctors Hosp.*, 801 S.W.2d 841 (Tex. 1990) (Medical Liability and Insurance Improvement Act's limit on wrongful death damages did not violate open courts, right to redress, or equal protection); *Judd v. Drezga*, 103 P.3d 135 (Utah 2004) (medical malpractice noneconomic damages cap did not violate open courts, uniform operation of laws, due process, right to jury trial, or separation of powers); *MacDonald v. City Hosp., Inc.*, 715 S.E.2d 405 (W. Va. 2011) (upholding cap on noneconomic damages); *In re Estate of Verba v. Ghaphery*, 552 S.E.2d 406 (W. Va. 2001) (upholding cap on noneconomic damages); *Robinson v. Charleston Area Med. Ctr.*, 414 S.E.2d 877 (W. Va. 1991) (finding cap on noneconomic damages constitutional); see also Carly N. Kelly & Michelle M. Mello, *Are Medical Malpractice Damages Caps Constitutional? An Overview of State Litigation*, 33 J.L. MED. & ETHICS 515, 527 (2005) ("Over the years, the scales in state courts have increasingly tipped toward upholding noneconomic damages caps.").

12. *MacDonald*, 715 S.E.2d at 421.

13. See *Garhart ex rel. Tinsman v. Columbia/Healthone, L.L.C.*, 95 P.3d 571 (Colo. 2004) (upholding aggregate limit on damages recoverable in health care liability actions); *Scholz v. Metro. Pathologists, P.C.*, 851 P.2d 901 (Colo. 1993) (finding statute did not violate due process or equal protection); *Gourley ex rel. Gourley v. Neb. Methodist Health Sys., Inc.*, 663 N.W.2d 43 (Neb. 2003) (upholding aggregate limit on damages in medical liability actions); *Pulliam v. Coastal Emer. Servs. of Richmond, Inc.*, 509 S.E.2d 307 (Va. 1999) (holding aggregate limit on medical malpractice recoveries constitutional) (affirming *Etheridge v. Med. Ctr. Hosp.*, 376 S.E.2d 525 (Va. 1989)); *Johnson v. St. Vincent Hosp., Inc.*, 404 N.E.2d 585 (Ind. 1980) (upholding aggregate limit on health care liability damages and other medical liability reforms), *overruled on other grounds, In re Stephens*, 867 N.E.2d

constitutionality of limits on noneconomic damages that apply to all personal injury actions<sup>14</sup> or in other contexts.<sup>15</sup> In some states, however, restrictions in state constitutions that have no federal corollary (e.g., “open courts” or “right to a remedy” provisions) and the placement of politics over the public interest have prevented enactment of reforms.<sup>16</sup> Federal legislation would provide a comprehensive, national solution.<sup>17</sup>

Most federal medical liability reform legislation looks to successful state reforms, such as California’s MICRA, as a model for improving the healthcare environment for all Americans.<sup>18</sup> Such legislation would fill in the gaps left by states that have not been able to adopt their own reforms.<sup>19</sup>

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148 (Ind. 2007) (holding attorneys could employ a sliding scale fee arrangement when representing medical malpractice clients under Patient Compensation Fund); *Butler v. Flint Goodrich Hosp.*, 607 So. 2d 517 (La. 1992) (upholding \$500,000 limit on general damages in medical malpractice actions, exclusive of the cost of future medical care and related benefits).

14. See *L.D.G., Inc. v. Brown*, 211 P.3d 1110 (Alaska 2009) (holding that noneconomic damages cap did not violate right to jury trial); *C.J. v. Dep’t of Corr.*, 151 P.3d 373 (Alaska 2006) (holding cap did not violate equal protection); *Evans ex rel. Kutch v. State*, 56 P.3d 1046 (Alaska 2002) (upholding noneconomic damages cap and other tort reforms); *In re Kirkland v. Blaine Cnty. Med. Ctr.*, 4 P.3d 1115 (Idaho 2000) (holding that cap on noneconomic damages did not violate constitutional protections); *DRD Pool Serv., Inc. v. Freed*, 5 A.3d 45 (Md. 2010) (holding limit on noneconomic damages constitutional); *Murphy v. Edmonds*, 601 A.2d 102 (Md. 1992) (upholding statutory cap on noneconomic damages in personal injury actions); *Arbino v. Johnson & Johnson*, 880 N.E.2d 420 (Ohio 2007) (upholding statutory limit on noneconomic damages with a lower limit for small employers).

15. See *Samples v. Fla. Birth-Related Neurological*, 40 So. 3d 18 (Fla. Dist. Ct. App. 2010) (upholding cap on claims by parents by birth-related neurological injuries); *King v. Va. Birth-Related Neurological Injury Comp. Program*, 410 S.E.2d 656 (Va. 1991) (holding that law removing claims of neurologically injured infants from the tort system was constitutional); *Wessels v. Garden Way, Inc.*, 689 N.W.2d 526 (Mich. Ct. App. 2004) (upholding cap on noneconomic loss recoveries in product liability actions); *Mizrahi v. North Miami Med. Ctr., Ltd.*, 761 So. 2d 1040 (Fla. 2000) (holding provision in wrongful death statute precluding adult children from recovering nonpecuniary damages in an action for a parent’s death due to medical malpractice did not violate equal protection); *Adams v. Via Christi Reg’l Med. Ctr.*, 19 P.3d 132 (Kan. 2001) (upholding limit on noneconomic damages for wrongful death); *Peters v. Saft*, 597 A.2d 50 (Me. 1991) (upholding limit on nonmedical damages recoverable against servers of liquor); *Schweich v. Ziegler, Inc.*, 463 N.W.2d 722 (Minn. 1990) (upholding limit on damages for embarrassment, emotional distress, and loss of consortium); *Lawson v. Hoke*, 119 P.3d 210 (Or. 2005) (upholding statute precluding award of noneconomic damages to uninsured motorists in actions arising from automobile accidents).

16. See Victor E. Schwartz et al., *Fostering Mutual Respect and Cooperation Between State Courts and State Legislatures: A Sound Alternative to a Tort Tug of War*, 103 W. VA. L. REV. 1, 5–6, 11–12 (2000) (discussing how state legislatures are best suited to “weigh and balance” broad tort policy issues).

17. See *infra* Part II.

18. Cf. CONG. BUDGET OFFICE, *THE EFFECTS OF TORT REFORM: EVIDENCE FROM THE STATES* 1 (2004), available at <http://www.cbo.gov/ftpdocs/55xx/doc5549/Report.pdf> (evaluating the success of tort reforms at the state level to determine whether similar reforms would work federally).

19. See, e.g., Help Efficient, Accessible, Low-cost, Timely Healthcare (HEALTH) Act of 2011, H.R. 5, 112th Cong. (2011) (as reported in the House of Representatives). The core of H.R. 5 is a \$250,000 limit on noneconomic damages in healthcare liability actions, following the MICRA model. *Id.* § 4(b). Other reforms in H.R. 5 include: (1) a statute of limitations of three years after the date of manifestation of injury or one year after the claimant discovers the injury, with certain exceptions; (2) fair share liability reform to provide that each party is liable based on its percentage of responsibility; (3)

This essay establishes that MICRA-like federal medical liability reform legislation is constitutional,<sup>20</sup> consistent with federalism principles,<sup>21</sup> and represents sound public policy.<sup>22</sup> The analysis is based on existing United States Supreme Court precedent and does not propose new legal theories to expand the application of the United States Constitution's Commerce Clause.<sup>23</sup>

#### I. FEDERAL MEDICAL LIABILITY REFORM LEGISLATION IS CONSTITUTIONAL

Federal medical liability reform legislation is consistent with Congress's authority to regulate interstate commerce given the cross-border impact of medical liability on doctors and patients, and considering the federal government's significant role in the healthcare system.<sup>24</sup> Congress's authority to adopt such legislation is clear.<sup>25</sup>

##### A. *The Commerce Clause*

Article 1, Section 8, Clause 3 of the United States Constitution provides Congress with authority "to regulate commerce . . . among the several states."<sup>26</sup> This enumerated power is the source of Congress's authority to enact medical liability reform legislation.<sup>27</sup> The United States Supreme Court "has made clear that the commerce power extends not only to 'the use of channels of interstate or foreign commerce' and to 'protection of the instrumentalities of interstate commerce,' but also to 'activities affecting commerce.'"<sup>28</sup> In determining whether

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sliding scale limits on attorney contingency fees depending on the amount of damages; (4) permitting the jury to consider compensation the plaintiff received from collateral sources; (5) reserving punitive damages to the most reprehensible conduct by requiring clear and convincing evidence that a healthcare provider acted with malicious intent to injure the claimant or deliberately failed to avoid unnecessary injury the claimant was substantially certain to suffer; (6) limiting punitive damages to the greater of two times the amount of economic damages awarded or \$250,000; (7) a compliance with standards defense to punitive damages for manufacturers and distributors of FDA-approved medical products; and (8) authorizing periodic payments of future damages. *Id.* §§ 3, 4(d), 5(a), 6, 7(a)–(c), 8(a).

20. *See infra* Part I.

21. *See infra* Parts I.B, E, F.

22. *See infra* Part I.C, E.

23. *See infra* Part I.A.

24. *See* HENRY COHEN, CONG. RESEARCH SERV., MEDICAL MALPRACTICE LIABILITY REFORM: LEGAL ISSUES AND FIFTY-STATE SURVEY OF CAPS ON PUNITIVE DAMAGES AND NONECONOMIC DAMAGES 2 (2005), available at [http://assets.opencrs.com/rpts/RL31692\\_20050208.pdf](http://assets.opencrs.com/rpts/RL31692_20050208.pdf) (noting that Congress has power to regulate medical malpractice under the Commerce Clause).

25. *See infra* Part I (outlining constitutional principles upon which Congress has the power and authority to adopt federal medical liability legislation).

26. U.S. CONST. art. I, § 8, cl. 3.

27. HENRY COHEN & VANESSA K. BURROWS, CONG. RESEARCH SERV., FEDERAL TORT REFORM LEGISLATION: CONSTITUTIONALITY AND SUMMARIES OF SELECTED STATUTES 2–3 (2008) (stating that tort reform legislation would generally be within Congress's commerce power).

28. *Hodel v. Va. Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264, 276–77 (1981) (quoting *Perez v. United States*, 402 U.S. 146, 150 (1971)).

Congress has acted within its authority under the Commerce Clause, a court will look to whether the activity is economic in nature, whether there are discernable ties to commerce, whether the activity as a whole has an effect on commerce, and what congressional findings have been made with respect to the activity's effects on commerce.<sup>29</sup> A federal statute will survive a Commerce Clause challenge if the law regulates activities that, when "viewed in the aggregate," substantially affect interstate commerce.<sup>30</sup>

Since the 1942 case of *Wickard v. Filburn*,<sup>31</sup> involving Congress's power to regulate the production of homegrown wheat, the United States Supreme Court has interpreted the Commerce Clause quite broadly with respect to the regulation of economic activity.<sup>32</sup> In *Wickard*, the Court found that "even if appellee's activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce . . ." <sup>33</sup> The Court rejected a Commerce Clause challenge to the statute, concluding that wheat farming as a whole substantially affects interstate commerce.<sup>34</sup> The Court later reaffirmed that "even activity that is purely intrastate in character may be regulated by Congress, where the activity, combined with like conduct by others similarly situated, affects commerce among the States or with foreign nations."<sup>35</sup>

More recently, the Supreme Court has placed appropriate restrictions on how far Congress may go in using the Commerce Clause to justify federal action,<sup>36</sup> but the application of this law to federal medical liability reform legislation is not a close call.<sup>37</sup> For example, in *United States v. Lopez*,<sup>38</sup> the Court invalidated the Gun

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29. See *United States v. Lopez*, 514 U.S. 549, 562, 558–59 (1995) (describing the factors used by the Court to decide whether Congress has authority under the Commerce Clause to regulate an activity).

30. *Id.* at 561.

31. 317 U.S. 111 (1942).

32. *Id.* at 114–17, 128–33; see, e.g., *Lopez*, 514 U.S. at 567–68 (holding federal criminal law prohibiting possession of a firearm in a local school zone unconstitutional because the law did not regulate an economic activity and thus had no effect on interstate commerce).

33. *Wickard*, 317 U.S. at 125.

34. *Id.* at 128–29.

35. See *Hodel v. Va. Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264, 277 (1981) (quoting *Fry v. United States*, 421 U.S. 542, 547 (1975)). Libertarian legal scholar Randy Barnett, an opponent of medical liability reform at the federal level, has nevertheless acknowledged that the Substantial Effects Doctrine "is followed even by conservative justices." Randy E. Barnett, Op-Ed., *Tort Reform and the GOP's Fair-Weather Federalism*, WASH. EXAMINER, May 21, 2011, <http://washingtonexaminer.com/opinion/op-eds/2011/05/tort-reform-and-gops-fair-weather-federalism>.

36. See *United States v. Lopez*, 514 U.S. 549, 558–60 (1995) (outlining three broad categories of activity that Congress may regulate, including the use of the channels of interstate commerce, the instrumentalities of interstate commerce, and those activities having a substantial relation to interstate commerce).

37. *Id.* at 567–68 (overturning a federal criminal law prohibiting possession of a firearm in a local school zone).

38. 514 U.S. 549 (1995).

Free School Zones Act of 1990, which provided a federal criminal penalty for possession of a firearm in a local school zone.<sup>39</sup> Similarly, in *Morrison v. United States*,<sup>40</sup> the Court overturned the Violence Against Women Act for its reliance on the Commerce Clause in making domestic violence against women a federal crime.<sup>41</sup> These cases simply caution Congress that the Court will not allow the Commerce Clause to be stretched to the point of supporting “criminal statute[s] that by [their] terms ha[ve] nothing to do with ‘commerce’ of any sort of economic enterprise, however broadly one might define those terms.”<sup>42</sup>

Congress continues to have broad authority to regulate economic activity.<sup>43</sup> For example, while the Supreme Court struck down the criminal penalty for possession of a firearm in a school zone, courts have uniformly upheld the constitutionality of a recent federal law that protects federally licensed manufacturers and sellers of firearms from most civil liability for injuries independently and intentionally inflicted by criminals who use their non-defective products (i.e., the Protection of Lawful Commerce in Arms Act).<sup>44</sup>

Medical injury litigation, in particular, is easily distinguished from *Lopez* and *Morrison* because “(1) the activity in question . . . is itself commercial activity and (2) the effects of medical malpractice litigation on the national economy are substantial.”<sup>45</sup> As scholars have explained:

Medical malpractice litigation is big business. The direct costs of medical malpractice litigation have been estimated at \$28 billion a year, but the economic effects are far larger and resonate throughout the economy in terms of ever-increasing costs for medical care. Moreover, many medical malpractice lawyers, experts, and medical malpractice insurance carriers do business in multiple states and thus are engaged directly in interstate commerce.<sup>46</sup>

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39. *Id.* at 551.

40. 529 U.S. 598 (2000).

41. *Id.* at 627. *See also* *United States v. Wilkinson*, 626 F. Supp. 2d 184, 194–95 (D. Mass. 2009) (holding that Congress exceeded its powers under the Commerce Clause and Necessary and Proper Clause by enacting a statute authorizing civil commitment of a sexually dangerous person).

42. *Lopez*, 514 U.S. at 561.

43. *See, e.g., In re Estate of Charlot v. Bushmaster Firearms, Inc.*, 628 F. Supp. 2d 174, 182 (D.D.C. 2009) (noting that acts of Congress have a “strong presumption of validity” and courts will uphold laws that have an economic purpose unless it is demonstrated that the laws are irrational or arbitrary).

44. *See Ilto v. Glock, Inc.*, 565 F.3d 1126, 1129 (9th Cir. 2009), *cert. denied*, 130 S. Ct. 3320 (2010) (dismissing claims brought by shooting victims against federally licensed manufacturers and sellers of firearms and holding the shield from liability under the PLCAA valid); *City of New York v. Beretta U.S.A. Corp.*, 524 F.3d 384, 395 (2d Cir. 2008) (finding Congress did not exceed its Commerce Clause authority in enacting the PLCAA); *In re Estate of Charlot*, 628 F. Supp. 2d at 185–86 (concurring “with the rationale of the other courts that have examined the PLCAA”).

45. E. Donald Elliott et al., *Administrative “Health Courts” for Medical Injury Claims: The Federal Constitutional Issues*, 33 J. HEALTH POL. POL’Y & L. 761, 771 (2008).

46. *Id.* at 767 (citation omitted).

The nonpartisan Congressional Research Service (CRS) has closely analyzed judicial precedent and concluded “there seems little doubt that tort reform legislation, in general, would be within Congress’s commerce power.”<sup>47</sup> Under its power to regulate interstate commerce, Congress may “make such legislation applicable to intrastate torts, because tort suits generally affect interstate commerce.”<sup>48</sup> The only arguable exception, CRS recognized, is when a federal tort reform applies to a particular intrastate tort, such as an assault by one individual resident on another, that has no connection with any commercial activity.<sup>49</sup> CRS concluded that “[t]here would appear to be no due process or federalism (or any other constitutional) impediments to Congress’s limiting a state common law right of recovery.”<sup>50</sup> With respect to MICRA-like federal legislation, CRS has specifically recognized that “[m]edical malpractice liability is governed by state law, but Congress has the power, under the Commerce Clause of the United States Constitution (Art. I, § 8, cl. 3) to regulate it.”<sup>51</sup>

Healthcare is truly national in scope and fundamental to interstate commerce.<sup>52</sup> Congress promotes access to healthcare by making health insurance a tax-free benefit for employees and their families.<sup>53</sup> In addition, the Medicare and Medicaid programs are the financing system for tens of millions of Americans.<sup>54</sup> The FY 2011 federal budget recognized that “[t]he key drivers of the long-range deficit are the Government’s major health and retirement programs: Medicare, Medicaid and Social Security.”<sup>55</sup> Based on the federal expenditures for these and other programs, and the interstate nature of the medical liability insurance market, Congress has authority to “regulate” the field of medical liability.<sup>56</sup> By placing an

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47. COHEN & BURROWS, *supra* note 27, at 2.

48. *Id.* at 18.

49. *Id.* at 2.

50. *Id.* at 18.

51. COHEN, *supra* note 24, at 1.

52. See Abigail R. Moncrieff, *Federalization Snowballs: The Need for National Action in Medical Malpractice Reform*, 109 COLUM. L. REV. 844, 847–48 (2009) (noting that state medical malpractice spillover costs are covered by the federal government).

53. See OFFICE OF MGMT. & BUDGET, ANALYTICAL PERSPECTIVES: BUDGET OF THE U.S. GOVERNMENT FISCAL YEAR 2011, at 236–37 (2010) [hereinafter 2011 BUDGET OF THE U.S.] (outlining tax consequences to employers and individuals of health insurance and expenses). Tax-free health insurance is estimated to cost the federal government more than \$1 trillion in foregone revenue between 2011 and 2015. *Id.* at 211 tbl.16–1.

54. *Id.* at 45 (explaining the growth of the Medicare and Medicaid programs and the coverage these programs provide to America’s disabled and elderly).

55. *Id.*

56. See, e.g., Robert M. Ackerman, *Tort Law and Federalism: Whatever Happened to Devolution?*, 14 YALE L. & POL’Y REV. 429, 443 (1996) (noting that under the spending power, federal funding for Medicare and Medicaid could provide a rationale for federal regulation of medical malpractice laws); Paul Taylor, *The Federalist Papers, the Commerce Clause, and Federal Tort Reform*, 45 SUFFOLK U. L. REV. 357, 357 (2012) (stating, “In the modern era, Congress has enacted many federal ‘tort reform’

upper limit on subjective and otherwise limitless pain and suffering damages against doctors and other medical professionals, Congress can promote a more cost-effective healthcare delivery system.

### B. *The Tenth Amendment*

Federal medical liability reform legislation is consistent with the Tenth Amendment, which provides that “[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”<sup>57</sup> The United States Supreme Court has interpreted the Tenth Amendment to prohibit Congress from “compel[ling] the States to implement, by *legislation* or *executive* action, federal regulatory programs.”<sup>58</sup> In 1992, in *New York v. United States*,<sup>59</sup> the Court invoked the Tenth Amendment to invalidate a federal statute that required states to enact legislation to provide for the disposal of radioactive waste or “take title” to the waste.<sup>60</sup> The Court ruled that Congress may not “command a state government to enact *state* regulation” even if the federal government might regulate the area directly—it may not “conscript state governments as its agents.”<sup>61</sup> Five years later, in *Printz v. United States*,<sup>62</sup> the Court applied similar reasoning to invalidate the Brady Handgun Violence Prevention Act.<sup>63</sup> The Brady Act required chief law enforcement officers of the states to conduct a background check of individuals applying for handgun permits.<sup>64</sup> *Printz* spoke on the “compelled enlistment of state executive officers for the administration of federal programs,” which the Court referred to as “executive-commandeering.”<sup>65</sup> The Court ruled that Congress violates the Tenth Amendment when “the whole *object* of the law [is] to direct the functioning of the state *executive*, and hence to compromise the structural framework of dual sovereignty.”<sup>66</sup>

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statutes that supersede contrary state laws, and judicial precedents leave little doubt as to their constitutionality.”).

57. U.S. CONST. amend. X. See Victor E. Schwartz et al., *Federalism and Federal Liability Reform: The United States Constitution Supports Reform*, 36 HARV. J. ON LEGIS. 269, 304 (1999) (noting that legislation enacted under Congress’s enumerated powers is constitutional).

58. *Printz v. United States*, 521 U.S. 898, 925 (1997) (emphasis added).

59. 505 U.S. 144 (1992).

60. *Id.* at 175–76.

61. *Id.* at 178.

62. 521 U.S. 898 (1997) (holding that Congress cannot require States to enforce a federal regulatory program).

63. *Id.* at 933 (“The Federal Government may not compel the States to enact or administer a federal regulatory program.”) (quoting *New York v. United States*, 505 U.S. 144, 188 (1992)).

64. *Id.* at 902–03.

65. *Id.* at 905, 916.

66. *Id.* at 932 (emphasis added).

In contrast, federal medical liability reform legislation does *not* require states to enact legislation, nor does it compel state executive branch action.<sup>67</sup> The legislation simply provides legal rules to be applied in medical liability actions.<sup>68</sup> Presently, federal courts sitting in diversity and state courts routinely engage in a choice-of-law analysis to determine which law to apply in a particular tort case.<sup>69</sup> For example, under current law, a federal or state court in California may choose to apply Oklahoma law if Oklahoma has a greater nexus to the case.<sup>70</sup> After enactment, federal medical liability reforms would be factored into the same type of calculus, with courts applying the federal law to the extent it provides a rule and the applicable state law to all other aspects of the case. It is also worth noting that because of the familiarity of courts with choice-of-law analyses,<sup>71</sup> and the courts' frequent application of state laws that are similar (if not identical) to MICRA-like federal reforms,<sup>72</sup> the legislation would not result in confusion when applied by courts after enactment.

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67. *Cf. Reno v. Condon*, 528 U.S. 141, 142 (2000) (finding that Congress, in enacting the Drivers' Privacy Protection Act, had an adequate grounding in interstate commerce and properly regulated the sale or release of drivers' personal information because even while placing some obligations on state agencies, "[i]t does not require the South Carolina Legislature to enact any laws or regulations . . . and it does not require state officials to assist in the enforcement of federal statutes regulating private individuals").

68. *See, e.g.*, Help Efficient, Accessible, Low-Cost, Timely Healthcare (HEALTH) Act of 2011, H.R. 5, 112th Cong. § 2(a)(1) (purporting to improve access to health care services and enhance medical care by decreasing the unnecessary burden of liability on healthcare providers).

69. *See, e.g.*, *McCann v. Foster Wheeler LLC*, 225 P.3d 516, 524 (Cal. 2010) (explaining California's approach to choice of law rules).

70. *See id.* at 527, 534 (noting that once a court determines there is a conflict of law between two states, the court will apply the law of the state whose interest would be more damaged if that state's law is not used).

71. *See id.* at 524 (explaining the choice of law rule that California "adopted and consistently applied" over the past forty years).

72. *See, e.g., id.* at 530, 536 (discussing suits brought by California plaintiffs against out-of-state defendants seeking to apply California law when the claim arose in a state that restricts awards for economic damages).

*C. The Guarantees of Due Process and Equal Protection*

The Fifth Amendment provides that a person shall not be “deprived of life, liberty, or property, without due process of law.”<sup>73</sup> Constitutional principles also prohibit the government from denying to any person the equal protection of the laws.<sup>74</sup> In cases involving constitutional challenges to economic regulation, such as liability limits, courts traditionally apply a deferential test that requires only that the law have a rational relationship to a legitimate government objective.<sup>75</sup> Federal medical liability reform legislation is rationally related to addressing healthcare costs and the practice of “defensive medicine,” while ensuring that people with meritorious claims receive adequate compensation.<sup>76</sup>

Tort reform legislation unavoidably involves a certain element of line-drawing. Consequently, plaintiffs’ lawyers have claimed that it is unconstitutional for a law to treat individuals in medical liability claims differently than those with other personal injuries<sup>77</sup> or impose a limit that will have a greater impact on those with more serious injuries than those with lesser injuries.<sup>78</sup> The United States Supreme Court, however, has firmly rejected such arguments in other tort liability contexts.<sup>79</sup> In addition, federal appellate courts have upheld noneconomic damages limits as “classic example[s]” of economic regulation—“a legislative effort to structure and accommodate ‘the burdens and benefits of economic life.’”<sup>80</sup> As the Tenth Circuit explained, “[w]hen a legislature strikes a balance between a tort victim’s right to recover noneconomic damages and society’s interest in preserving the availability of affordable liability insurance, it is engaging in its fundamental and legitimate role of structur[ing] and accommodat[ing] ‘the burdens and benefits of economic life.’”<sup>81</sup>

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73. U.S. CONST. amend V.

74. U.S. CONST. amend. XIV, § 1. *See* Gordon A. Christenson, *Using Human Rights Law to Inform Due Process and Equal Protection Analysis*, 52 U. CIN. L. REV. 3, 29 (1983) (outlining the “suggestion that equal protection guarantees were part of the Constitution” before the enactment of the Fourteenth Amendment).

75. *See* *United States v. Carolene Products Co.*, 304 U.S. 144, 152 (1938) (explaining the “rational basis” standard in the assessment of constitutionality).

76. *See* *Hoffman v. United States*, 767 F.2d 1431, 1437 (9th Cir. 1985) (noting that a California statute providing for a cap on noneconomic damages satisfied the rational basis standard and therefore did not violate the Equal Protection Clause).

77. *Knowles v. United States*, 829 F. Supp. 1147, 1153 & n.5 (D.S.D. 1993).

78. *Id.*

79. *See* *Schwartz et al.*, *supra* note 57, at 280–97 (describing cases in which the Supreme Court has upheld legislation regulating specific tort classifications as constitutional).

80. *See, e.g., Boyd v. Bulala*, 877 F.2d 1191, 1196 (4th Cir. 1989) (quoting *Duke Power Co. v. Carolina Env’tl. Study Grp., Inc.*, 438 U.S. 59 (1978)). In *Boyd*, the Fourth Circuit held that Virginia’s statutory limit on medical liability awards had a reasonable relation to a valid legislative purpose and did not violate due process or equal protection. *Id.* at 1197.

81. *Patton v. TIC United Corp.*, 77 F.3d 1235, 1247 (10th Cir.) (quoting *Boyd*, 877 F.2d at 1196).

#### D. Right to Jury Trial

The Seventh Amendment states that “[i]n suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved.”<sup>82</sup> Federal appellate courts recognize that the jury’s role “as factfinder [is] to determine the extent of a plaintiff’s injuries,” not “to determine the legal consequences of its factual findings.”<sup>83</sup> Furthermore, a judge who “merely implement[s] a policy decision of the legislature in applying the law enacted by the legislature when it predetermined the extent and amount of damages that it, the legislature, would allow in a malpractice action” does not “reexamin[e] a ‘fact tried by a jury’” within the meaning of the Seventh Amendment.<sup>84</sup> State high courts have also found that statutory limits on noneconomic damages do not intrude on the role of the jury.<sup>85</sup>

When opponents of limits on noneconomic damages have challenged state statutes, they have sometimes pointed to case law holding that a *judge* may not unilaterally reduce a jury’s verdict.<sup>86</sup> These cases recognize that a judge who finds that a verdict is excessive or otherwise not supported by the evidence must offer the plaintiff a choice—accept the lower verdict or face a new trial, a process known as “remittitur.”<sup>87</sup> Statutory limits on noneconomic damages, however, reflect a public policy choice by the *legislature*, not a legal decision by a *judge*.<sup>88</sup>

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82. U.S. CONST. amend. VII.

83. *Boyd*, 877 F.2d at 1196.

84. *Davis v. Omitowoju*, 883 F.2d 1155, 1162 (3d Cir. 1989).

85. *See, e.g.*, *Fein v. Permanente Med. Grp.* 695 P.2d 665, 680 (Cal. 1985) (noting the “broad control” that the Legislature has over the assessment of damages); *Peters v. Saft*, 597 A.2d 50, 53–54 (Me. 1991) (emphasizing a jury’s right to determine damages) (citation omitted); *DRD Pool Servs., Inc. v. Freed*, 5 A.3d 45, 57 (Md. 2010) (noting that a cap on damages is independent from the right to a jury trial.); *Adams v. Children’s Mercy Hosp.*, 832 S.W.2d 898, 907 (Mo. 1992) (en banc) (upholding a statutory limit on noneconomic damages following the jury’s determination of facts and assessment of damages); *Arbino v. Johnson & Johnson*, 880 N.E.2d 420, 431 (Ohio 2007) (explaining that awards can be properly modified “[s]o long as the fact-finding process is not intruded upon”); *Pulliam v. Coastal Emergency Servs.*, 509 S.E.2d 307, 312 (Va. 1999) (“The medical malpractice cap, we said, does nothing more than establish the outer limits of a remedy; remedy is a matter of law and not of fact; and a trial court applies the remedy’s limitation only after the jury has fulfilled its fact-finding function.”) (citing *Etheridge v. Med. Ctr. Hosps.*, 376 S.E.2d 525, 529 (Va. 1989)).

86. *See Hetzel v. Prince William Cnty., Va.*, 523 U.S. 208, 211 (1998) (holding that a court lacks authority to modify a damage award entered by a jury).

87. *See BLACK’S LAW DICTIONARY* 409 (9th ed. 2009) (defining remittitur as “[a]n order awarding a new trial, or a damages amount lower than that awarded by the jury, and requiring the plaintiff to choose between those alternatives”). Federal courts have used remittitur for nearly 200 years. *See Blunt v. Little*, 3 F. Cas. 760, 761–62 (C.C.D. Mass. 1822) (No. 1,578) (determining that the court may grant a new trial for excessive damages and that it is the duty of the court to interfere in order to prevent a wrong, if the jury award reflects gross error). Despite its firm establishment in federal law and practice, much deference is given to juries that “had the opportunity to judge the credibility of the witnesses at trial.” *Tezak v. Montgomery Ward & Co., Inc.*, 33 F. App’x 172, 178 (6th Cir. 2002). *Dimick v. Schiedt*, 293 U.S. 474, 484–85 (1935), involved whether a judge may *increase* a jury’s verdict, rather than reduce it, which is a distinction the Supreme Court recognized as significant because no jury would have passed on the increased amount. Furthermore, the *Dimick* decision “was directed at the power of

In addition, opponents of limits on civil tort damages have argued that a decision involving federal copyright law, *Feltner v. Columbia Pictures Television, Inc.*,<sup>89</sup> supports their view.<sup>90</sup> It does not. *Feltner* found only that the plaintiff had a right for a jury to determine the amount of his or her statutory damages, not that a plaintiff had a right to have a jury exceed the limits set by Congress on such damages.<sup>91</sup> Any question that *Feltner* prohibits such limits is discredited by the fact that the Copyright Act itself authorizes damages either “in a sum of not less than \$500 or more than \$20,000,” or “a sum of not more than \$100,000,” depending on the circumstances.<sup>92</sup>

### *E. Courts Routinely Uphold Federal Civil Justice Reform Laws*

For over a century, courts have consistently upheld federal tort reform laws as constitutional.<sup>93</sup> Early laws regulated liability for personal injury and property damage on railroads and ships.<sup>94</sup> In the 1970s and 1980s, courts upheld federal laws addressing liability stemming from a wide range of issues, including black lung disease,<sup>95</sup> nuclear power,<sup>96</sup> swine flu<sup>97</sup> and childhood vaccinations,<sup>98</sup> and atomic weapons testing,<sup>99</sup> among others. Since that time, the judiciary has upheld federal

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judges, not of the legislature and, by virtue of the very context of the decision, related to modification of a jury verdict by a judge, not an enactment of a statute.” *Franklin v. Mazda Motor Corp.*, 704 F. Supp. 1325, 1331 (D. Md. 1989).

88. *See Davis*, 883 F.2d at 1161 (holding that it is the role of the legislature, not the jury, to “determine the legal consequences of its factual findings”).

89. 523 U.S. 340 (1998).

90. *Id.* at 355.

91. *Id.*

92. 17 U.S.C. § 504(c)(1)–(2) (2006).

93. *Schwartz et al.*, *supra* note 57, at 280.

94. *See Crowell v. Benson*, 285 U.S. 22, 37–39 (1932) (upholding the Longshore and Harbor Workers’ Compensation Act); *Mondou v. N.Y., New Haven & Hartford R.R. Co.*, 223 U.S. 1, 49–50 (1912) (upholding the Federal Employers’ Liability Act of 1908); *Providence v. Hill Mfg. Co.*, 109 U.S. 578, 588 (1883) (upholding the Limitation of Vessel Shipowners’ Liability Act and the Harter Act).

95. *See Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 13–14 (1976) (upholding the Black Lung Benefits Act of 1972).

96. *See Duke Power Co. v. Carolina Envtl. Study Grp., Inc.*, 438 U.S. 59, 86–88 (1978) (upholding the Price-Anderson Act).

97. *See DiPippa v. United States*, 687 F.2d 14, 19 (3d Cir. 1982) (upholding the Swine Flu Act on rational basis grounds); *Ducharme v. Merrill-Nat’l Labs., Inc.*, 574 F.2d 1307, 1311 (5th Cir. 1978), *cert. denied*, 439 U.S. 1002 (1978) (upholding the Swine Flu Act as a “valid exercise of Congressional power under the Constitution”); *Wolfe v. Merrill-Nat’l Labs., Inc.*, 433 F. Supp. 231, 238 (M.D. Tenn. 1977); *Jones v. Wyeth Labs., Inc.*, 583 F.2d 1070, 1070 (8th Cir. 1978); *Sparks v. Wyeth Labs., Inc.*, 431 F. Supp. 411, 418 (W.D. Okla. 1977) (upholding the Swine Flu Act as Constitutional on Seventh Amendment grounds).

98. *See Black v. Sec’y of Health & Human Servs.*, 93 F.3d 781, 787 (Fed. Cir. 1996) (upholding the eligibility requirement for participation in federal no-fault compensation program for injuries arising out of vaccine administration).

99. *See Hammond v. United States*, 786 F.2d 8, 12 (1st Cir. 1986) (upholding a statute relieving government contractors operating nuclear weapons testing from tort liability); *see also In re Consol.*

laws limiting the liability of general aviation aircraft manufacturers,<sup>100</sup> rental car companies,<sup>101</sup> and firearms manufacturers.<sup>102</sup> Federal securities litigation reform legislation has also been upheld as constitutional.<sup>103</sup> In recent years, Congress has promoted various socially desirable activities by providing liability relief for school teachers,<sup>104</sup> volunteers,<sup>105</sup> suppliers of materials used in implantable medical devices,<sup>106</sup> donors of grocery products to nonprofit organizations,<sup>107</sup> good Samaritans who use automated external defibrillators (AEDs) to help people in medical emergencies,<sup>108</sup> and Amtrak.<sup>109</sup> As the United States Supreme Court has recognized:

Our cases have clearly established that “[a] person has no property, no vested interest, in any rule of the common law.” The “Constitution does not forbid the creation of new rights, or the abolition of old ones recognized by the common law, to attain a permissible legislative object,” despite the fact that “otherwise settled expectations” may be upset thereby. Indeed, statutes

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U.S. Atmospheric Testing Litig., 820 F.2d 982, 991–92 (9th Cir. 1987) (limiting the tort liability for government contractors for radiation exposure).

100. See, e.g., *Lyon v. Agusta S.P.A.*, 252 F.3d 1078, 1089 (9th Cir. 2001) (upholding Congressional authority to bar action under the General Aviation Revitalization Act [GARA] of 1994); *Robinson v. Hartzell Propeller Inc.*, 454 F.3d 163, 174 (3d Cir. 2006) (upholding the constitutionality of GARA).

101. For a review of cases upholding the Graves Amendment, which governs liability against rental car companies, see, e.g., *Garcia v. Vanguard Car Rental USA, Inc.*, 540 F.3d 1242, 1253 (11th Cir. 2008); *Carton v. Gen. Motors Acceptance Corp.*, 639 F. Supp. 2d 982, 992 (N.D. Iowa 2009); *Green v. Toyota Motor Creditcorp.*, 605 F. Supp. 2d 430, 434–35 (E.D.N.Y. 2009); *Flagler v. Budget Rent A Car Sys., Inc.*, 538 F. Supp. 2d 557 (E.D.N.Y. 2008); *Stampolis v. Provident Auto Leasing Co.*, 586 F. Supp. 2d 88, 92–94, 105 (E.D.N.Y. 2008); *Jasman v. DTG Operations, Inc.*, 533 F. Supp. 2d 753, 756 (W.D. Mich. 2008); *Berkan v. Penske Truck Leasing Can., Inc.*, 535 F. Supp. 2d 341, 345 (W.D.N.Y. 2008); *Rodriguez v. Testa*, 993 A.2d 955, 969 (Conn. 2010).

102. See *supra* note 44 and accompanying text.

103. See *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 326–27 (2007) (holding that heightened pleading standards prescribed by the Private Securities Litigation Reform Act did not violate the Seventh Amendment).

104. See Paul D. Coverdell Teacher Protection Act of 2001, 20 U.S.C. §§ 6731–6738 (2006) (excepting teachers from liability when acting within the scope of their employment).

105. See Volunteer Protection Act of 1997, 42 U.S.C. §§ 14501–14505 (2006) (restricting the liability of a volunteer at a nonprofit entity for the actions of that volunteer acting on behalf of the nonprofit or governmental entity).

106. See Biomaterials Access Assurance Act of 1998, 21 U.S.C. §§ 1605–1606 (2006) (providing options for biomaterials suppliers to limit their liability).

107. See Bill Emerson Good Samaritan Food Donation Act of 1996, 42 U.S.C. § 1791 (2006) (preventing liability of an individual who donates apparently good food to a nonprofit organization and to a nonprofit organization that received an apparently good food donation).

108. See Cardiac Arrest Survival Act of 2000, 42 U.S.C. § 238q (2006) (providing immunity for an individual who attempts to help someone in cardiac arrest with an automated external defibrillator device).

109. See Amtrak Reform and Accountability Act of 1997, 49 U.S.C. § 28103 (2006) (limiting the liability of passenger railways by requiring a plaintiff to show, by “clear and convincing evidence,” that the railroad conducted itself with “a conscious, flagrant indifference to the rights or safety of others”).

limiting liability are relatively commonplace and have consistently been enforced by the courts.<sup>110</sup>

*F. Time After Time, Courts Reject Federal Constitutional Challenges to State Medical Liability Reform Laws*

Decisions upholding state medical liability reforms under the United States Constitution also support the constitutionality of MICRA-like federal medical liability reform legislation.<sup>111</sup> Numerous federal courts have rejected challenges to state noneconomic damages limits under the United States Constitution as meritless.<sup>112</sup> Even personal injury lawyers have long understood that the United States Constitution does not bar civil liability reform.<sup>113</sup> That is why a leading lawyer who represents the interests of personal injury lawyers has bluntly

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110. *Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59, 88 n.32 (1978) (citations omitted).

111. *See* *Fein v. Permanente Med. Grp.*, 695 P.2d 665, 682 (Cal. 1985) (upholding the constitutionality of MICRA and finding it within state legislature's authority). Similarly, a federal statute can be justified under the need of furthering a legitimate state interest, such as limiting the costs of medical malpractice insurance. *Id.* at 686. In addition to justifying the legitimate federal interest in medical liability reform, Congress also has such authority under the Commerce Clause. *See* COHEN, *supra* note 24, at 1.

112. *See, e.g., In re Estate of McCall v. United States*, 642 F.3d 944, 951 (11th Cir. 2011) (finding Florida's limit on noneconomic damages in medical liability actions does not violate the U.S. Constitution); *Smith v. Botsford Gen. Hosp.*, 419 F.3d 513, 519–20 (6th Cir. 2005) (finding Michigan's limit on noneconomic damages in medical malpractice actions does not violate the Seventh Amendment); *Patton v. TIC United Corp.*, 77 F.3d 1235, 1247 (10th Cir. 1996) (upholding Kansas's limit on noneconomic losses in health care liability actions); *Boyd v. Bulala*, 877 F.2d 1191, 1197 (4th Cir. 1989) (finding Virginia's limit on recovery in medical malpractice actions does not violate the U.S. Constitution); *Davis v. Omitowaju*, 883 F.2d 1155, 1165 (3d Cir. 1989) (finding the Virgin Islands' limit on noneconomic damages does not violate the Seventh Amendment); *Hoffman v. United States*, 767 F.2d 1431, 1437 (9th Cir. 1985) (finding California's limit on noneconomic damages in medical malpractice suits does not violate the U.S. Constitution); *In re Estate of Sisk v. Manzanares*, 270 F. Supp. 2d 1265, 1278–79 (D. Kan. 2003) (upholding Kansas's noneconomic damage cap in wrongful death actions under the U.S. Constitution); *Watson v. Hortman*, No. 2:08-CV-81-TJW-CE, 2010 WL 3566736, at \*6 (E.D. Tex. Sept. 13, 2010) (rejecting a challenge to Texas's limit on noneconomic damages in health care liability claims under the U.S. and Texas Constitutions); *Simms v. Holiday Inns, Inc.*, 746 F. Supp. 596, 598 (D. Md. 1990) (upholding Maryland's limit on noneconomic damages in personal injury actions); *Franklin v. Mazda Motor Corp.*, 704 F. Supp. 1325, 1335 (D. Md. 1989) (finding Maryland's noneconomic damage limit does not violate the U.S. or Maryland Constitutions); *Fed. Express Corp. v. United States*, 228 F. Supp. 2d 1267, 1271 (D. N.M. 2002) (finding New Mexico's medical liability limit is not arbitrary and capricious). *See also* *Gasparini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 429 n.9 (1996) (recognizing that courts of appeals regularly find that district court application of statutory caps on medical malpractice jury verdicts does not violate the Seventh Amendment); *Owen v. United States*, 935 F.2d 734, 739 (5th Cir. 1991) (finding medical malpractice liability limit valid under Louisiana's Constitution).

113. *See* Victor E. Schwartz & Leah Lorber, *Judicial Nullification of Civil Justice Reform Violates the Fundamental Federal Constitutional Principle of Separation of Powers: How to Restore the Right Balance*, 32 RUTGERS L.J. 907, 917–19 (2001) (concluding that federal tort reform is likely to be Constitutional).

counseled plaintiffs' lawyers that "most state constitutions are far superior to the federal constitution" for nullifying tort reform laws.<sup>114</sup>

## II. FEDERAL MEDICAL LIABILITY REFORM LEGISLATION RETAINS STATE AUTHORITY AND PROVIDES SIGNIFICANT FLEXIBILITY FOR STATE-BASED SOLUTIONS

Federal medical liability reform legislation presently under consideration would preserve existing state medical liability laws, regardless of whether a state has enacted a limit on noneconomic damages that is higher or lower than the proposed federal limit of \$250,000.<sup>115</sup> Thus, the legislation would not impact states such as Mississippi, which has enacted a \$500,000 limit on noneconomic damages in medical liability cases,<sup>116</sup> or Maryland, where the noneconomic damage cap applicable to medical liability claims currently stands at \$710,000 and increases \$15,000 each year.<sup>117</sup> Nor would the federal legislation impact laws in states such as Indiana, Nebraska, or Virginia, which have chosen to place aggregate limits on compensatory damages in medical liability lawsuits.<sup>118</sup>

Under the currently proposed federal legislation, states would also have the flexibility to adopt their own limits on damages in healthcare lawsuits *after* the federal legislation is enacted.<sup>119</sup> States would continue to have a wide range of options for addressing medical liability.<sup>120</sup> For instance, with respect to noneconomic damages, states could set a higher limit in all cases or in cases involving catastrophic injury,<sup>121</sup> opt to include an annual inflation adjustment,<sup>122</sup> or

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114. *Id.* at 917 (quoting Ned Miltenberg, Constitutional Challenges to Tort Reform, Learn How to Develop Substantive and Procedural Challenges to Tort Reform Legislation, Address Before the Annual Meeting Session of Ass'n of Trial Lawyers of Am. (1999)).

115. See Help Efficient, Accessible, Low-cost, Timely Healthcare (HEALTH) Act of 2011, H.R. 5, 112th Cong. § 11(c) (2011) (as reported in the House of Representatives) (stating that the proposed federal limit on noneconomic damages preempts state law where there is no state cap on noneconomic damages).

116. MISS. CODE ANN. § 11-1-60(2)(a) (Supp. 2011).

117. MD. CODE ANN., CTS. & JUD. PROC. § 3-2A-09 (LexisNexis 2006).

118. See IND. CODE ANN. § 34-18-14-3 (LexisNexis 2008 & Supp. 2009) (limiting the total amount recoverable in medical malpractice cases to \$1.25 million and to \$250,000 per health care provider with any amount in excess of these limits is to be paid from a Patient's Compensation Fund); NEB. REV. STAT. ANN. § 44-2825 (2010) (limiting total damages in medical malpractice cases to \$1.75 million and the liability of each health care provider liability to \$500,000 with any excess of total liability paid from an Excess Liability Fund); VA. CODE ANN. § 8.01-581.15 (2007 & Supp. 2011) (limiting the total amount recoverable for medical malpractice claims to \$2 million in 2011, with established increases through July 1, 2031 in which the maximum amount recoverable will be \$3 million).

119. See H.R. 5 § 11(c)(1) (stating that federal law will not preempt or supersede any state law specifying a monetary amount for compensatory or punitive damages in a health care suit).

120. See *id.* § 11(c)(1) (allowing states to set their own limits on damages even after the federal law is enacted).

121. See *id.* (permitting states to set limits for compensatory and punitive damages); *cf.* OHIO REV. CODE ANN. § 2315.18 (LexisNexis 2010) (providing that a plaintiff having a substantial physical deformity or severe permanent physical dysfunction as a result of the injury is not subject to a cap on

determine the maximum noneconomic damages that an individual may receive based on his or her remaining life expectancy.<sup>123</sup> These are all approaches currently employed by various states.<sup>124</sup>

Proposed federal limits on noneconomic and punitive damages in medical liability claims would serve as the default rule, governing only when state law would otherwise allow for unlimited damages.<sup>125</sup> The federal limit would apply in states such as Georgia and Illinois, where state legislators enacted limits on noneconomic damages but activist courts struck them down on state constitutional grounds.<sup>126</sup> The federal noneconomic damage limit would also apply in states that have not enacted their own limits on damages in medical liability actions.<sup>127</sup> In a few of these states, the state constitution explicitly precludes legislative limits on damages in personal injury lawsuits,<sup>128</sup> which leaves federal reform as the only option aside from a constitutional amendment.

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noneconomic damages, but an action for a non-catastrophic injury cannot be awarded noneconomic damages exceeding \$250,000).

122. H.R. 5 § 11(c). *Cf.* WIS. STAT. ANN. §§ 655.017, 893.55 (West 2010) (capping noneconomic damages at \$750,000 in 2006 and allowing the board of governors to submit recommendations for changing the limit along with reasons for such change).

123. H.R. 5 § 11(c). *Cf.* ALASKA STAT. § 09.17.010(b)–(c) (2010) (creating a limit that is either \$1,000,000 or the life expectancy of the plaintiff multiplied by \$25,000, whichever is greater).

124. *See supra* notes 116–18 and accompanying text.

125. H.R. 5 §§ 4(a)–(b), 11.

126. *See, e.g.,* Moore v. Mobile Infirmary Ass'n, 592 So. 2d 156, 164 (Ala. 1992) (striking down a \$400,000 cap on noneconomic damages as “an impermissible burden on the right to a trial by jury”); Atlanta Oculoplastic Surgery, P.C. v. Nestlehutt, 691 S.E.2d 218, 224 (Ga. 2010) (holding that Georgia’s cap on noneconomic damages infringed on the constitutional right to a jury trial); LeBron v. Gottlieb Mem’l Hosp., 930 N.E.2d 895, 914 (Ill. 2010) (holding that noneconomic damages cap violated the separation of powers); Brannigan v. Usitalo, 587 A.2d 1232, 1236 (N.H. 1991) (striking down an \$875,000 cap since it violated an individual’s right to recover damages for his or her injuries); Arneson v. Olson, 270 N.W.2d 125, 136 (N.D. 1978) (holding that a North Dakota cap of \$300,000 violated equal protection); Sofie v. Fibreboard Corp., 771 P.2d 711, 723 (Wash. 1989) (finding limit on noneconomic damages to violate an individual’s right to a jury trial).

127. *Cf.* H.R. 5 § 11(c)(1) (providing that any state law establishing monetary damages, enacted before or after proposed federal law, shall not be preempted).

128. *See, e.g.,* ARK. CONST. art. V, § 32 (prohibiting the legislature from enacting a law which would limit the amount recovered for injuries resulting in death or injuries to persons or property, outside of workmen’s compensation); PA. CONST. art. III, § 18 (prohibiting the legislature from limiting the amount recovered for injuries resulting in death or a person’s property outside of an occupational setting); ARIZ. CONST. art. II, § 31 (prohibiting laws that limit the amount of damages recovered for death or injury to any person); *id.* art. XVIII, § 6 (providing that the right to recover damages shall not be abrogated or subject to a statutory limitation); WYO. CONST. art. 10, § 4 (prohibiting limits on the amount of damages that can be recovered in personal injury suits).

## III. FEDERAL ACTION IS NEEDED AND APPROPRIATE

A. *The Adverse Effects of Excessive Medical Liability Extend Beyond State Borders*

When faced with high medical liability insurance premiums, experience shows that doctors will curtail their practices to avoid high-risk areas and often relocate to states with reasonable limits on liability.<sup>129</sup> Congress may appropriately exercise its authority under the Commerce Clause to safeguard the ability of doctors to treat patients without costs that are excessive in comparison to colleagues working in jurisdictions that limit liability.<sup>130</sup>

B. *The Federal Government Has a Large Financial Stake in the Healthcare System*

In March 2011, the Congressional Budget Office (CBO) estimated that nationwide implementation of medical liability reforms, including caps on noneconomic damages, would reduce federal budget deficits by \$62.4 billion over ten years.<sup>131</sup> These savings would come from a \$49.5 billion reduction in costs for federal programs including Medicare, Medicaid, the Children's Health Insurance Program, the Federal Employees Health Benefits program, and subsidies for coverage purchased through health insurance exchanges.<sup>132</sup> The CBO also found that because employers would pay less for health insurance for employees, more of

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129. See Chiu-Fang Chou & Anthony T. Lo Sasso, *Practice Location Choice by New Physicians: The Importance of Malpractice Premiums, Damage Caps, and Health Professional Shortage Area Designation*, 44 HEALTH SERVICES RES. 1271, 1284–85 (2009) (concluding that surgeons are more likely to move to areas with caps on malpractice damage awards); Kessler et al., *supra* note 8, at 2623 (finding greater growth in physician supply in states with reforms that directly limit liability); Hellinger & Encinosa, *supra* note 6, at 13 (finding that physician supply increased at a faster rate in areas with tort reform between 1970 and 2000); Jonathan Klick & Thomas Stratmann, *Does Medical Malpractice Reform Help States Retain Physicians and Does it Matter?* 3–5 (November 3, 2005) (unpublished manuscript), available at [http://www.usc.edu/schools/business/FBE/seminars/papers/AE\\_2-17-06\\_STRATMANN-medmal.pdf](http://www.usc.edu/schools/business/FBE/seminars/papers/AE_2-17-06_STRATMANN-medmal.pdf) (finding that physicians will locate to places where it is cheaper to practice, including the potential costs of damages from malpractice suits).

130. See COHEN & BURROWS, *supra* note 27, at 2 (stating that it is within Congress's power under the Commerce Clause to enact tort reform to safeguard doctors).

131. See CONG. BUDGET OFFICE, *REDUCING THE DEFICIT: SPENDING AND REVENUE OPTIONS 35–36* (2011), <http://www.cbo.gov/ftpdocs/120xx/doc12085/03-10-ReducingTheDeficit.pdf> (estimated savings per year from limiting medical malpractice torts which total \$62.4 billion). CBO has also provided various other estimates of cost savings, which may vary based on the methodology and types of reforms considered. See CONG. BUDGET OFFICE COST ESTIMATE, H.R. 5: HELP EFFICIENT, ACCESSIBLE, LOW COST, TIMELY HEALTHCARE (HEALTH) ACT OF 2011 4, <http://www.cbo.gov/ftpdocs/120xx/doc12095/hr5.pdf> [hereinafter BUDGET OFFICE COST ESTIMATE] (estimating H.R. 5, as reported by the House Judiciary Committee on February 16, 2011, would reduce the federal deficit by \$40 billion over the next decade); Letter from Douglas W. Elmendorf, Dir. Cong. Budget Office to the Honorable Orrin G. Hatch, Senator (Oct. 9, 2009), [http://www.cbo.gov/ftpdocs/106xx/doc10641/10-09-Tort\\_Reform.pdf](http://www.cbo.gov/ftpdocs/106xx/doc10641/10-09-Tort_Reform.pdf) (estimating that nationwide implementation of medical liability reforms would reduce federal budget deficits by \$54 billion over ten years).

132. CONG. BUDGET OFFICE, *supra* note 131, at 35–36.

their employees' compensation would be in the form of taxable wages and other fringe benefits, leading to an additional \$12.9 billion in federal revenue over the next 10 years.<sup>133</sup> Medical liability reform would reduce discretionary spending on federal programs by about \$1.6 billion over the next decade, according to the CBO.<sup>134</sup>

In addition to reducing the deficit, the CBO found that medical liability reform would lead to lower medical liability premiums.<sup>135</sup> As a result, patients would benefit from lower prices for healthcare services.<sup>136</sup> The CBO also concluded that reducing the liability pressures on doctors would lead them to engage in less defensive medicine, saving the cost of expensive, but unnecessary, services.<sup>137</sup> Credible estimates of the annual nationwide costs of defensive medicine conservatively begin at \$50 billion.<sup>138</sup>

### C. *There Is Bipartisan Recognition that Federal Action Is Needed*

In December 2010, President Barack Obama's National Commission on Fiscal Responsibility and Reform discussed many of the reforms included in recently proposed MICRA-like federal legislation, including modifying the collateral source rule, imposing a one- to three-year statute of limitations, and eliminating joint liability.<sup>139</sup> The report stated that many of the Commissioners "believe that we should impose statutory caps on punitive and non-economic damages, and we recommend that Congress consider this approach and evaluate its impact."<sup>140</sup> The Commission found that such changes would save taxpayers \$17 billion through 2020.<sup>141</sup>

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133. *Id.*

134. *Id.* at 36.

135. *Id.* at 35–36.

136. *Id.* at 36.

137. *See id.* (explaining that physicians typically order fewer medical services when they are not worried about medical malpractice claims).

138. *See* Michelle M. Mello et al., *National Costs of the Medical Liability System*, 29 HEALTH AFF. 1569, 1574 (2010) (noting that a 2010 study found that defensive medicine wasted \$45.6 billion in 2008). Other studies have reached significantly higher estimates. *See* PRICEWATERHOUSECOOPERS' HEALTH RESEARCH INST., *THE PRICE OF EXCESS: IDENTIFYING WASTE IN HEALTHCARE SPENDING* 6 (2008), available at <http://www.pwc.com/cz/en/verejna-sprava-zdravotnictvi/prices-of-excess-healthcare-spending.pdf> (estimating the cost of defensive medicine to be \$210 billion); Lawrence J. McQuillan & Hovannes Abramyan, *The Facts about Medical Malpractice Liability Costs*, HEALTH POL'Y PRESCRIPTIONS, Oct. 2009, at 1, 2, available at <http://www.pacificresearch.org/publications/the-facts-about-medical-malpractice-liability-costs> (estimating costs of \$191 billion).

139. *See* NAT'L COMM'N ON FISCAL RESPONSIBILITY & REFORM, 111TH CONG., *THE MOMENT OF TRUTH* 39–40 (2010), available at [http://www.fiscalcommission.gov/sites/fiscalcommission.gov/files/documents/TheMomentofTruth12\\_1\\_2010.pdf](http://www.fiscalcommission.gov/sites/fiscalcommission.gov/files/documents/TheMomentofTruth12_1_2010.pdf).

140. *Id.* at 40.

141. *Id.* at 39.

*D. The Benefits of Healthcare Liability Reform Are Well Documented*

There is a sizable body of literature demonstrating that limits on noneconomic damages can significantly lower medical liability insurance premiums.<sup>142</sup> In California, for instance, medical liability insurance rates have remained relatively stable while mushrooming in many states that have not enacted reforms.<sup>143</sup>

Furthermore, “[m]any studies demonstrate that professional liability exposure has an important effect on recruitment of medical students to the field and retention of physicians within the field and within a particular state.”<sup>144</sup> States with limits on noneconomic damages generally experience greater increases in the number of doctors per capita.<sup>145</sup> For example, adoption of medical liability reforms, including a cap on noneconomic damages, in Mississippi restored access to healthcare<sup>146</sup> in a state that had the lowest number of physicians per capita in the country and where many communities did not have a local obstetrician.<sup>147</sup> Likewise, after Texas enacted a package of reforms that included limits on noneconomic damages, thousands of physicians came to the state, with many settling in underserved communities.<sup>148</sup> Many of these physicians provide essential specialties, such as

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142. See CAROL K. KANE & DAVID W. EMMONS, AM. MED. ASS'N, *THE IMPACT OF LIABILITY PRESSURE AND CAPS ON DAMAGES ON THE HEALTHCARE MARKET: AN UPDATE OF RECENT LITERATURE I* (2007); see also Leonard J. Nelson et al., *Medical Malpractice Reform in Three Southern States*, 4 J. HEALTH & BIOMEDICAL L. 69, 89 (2008) (“It is clear . . . across a number of rigorous studies using a variety of data periods, measures and methods, damage caps have been shown to be effective in reducing medical malpractice insurance premiums.”); OFFICE OF THE ASSISTANT SEC'Y FOR PLANNING & EVALUATION, U.S. DEP'T OF HEALTH & HUMAN SERVS., *CONFRONTING THE NEW HEALTH CARE CRISIS: IMPROVING HEALTH CARE QUALITY AND LOWERING COSTS BY FIXING OUR MEDICAL LIABILITY SYSTEM 15* (2002) [hereinafter *CONFRONTING THE NEW HEALTH CARE CRISIS*], available at <http://aspe.hhs.gov/daltcp/reports/litrefm.pdf> (“[T]here is a substantial difference in the level of medical malpractice premiums in states with meaningful caps . . . and states without meaningful caps.”).

143. See, e.g., Alexis Walters, *Medical Liability Reform and the States*, BULLETIN OF THE AM. C. OF SURGEONS, Mar. 2010, at 29, 29 (noting that since 1975, when MICRA was enacted, medical liability premiums in California have increased approximately less than one-third as much as they have in the country as a whole).

144. Robert L. Barbieri, *Professional Liability Payments in Obstetrics and Gynecology*, 107 OBSTETRICS & GYNECOLOGY 578, 578 (2006).

145. See William E. Encinosa & Fred J. Hellinger, *Have State Caps on Malpractice Awards Increased the Supply of Physicians?*, 24 HEALTH AFF. W5-250, W5-256 (2005).

146. See Nelson et al., *supra* note 142, at 139 (finding that, as result of tort reform, by late 2004 “the problems in [Mississippi] malpractice insurance seem to have abated”).

147. See Sarah Domin, *Where Have All the Baby-Doctors Gone? Women's Access to Healthcare in Jeopardy: Obstetrics and the Medical Malpractice Insurance Crisis*, 53 CATH. U. L. REV. 499, 501 (2004) (stating that most Mississippi cities with populations of less than 20,000 people no longer had local obstetricians); Lynne Jeter, *Tort Reform Impact Ripples Out Through the Economy*, MISS. BUS. J., Nov. 29, 2004, at 30, 30 (reporting that in 2002, Mississippi had the lowest number of physicians per 1,000 residents in the country and was losing physicians to other states).

148. See Joseph Nixon, Editorial, *Cross Country: Why Doctors Are Heading for Texas*, WALL ST. J., May 17, 2008, at A9 (stating that after Texas enacted tort reform legislation in 2003 and 2005, which included a \$250,000 limit on noneconomic damages, over 7,000 physicians reportedly inundated Texas, with many going into underserved regions); Rick Perry, Governor of Tex., Speech at the Greater

obstetrics, orthopedics, and neurosurgery.<sup>149</sup> In West Virginia, where emergency rooms lacked trauma surgeons to treat serious bone, brain, and spinal injuries,<sup>150</sup> doctors have seen their average premium decrease by one-third to one-half since the state adopted reforms.<sup>151</sup>

In particular, limits on subjective noneconomic damages reduce the pressure on doctors to engage in defensive medicine, such as ordering costly tests out of excessive caution because of concern over potential liability.<sup>152</sup> In a national survey, “79% [of physicians] said they had ordered more tests than they would, based only on professional judgment of what is medically needed, and 91% have noticed other physicians ordering more tests.”<sup>153</sup> A 2005 survey in the *Journal of the American Medical Association* found that virtually ninety-three percent of high-

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Houston Partnership: Lawsuit Reforms will Expedite Justice for Legitimate Claims and Help Strengthen Texas’ Economic Climate (Mar. 14, 2011), <http://governor.state.tx.us/news/speech/15823/> (“In the first five years after tort reform passed, more than 14,000 doctors either returned to practice in Texas or began practicing here for the first time.”); *see also* Barbieri, *supra* note 144, at 578 (suggesting that the extremely high medical malpractice and liability payments of obstetrician-gynecologists may deter medical students from entering the specialty or discourage physicians from continuing to practice within that specialty).

149. Ralph Blumenthal, *After Texas Caps Malpractice Awards, Doctors Rush to Practice There*, N.Y. TIMES, Oct. 5, 2007, at A21.

150. *See* Phil Kabler, *State Doctors Rally for Tort Reform*, CHARLESTON GAZETTE, Aug. 20, 2002, at P2A (reporting that high insurance costs led to the absence of neurosurgeons in Wheeling, Logan, and Beckley). The lack of trauma surgeons to treat emergency bone, brain, and spinal injuries led West Virginia’s Department of Health and Human Resources (“DHHR”) to downgrade the Charleston Area Medical Center (CAMC) trauma center from a Level I to a Level III facility in August 2002. *See* Dawn Miller, *CAMC Loses Trauma Status: People With Serious Multiple Injuries to go to Morgantown, Elsewhere*, CHARLESTON GAZETTE, Aug. 24, 2002, at P1A (explaining that the new Level III status means those with more than one serious injury will be sent elsewhere for emergency care). Due to the distance needed to obtain emergency care, West Virginia residents who experience serious injuries stemming from car accidents to gunshots could die or become paralyzed because of the distance necessary to travel to a trauma hospital, when they might have been otherwise saved. *See* Joy Davia, *Trauma Patients Forced to Make Longer Trips to Get Care*, CHARLESTON GAZETTE, Sept. 11, 2002, at PIC.

151. *See* W.VA. OFFICE OF THE INS. COMM’R, MEDICAL MALPRACTICE REPORT: INSURERS WITH 5% MARKET SHARE 51 (2009), <http://wvinsurance.gov/LinkClick.aspx?fileticket=KHt9sy2Fod4%3d&tabid=207&mid=798> (showing that the average premium per physician dropped from \$40,034.93 in 2004 to \$21,026.19 in 2008). Physicians insured with the state’s largest medical liability insurer, West Virginia Mutual Insurance Company, have experienced an overall average decrease in premiums of 32% with many specialists receiving as much as a 55% reduction since 2004. W.VA. MUT. INS. CO., ANNUAL REPORT 2 (2009), [http://www.wvmic.com/docs/2009 WV Mutual Annual Report.pdf](http://www.wvmic.com/docs/2009%20WV%20Mutual%20Annual%20Report.pdf). Thus, premiums are down one-third to one-half compared to 2004, depending on the area of practice. *Id.* at 4–5. In 2010, West Virginia Mutual provided a 12% dividend credit to all renewing doctors as additional premium relief. *Unprecedented Rate Relief Continues*, Q. COVERAGE (W.Va. Mut. Ins. Co., Charleston, W.Va.), Summer 2010, at 3, available at <http://www.wvmic.com/docs/Summer%202010%20Newsletter.pdf>. The insurer directly attributes its ability to provide rate relief for policyholders to tort reform legislation. *Id.* at 1.

152. *See* Daniel Kessler & Mark McClellan, *Do Doctors Practice Defensive Medicine?*, 111 QUARTERLY J. OF ECON. 353, 383 (1996) (finding that tort reforms can reduce health care costs by five percent to nine percent without substantial effects on mortality or medical complications).

153. CONFRONTING THE NEW HEALTH CARE CRISIS, *supra* note 142, at 4.

risk specialists in Pennsylvania ordered unnecessary tests, performed unwarranted diagnostic procedures, and referred patients for unneeded consultations to protect themselves from litigation.<sup>154</sup> In a 2008 survey, eighty-three percent of Massachusetts physicians reported practicing defensive medicine; the survey also concluded that about twenty-five percent of all radiological imaging tests were ordered for defensive purposes, and twenty-eight percent and thirty-eight percent, respectively, of those surveyed admitted reducing the number of high-risk patients they saw and limiting the number of high-risk procedures or services they performed.<sup>155</sup> In Mississippi, from 1998 to 2002, the counties with the most litigation had higher per capita medical expenditures as a result of defensive practices.<sup>156</sup>

The costs of defensive medicine are “passed almost entirely to the consumer,” if not directly, then indirectly through private or public insurance plans.<sup>157</sup> “[M]alpractice reforms that directly reduce provider liability pressure lead to reductions of 5 to 9 percent in medical expenditures without substantial effects on mortality or medical complications.”<sup>158</sup>

Limits on noneconomic damages may also reduce another form of defensive medicine—i.e., the avoidance of higher risk patients. In Mississippi, “[p]rior to tort reform, many physicians had ceased practicing in the state or discontinued high-risk procedures due to a largely unregulated legal climate in which multimillion-dollar lawsuit rewards had driven malpractice insurance rates up to unaffordable levels.”<sup>159</sup> As further explained by a blue-ribbon panel in Florida: “The concern over litigation and the cost and lack of medical malpractice insurance have caused doctors to discontinue high-risk procedures, turn away high-risk patients, close practices, and move out of the state. In some communities, doctors have ceased or

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154. David M. Studdert et al., *Defensive Medicine Among High-Risk Specialist Physicians in a Volatile Malpractice Environment*, 293 JAMA 2609, 2609 (2005).

155. Press Release, Mass. Med. Soc’y, MMS First-of-its-kind Survey of Physicians Shows Extent and Cost of the Practice of Defensive Medicine and its Multiple Effects of Health Care on the State (Nov. 17, 2008), available at [http://www.massmed.org/AM/Template.cfm?Section=Advocacy\\_and\\_Policy&TEMPLATE=/CM/ContentDisplay.cfm&CONTENTID=23559](http://www.massmed.org/AM/Template.cfm?Section=Advocacy_and_Policy&TEMPLATE=/CM/ContentDisplay.cfm&CONTENTID=23559).

156. See Brandon Roberts & Irving Hoch, *Malpractice Litigation and Medical Costs in Mississippi*, 16 HEALTH ECON. 841, 851–52 (2007) (concluding that increased litigation correlates with increased Medicare expenditures for several potential reasons, including the practice of defensive medicine).

157. Brandon Roberts, *Research Explores Effects of Malpractice Litigation on Medical Costs*, MISS. BUS. J., June 25, 2007, at B19.

158. Palmisano, *supra* note 1, at 377 (quoting Daniel P. Kessler & Mark B. McClellan, *Do Doctors Practice Defensive Medicine?* 2 (Nat’l Bur. Of Econ. Research, Working Paper No. 5466, 1996), available at <http://www.nber.org/papers/w5466.pdf>); see also Nelson et al., *supra* note 142, at 90 (discussing studies which “have found a link between the adoption of malpractice reforms and the reduction in defensive medical practices.”).

159. *Advocate, MD Takes Advantage of the Success of Tort Reform, Purchases Mississippi Medical Malpractice Availability Plan*, HEALTH & MED. WK., June 9, 2008, at 2975.

discontinued delivering babies and discontinued hospital care.”<sup>160</sup> Noneconomic damages limits also promote more uniform treatment of individuals with comparable injuries,<sup>161</sup> facilitate settlements, and address potential due process problems with excessive awards.<sup>162</sup>

### CONCLUSION

More than a century of United States Supreme Court precedent,<sup>163</sup> the consistent rejection of federal constitutional challenges to state medical liability reform,<sup>164</sup> and the Congressional Research Service’s expert opinion<sup>165</sup> prove that MICRA-like federal medical liability reform legislation would pass constitutional muster if challenged. A MICRA-like federal medical liability reform law including a nationwide limit on noneconomic damages would help all Americans obtain access to more affordable healthcare.<sup>166</sup> Furthermore, by retaining significant flexibility for states to enact their own medical liability laws, the legislation respects states’ rights and federalism principles.<sup>167</sup>

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160. See Anderson, *supra* note 1, at 353–54 (quoting FLA. DEPT. OF HEALTH, GOVERNOR’S SELECT TASK FORCE ON HEALTHCARE PROFESSIONAL LIABILITY INSURANCE vi (2003)); see also Jonathan Thomas, *The Effect of Medical Malpractice*, 19 ANNALS HEALTH L. ADVANCE DIRECTIVE 306, 312 (2010); Laura A. Bischoff, *Taft Signs Malpractice Reform Bill: Cap on Awards for Pain and Suffering*, DAYTON DAILY NEWS, Jan. 11, 2003, at B1 (reporting that before Ohio limited medical liability noneconomic damages, premium increases led “some doctors to retire early, move, or turn away high-risk patients”).

161. See Oscar G. Chase, *Helping Jurors Determine Pain and Suffering Awards*, 23 HOFSTRA L. REV. 763, 769 (1995) (unpredictability “undermines the legal system’s claim that like cases will be treated alike”).

162. See *Gilbert v. DaimlerChrysler Corp.*, 685 N.W.2d 391, 400 n.22 (Mich. 2004) (“A grossly excessive award for pain and suffering may violate the Due Process Clause even if it is not labeled ‘punitive.’”).

163. See *supra* Part I.

164. See *supra* notes 111–14 and accompanying text.

165. COHEN & BURROWS, *supra* note 27, at 2 (finding that Congress has power, under the Commerce Clause, to regulate medical malpractice).

166. See Ronen Avraham, *An Empirical Study of the Impact of Tort Reforms on Medical Malpractice Settlement Payments*, 36 J. LEGAL STUDIES S183, S221 (2007) (discussing a study of more than 100,000 settled cases that showed that caps on noneconomic damages “do in fact have an impact on settlement payments”); Nelson et al., *supra* note 142, at 89 (concluding that tort damages caps effectively lead to reduced medical malpractice insurance rates); Meredith L. Kilgore et al., *Tort Law and Medical Malpractice Insurance Premiums*, 43 INQUIRY 255, 265 (2006) (damage limits lowered premiums for internal medicine, general surgery, and obstetrics/gynecology by 17.3%, 20.7%, and 25.5%, respectively).

167. See *supra* Part II.