

# **Administrative “Health Courts” for Medical Injury Claims: The Federal Constitutional Issues**

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**Abstract** Our article analyzes whether the federal government may constitutionally supplant a traditional system of common-law trials before state judges and juries with new federal institutions designed by statute for compensating victims of medical injuries. Specifically, this article examines the federal constitutional issues raised by various proposals to replace traditional medical malpractice litigation in state courts with a federal system of administrative “health courts.” In doing so, we address the following constitutional issues:

1. Is there federal authority to preempt state law (the commerce clause and spending clause issues)?
2. May jurisdiction be created in non–article 3 tribunals, and may claims be decided without trial by jury (the separation of powers and Seventh Amendment issues)?
3. Would pilot programs that require some claims to be pursued in a federal administrative forum while other claimants are left to pursue traditional state tort law remedies be constitutional (the equal protection issue)?

The article concludes that a federal compensation system through administrative health courts should be constitutional provided the statute is appropriately drafted and that appropriate factual findings are made concerning the benefits to patients and the public as well as to doctors and their insurers.

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Among other things, the 109th Congress may go down in history as the “tort reform” Congress. After years of merely talking about tort reform, a Republican-led House of Representatives, Senate, and White House finally did something about it; they passed and signed into law several bills that lay claim to be reforms of the civil justice system.<sup>1</sup> But critics, including the lead author of this article, contend that the measures enacted to date are merely peripheral tinkering and that more fundamental reforms are needed to deal with the real problems of our civil justice system (Brickman 2006).

The purpose of this article is to assess the degree to which federal, as opposed to state, legislation may be used constitutionally to make more fundamental reforms to the system for delivering civil justice.<sup>2</sup> The focal point for this analysis is the pending proposal by the nonprofit organization Common Good to replace the traditional system of case-by-case medical malpractice litigation in state courts with a new federal system of compensation for avoidable medical injuries through administrative tribunals and rule makings.<sup>3</sup> A bill to authorize pilot programs for the spe-

1. See, e.g., the Class Action Fairness Act, Public Law 109-2 (2005), which gives federal district courts jurisdiction over an increased number of class action suits and provides guidelines for the awarding of attorney fees in certain types of settlements; the Protection of Lawful Commerce in Arms Act, Public Law 109-92 (2005), which protects manufacturers and sellers of firearms from liability resulting from the criminal or unlawful misuse of their products. See also the Personal Responsibility in Food Consumption Act of 2005 (“The Cheeseburger Bill”), H.R. 554, 109th Cong., 2nd sess. This bill would have precluded civil liability for food sellers and related entities for claims relating to a person’s weight gain, obesity, or any health condition associated with weight gain or obesity. It passed the House by a vote of 306–120 but never came up for a vote in the Senate ([thomas.loc.gov/cgi-bin/query/z?c109:H.R.554](http://thomas.loc.gov/cgi-bin/query/z?c109:H.R.554): [accessed January 14, 2007]).

2. In support of the argument that state legislation concerning administrative health courts would likely not survive state constitutional review, see Widman (2006), which argues that health courts would be unconstitutional under most state constitutions because “health courts propose to remove long-standing common law state rights from the civil justice system and place them in an alternative system without juries, without any accountability mechanisms, without procedural safeguards, and without any meaningful appeals process”; but see Mello et al. (2008), which concludes that a carefully designed health courts pilot could withstand constitutional scrutiny in many states.

3. For more details, see Common Good (2005). The essence of the Common Good proposal is as follows: “Health courts would have judges dedicated full-time to resolving healthcare disputes. The judges would make written rulings in every case to provide guidance on proper standards of care. Their rulings would set precedents on which both patients and doctors could rely. As with similar administrative courts that exist in other areas of law—for tax disputes, workers’ compensation, and vaccine liability, among others—there would be no juries. To assure uniformity and predictability, each ruling could be appealed to a new Medical Appellate Court.” Other features of the Common Good proposal are:

(1) full-time judges: the hallmark of the health courts would be full-time judges, dedicated solely to addressing healthcare cases. The judges would be appointed through a nonpartisan screening commission; (2) neutral experts: those judges would be able to choose from a panel of experts in each area of medicine, avoiding the dueling “hired gun” experts that

cialized administrative “health courts” advocated by Common Good and professors Michelle Mello and David Studdert of the Harvard School of Public Health has been introduced in Congress (Fair and Reliable Medical Justice Act, S. 1337, 109th Cong. [2005]), and *USA Today*, AARP, and others have endorsed trying out the concept.<sup>4</sup>

Central to the proposed new federal health courts system would be specialized administrative tribunals that use expert judges and neutral expert witnesses in place of juries to award compensation in cases in which injuries are claimed as a result of errors or omissions in medical treatment (Common Good 2005). Supporters of the proposal contend that claimants would benefit from a lower burden of proof, in that they would only need to show that the injuries they suffered should have been avoidable (*ibid.*).<sup>5</sup> Further, persons suffering from avoidable injuries during medical treatment would be entitled to recover 100 percent of their economic losses, but compensation for pain and suffering would be established according to a predetermined schedule rather than awarded ad hoc in individual cases. Doctors and hospitals would also benefit if the system lives up to its goals because, according to its designers, it should provide greater predictability, professionalism, and a decreased need for “defensive medicine,” the practice of prescribing unnecessary tests and other costly procedures to build a record to defend oneself in court.<sup>6</sup> In addition, a system that

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confuse and prolong disputes today; (3) speedy proceedings; lower costs: most cases would be resolved within months. Except in exceptional cases, legal fees would be held to 20 percent, reducing current costs by almost half; (4) liberalized recovery for injured patients: once a mistake is verified, recovery would be automatic without the need to prove precisely how it happened; (5) damages: patients would be reimbursed for all of their medical costs and lost income, plus a fixed sum that would be predetermined according to a schedule addressing specific types of injuries. The schedule would be established by a panel of experts and updated periodically to reflect changing costs. (*ibid.*)

4. See *USA Today* (2005) and Howard (2007), but also see Baker (2005), who discusses the need for evidence-based reform instead of the “myth-based reforms” that have dominated medical malpractice policy debate, in which it would be easier to bring a claim that would, in turn, encourage doctors and other health care professionals to take responsibility for and learn from their mistakes.

5. But see Widman (2006: 61–62): “an avoidability standard contemplates some element of fault in that there is a judgment that care was somehow sub-optimal and this lower level of care resulted in injury. This element of fault is one of the most suspect parts of the proposal.” While we recognize that there is enormous debate regarding the Common Good proposal, our purpose is not to examine the pros and cons of this proposal but to analyze the federal constitutional issues raised by the proposal.

6. But see Baker (2005: 120): “while there may be some defensive medicine in the pejorative sense, the impact on health-care costs is small.” Baker contends that the problem of defensive medicine is overblown, is difficult to reliably measure, and is, at most, a small problem. He contends that we should focus on all the wasteful procedures and poor-quality care that have nothing to do with the fear of lawsuits. Again, the authors recognize the merits of the debate but caution that our analysis is concerned with the federal constitutional issues raised by such a proposal, rather than with the pros and cons of the proposal itself.

compensates all avoidable medical injuries rather than one that compensates only injuries in which a doctor or hospital is found to have committed professional malpractice should reduce the adversary atmosphere that can impede the trust relationship between doctors and patients. As an additional side benefit, removing the legal requirement to find that a doctor committed professional malpractice to compensate an injured person might also decrease the stigma for doctors and the resulting hostility between the medical and legal professions.

The purpose of the present article is not, however, to argue the policy issues supporting or opposing the proposal for medical malpractice reform;<sup>7</sup> that has already been admirably done by others (Howard 2007).<sup>8</sup> The purpose of this article is instead to focus on the federal constitutional issues raised by the proposals to replace traditional medical malpractice litigation in state courts with a federal system of administrative health courts. The question for this article is may the federal government constitutionally supplant a traditional system of common-law trials before state judges and juries with new federal institutions designed by statute for compensating victims of medical injuries? Our answer is a qualified yes—provided that the statute is appropriately drafted and that appropriate factual findings are made concerning the benefits to patients and the public as well as to doctors and their insurers. With these safeguards, a federal statute replacing traditional medical malpractice litigation with a federal compensation system through administrative health courts should be constitutional.

7. For a detailed review of medical malpractice liability and why the real medical malpractice problems are medical malpractice itself and the system that prevents claims, see Baker (2005: 157): the “evidence shows that the fundamental problem with medical malpractice lawsuits is almost exactly the opposite of what the medical malpractice myth would have us believe. The problem is not that there are too many claims; the problem is that there are too few.” According to Baker, an evidence-based reform would make it easier to bring a lawsuit and would provide a way for injured patients to find out what caused their injuries without having to bring a lawsuit.

8. For a discussion of the policy issues regarding health courts and the failings of the current system, see Localio et al. (1991), which argues that less than 2 percent of patients injured due to negligence ever file a malpractice claim, and only about one in fourteen individuals with a serious injury—a disability lasting six months or more—is compensated; see also Studdert et al. (2000), which argues that patients’ decisions to sue are poorly correlated to incidents of medical negligence. Many patients sue when negligence has not occurred, and many victims of negligence do not sue when negligence has occurred; Mello and Brennan (2002), which argues that one of the main reasons why the tort system has proved an imprecise and ineffective method for enforcing patient safety is that patients’ decisions to sue are poorly correlated to incidents of medical negligence; Udell and Kendall (2005); and Baker (2005: 19): the “reality is that we have an epidemic of medical malpractice. Compared to the amount of medical malpractice, we have very little malpractice litigation. The number of lawsuits is not growing, and the overall size of the lawsuits is tracking the rate of medical inflation.”

While the focal point for our analysis is the proposal to federalize medical malpractice law and replace traditional state court litigation before judges and juries with a system of federal administrative health courts, much of the same analysis would also be applicable to other proposals to substitute federal administrative compensation systems for traditional state-court litigation. For example, much of the same analysis applies to S.852, the Federal Activities Inventory Reform (FAIR) Act, that would substitute payments from a federal trust funded by taxes on defendants for case-by-case litigation of asbestos cases (FAIR Act, S. 852, 109th Cong. [2005]).

Proposals to substitute a federal administrative remedy for an area of civil litigation traditionally dominated by the states raise the following basic federal constitutional issues:

1. Is there federal authority to preempt state law (the commerce clause and spending clause issues)?
2. May jurisdiction be created in non–article 3 tribunals, and may claims be decided without trial by jury (the separation of powers and Seventh Amendment issues)?
3. Would pilot programs that require some claims to be pursued in a federal administrative forum while other claimants are left to pursue traditional state tort law remedies be constitutional (the equal protection issue)?

We discuss each of these issues in the order listed. Our overall conclusion is that we are not stuck with tinkering around the edges of eighteenth-century technologies for delivering civil justice but may, if Congress so chooses, replace them with more modern institutions designed by statute, provided that the legislation is fair, carefully drafted, and makes appropriate factual findings. For these reasons, pilot programs to experiment and create the data needed to support factual findings may be particularly desirable as a first step, for legal as well as political reasons. The Supreme Court, like Congress, is much more likely to accept a federal medical injury compensation system delivered through administrative health courts as a legitimate reform that improves the medical delivery system for all concerned if that conclusion has been demonstrated in practice through pilot projects rather than merely hypothesized in academic writings. We also offer suggestions for drafters regarding the features of legislation and supporting legislative findings that are most likely to withstand federal constitutional challenge.

In America, fundamental reforms of the civil justice system are often

accomplished by substituting an administrative system for a judicial one. The British recently fundamentally reworked their civil justice system.<sup>9</sup> It would be difficult, if not impossible, to make comparable reforms to civil litigation in the United States. For both political and constitutional reasons, litigation in a court of law in the United States has a variety of features—including oral hearings, the adversary system, generalist judges, and the role of civil juries—that are relatively difficult to change. The classic American solution to situations in which fundamental reform is deemed to be required is to take the cases out of the courts and replace traditional litigation in court with an administrative remedy. One may think of this as a legal fiction:<sup>10</sup> a court is not a “court” if it is an administrative tribunal, and therefore changes may be possible in an administrative system that would not be possible if the cases were left in court. The fundamental defining characteristic of administrative tribunals in American law is that their features may be modified by statute or regulations within the broad constraints of due process. Thus, in the past when reformers believed that a fundamental redesign of the American civil justice delivery system was required, such changes were typically made by substituting an administrative remedy for a judicial one. “The administrative process is, in essence, our generation’s response to the inadequacy of the judicial and legislative process,” wrote James Landis (1938: 46), one of the principal architects of the New Deal. The substitution of an administrative remedy for a judicial one has happened many times in American history in areas as diverse as utility-rate regulation, workers’ compensation, securities law, labor law, and environmental law. These are all areas that once were governed primarily by litigation before common-law judges and juries but today are governed primarily, and in some instances, exclusively, by administrative tribunals. Medical malpractice may be next (see Paglia 1991).

9. See, generally, Department for Constitutional Affairs (2002). Broad-ranging reforms were implemented in April 1999, using many of the recommendations made by Woolf (1996). In addition, it is not widely known that the United Kingdom abolished trial by jury in most civil cases in 1927.

10. For a general argument about the role of legal fictions in promoting legal change, see Fuller (1969). Compare Administrative Procedure Act, 5 U.S.C. § 551 (1), which defines an “agency” as “each authority of the Government of the United States, . . . but does not include the Congress; the courts of the United States” and other exceptions not relevant here.

### **Is There Federal Authority to Preempt State Medical Injury Law (the Commerce Clause Issue)?**

Medical malpractice litigation is big business. The direct costs of medical malpractice litigation have been estimated at \$28 billion a year (Howard 2007),<sup>11</sup> 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>12</sup> Provided that Congress holds appropriate hearings and makes factual findings documenting substantial effects on interstate commerce from the present system of medical malpractice litigation, we conclude that Congress has power to create a federal system to regulate medical injuries under the commerce clause.

Until recently, many lawyers considered Congress's power to regulate economic activity to be plenary.<sup>13</sup> Congress could regulate anything that it wanted on the grounds that the activity might have some marginal effect on interstate commerce.<sup>14</sup> In several recent decisions, however, the current Supreme Court, led in this area by Justice Clarence Thomas, has rediscovered the structural Constitution and the role of the states as a limit on federal power. The seminal cases are *United States v. Lopez* (514 U.S. 549 [1995]) and *United States v. Morrison* (529 U.S. 598 [2000]). In *Lopez*, the Supreme Court held unconstitutional a federal criminal statute prohibiting the possession of handguns in the vicinity of schools for lack of proof of

11. There is burgeoning academic literature documenting the economic effects of medical malpractice litigation. Examples are Danzon, Pauly, and Kingston (1990); Congressional Budget Office (2006), which reviews existing literature and concluding, inter alia, that limits on medical practice recoveries proposed in 2003 would have saved \$15 billion annually in federal health case spending; and Viscusi, Born, and Baker (2006).

12. Many firms specializing in medical malpractice tout their ability to represent claimants throughout the country. See, e.g., Studnicki Law Firm (2004); Ashcraft and Gerel, LLP (n.d., emphasis supplied): "The law firm of [omitted] has successfully handled a large number of medical malpractice claims *across the nation*, resulting in many multi-million dollar settlements and verdicts. Our attorneys are *admitted to practice in numerous states throughout the US*, including but not limited to [omitted], and we have been brought into cases to serve as associate counsel both within and outside of our home jurisdictions."

13. See Krauss (2001: 358): "Over the last 65 years, many courts have read the Commerce Clause far more broadly in upholding federal regulation of virtually all private activity on the grounds that everything, ultimately, affects commerce."

14. See Rotunda and Nowak (1999: sec. 4.8): "Prior to *Lopez*, the opinions of the Supreme Court between 1937 and 1994 could have been read to allow Congress to regulate a class of interstate activities that had only an insignificant, or trivial, effect on interstate commerce."

an actual effect on interstate commerce.<sup>15</sup> *Lopez* strikes an important cautionary note to the drafters of medical malpractice reform at the federal level: “before federalizing tort actions traditionally reserved to the states, Congress must show that it has constitutional authority to do so” (Krauss 2001: 359). We agree with those commentators who have suggested that specific legislative findings, as opposed to hypothesis and surmise, about possible effects on interstate commerce are advisable in order for legislation to be upheld. After *Lopez*, it appears that the current Supreme Court is no longer willing to uphold federal legislation that impinges on areas that have traditionally been the domain of the states without findings demonstrating the effects on interstate commerce.<sup>16</sup> Thus, legislative findings demonstrating that medical malpractice litigation actually has a significant effect on the economy are desirable.<sup>17</sup>

15. *United States v. Lopez* (514 U.S. 549, 580 [1995]): “unlike the earlier cases to come before the Court here neither the actors nor their conduct have a commercial character, and neither the purposes nor the design of the statute have an evident commercial nexus” (J. Kennedy, concurring).

16. See, e.g., Tribe (2000: 819): “*Lopez*’s discussion of the substantial effects test reveals that, rather than focusing on the quantity of the regulated activity’s effects, the Court was attempting to reconfigure its precedents to focus more attention on the nature of the underlying activity—paying particular attention to whether or not that activity could itself be described as part of an economic enterprise.”

17. See, e.g., *United States v. Morrison*, 529 U.S. 598, 610: “a fair reading of *Lopez* shows that the noneconomic, criminal nature of the conduct at issue was central to our decision in that case” (citing *Lopez*, at 551: “The Act [does not] regulat[e] a commercial activity”); “Even *Wickard*, which is perhaps the most far reaching example of Commerce Clause authority over intrastate activity, involved economic activity in a way that the possession of a gun in a school zone does not” (ibid.: 560); “Section 922(q) is not an essential part of a larger regulation of economic activity” (ibid.: 561); “Admittedly, a determination whether an intrastate activity is commercial or noncommercial may in some cases result in legal uncertainty. But, so long as Congress’ authority is limited to those powers enumerated in the Constitution, and so long as those enumerated powers are interpreted as having judicially enforceable outer limits, congressional legislation under the Commerce Clause always will engender ‘legal uncertainty’” (ibid.: 566); “The possession of a gun in a local school zone is in no sense an economic activity that might, through repetition elsewhere, substantially affect any sort of interstate commerce” (ibid.: 567); see also 573–574 (J. Kennedy, concurring), stating that *Lopez* did not alter our “practical conception of commercial regulation” and that Congress may “regulate in the commercial sphere on the assumption that we have a single market and a unified purpose to build a stable national economy”; “Were the Federal Government to take over the regulation of entire areas of traditional state concern, areas having nothing to do with the regulation of commercial activities, the boundaries between the spheres of federal and state authority would blur” (ibid.: 577); “Unlike the earlier cases to come before the Court here neither the actors nor their conduct has a commercial character, and neither the purposes nor the design of the statute has an evident commercial nexus. The statute makes the simple possession of a gun within 1,000 feet of the grounds of the school a criminal offense. In a sense any conduct in this interdependent world of ours has an ultimate commercial origin or consequence, but we have not yet said the commerce power may reach so far” (ibid.: 580, citation omitted). *Lopez*’s review of Commerce Clause case law demonstrates that in those cases where we have sustained federal regulation of intrastate activity based upon the activity’s substantial effects on interstate commerce, the activity in question has been some sort of economic endeavor. See *United States v. Morrison*



Moreover, *Lopez* and its progeny draw a careful distinction between activity that affects interstate commerce and activity that is in or is itself interstate commerce.<sup>18</sup> Congress has clear authority over economic activities that are in or are themselves part of interstate commerce. However, in situations in which activity (such as the handgun possession at issue in *Lopez* itself) is not itself economic in nature but merely affects commerce, federal power is more doubtful, especially when the effect on interstate commerce argument is being used to federalize an area traditionally regulated by the states.<sup>19</sup>

Medical malpractice litigation arguably meets both branches of the test: medical malpractice litigation is itself big business, and much of it is conducted on an interstate level, with specialized lawyers and professional expert witnesses moving and referring business from state to state. And information about successful theories of liability or defense move rapidly across state lines, so that a new theory or case in one jurisdiction will rapidly spawn copycat litigation in other states. But medical malpractice litigation also affects interstate commerce, in that many patients move across state lines to seek medical care, and most of the techniques, therapies, drugs, and medical devices that are the targets of litigation in one state are typically invented in another. Although the trial of an individual malpractice case may superficially appear to be local, the raw materials that are put together in any particular medical malpractice case have probably moved in interstate commerce as surely as the components that are assembled into a computer or other manufactured item have moved in interstate commerce.

The courts have long recognized that manufacturing, even though its final stage takes place at one location, may be regulated under the commerce clause because it is only one stage in an integrated economic activ-

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at 559–560; see also Tribe (2000: 819): “The majority opinion in *Lopez* suggested that the Court’s invalidation of the Gun-Free School Zones Act flowed from its conclusion that the relevant test was whether the regulated activity—there, any instance of firearms possession near a school—‘substantially affects,’ rather than merely ‘affects,’ interests commerce.”

18. See Tribe (2000: 819, emphasis added): “The focus of the Court’s attention—as long as *Lopez* survives”—will be on whether there is a “colorable claim that the interstate *activity itself* is commercial or economic.”

19. *Lopez*, 514 U.S. at 577 (J. Kennedy, concurring): “Were the Federal Government to take over the regulation of entire areas of traditional state concern, areas having nothing to do with the regulation of commercial activities, the boundaries between the spheres of federal and state authority would blur.” See also Tribe (2000: 824): “few pieces of legislation contain the combination of commerce-less elements present in the Gun-Free School Zone Act, which . . . contained no contemporaneous findings or even legislative history shedding light on how guns near schools affect commerce . . . [and was] regulated in a sphere that is traditionally a matter of state law.”

ity or “stream of commerce” in which many of the component parts move in interstate commerce (*Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41 [1938]). Fair housing in a motel may be regulated by the federal government because some of the travelers who stay at the motel have moved in interstate commerce (*Heart of Atlanta Motel v. United States*, 379 U.S. 241, 258 [1964]),<sup>20</sup> and a local barbeque restaurant may be subject to the federal Civil Rights Act of 1964 because some of the food that it serves has moved in interstate commerce (*Katzenbach v. McClung*, 379 U.S. 294, 303–304 [1964]).<sup>21</sup> That same principle is true for medical malpractice litigation. Its components may be less tangible, but their movement in interstate commerce and effect on interstate commerce is no less real.

Therefore, Congress would be well advised to make careful legislative findings about how medical malpractice litigation actually (1) is itself significant economic activity that moves in interstate commerce<sup>22</sup> and (2) also affects interstate commerce, in order to satisfy *Lopez*’s findings requirement.<sup>23</sup>

20. In this case, the owner of a large motel, which only allowed white persons to inhabit the accommodations, sued for declaratory relief contending that the “prohibition of racial discrimination in places of public accommodation affecting commerce exceeded Congress’ powers under the Commerce Clause” (*Heart of Atlanta Motel v. United States*, 379 U.S. 241, 258 [1964]). The Court denied the owner’s contentions and held that Congress did not exceed its power under the commerce clause, stating:

the power of Congress over interstate commerce is not confined to the regulation of commerce among the states. It extends to those activities intrastate which so affect interstate commerce or the exercise of the power of Congress over it as to make regulation of them appropriate means to the attainment of a legitimate end, the exercise of the granted power of Congress to regulate interstate commerce. Thus, the power of Congress to promote interstate commerce also includes the power to regulate the local incidents thereof, including local activities in both the States of origin and destination, which might have a substantial and harmful effect upon that commerce. (ibid.; quoting *McCulloch v. Maryland*, 4 Wheat. 316, 421)

21. *Katzenbach v. McClung* (379 U.S. 294, 303–304 [1964]) held that

Congress has determined for itself that refusals of service to Negroes have imposed burdens both upon the interstate flow of food and upon the movement of products generally. Of course, the mere fact that Congress has said when particular activity shall be deemed to affect commerce does not preclude further examination by this Court. But where we find that the legislators, in light of the facts and testimony before them, have a rational basis for finding a chosen regulatory scheme necessary to the protection of commerce, our investigation is at an end.

22. As Chief Justice Rehnquist stated in his opinion in *Lopez*, “Where economic activity substantially affects interstate commerce, legislation regulating that activity will be sustained” (514 U.S. at 560). Thus, Congress would be advised to make findings regarding the effect on interstate economic activity. See, e.g., *Morrison*, 529 U.S. at 612: “while Congress normally is not required to make formal findings as to the substantial burdens that an activity has on interstate commerce, the existence of such findings may enable us to evaluate the legislative judgment that the activity in question substantially affect[s] interstate commerce, even though no such substantial effect [is] visible to the naked eye” (internal citations omitted).

23. See *Morrison*, 529 U.S. at 610: “Both petitioners and Justice [David] Souter’s dissent downplay the role that the economic nature of the regulated activity plays in our Commerce

But finding an effect on commerce is not the only issue, as *United States v. Morrison* illustrates.<sup>24</sup> In *Morrison*, the Court invalidated a federal criminal statute punishing violence against women (see *Morrison*, 529 U.S. 614). Even though conceding that there were evidence and congressional findings sufficient to satisfy *Lopez* that violence against women did indeed have some effect on commerce, the Court nonetheless held that what it characterized as a less-than-substantial effect on commerce does not justify the federal government in regulating areas that have traditionally been regulated by the states.<sup>25</sup>

Taken out of context, some of the broad language in *Morrison* could appear to call into question the power of Congress to federalize the compensation and deterrence system for medical errors and injuries, because medical malpractice litigation has traditionally been the province of the states.<sup>26</sup> Nonetheless, we think it is clear that if appropriate findings are made regarding the substantial effects of medical malpractice litigation on the national economy, not only directly but also indirectly through the practice of defensive medicine, federal power to regulate in this area would be upheld. While medical malpractice litigation has traditionally been the province of the states, that is always the case for areas that Congress could, but to date, has chosen not to regulate under the commerce clause (the so-called dormant commerce clause). What distinguishes *Morrison* is that (1) the activity in question, medical injury litigation, is itself commercial activity and (2) the effects of medical malpractice litigation on the national economy are substantial.

In *United States v. Lopez* (514 U.S. at 559), the Supreme Court made clear that to be subject to federal regulation, an activity must *substantially* affect interstate commerce in order for the federal government to regulate an area typically controlled by the states. Justice Anthony Kennedy

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Clause analysis. But a fair reading of *Lopez* shows that the noneconomic, criminal nature of the conduct at issue was central to our decision in that case.”

24. *Morrison*, 529 U.S. at 614 (quoting *Lopez*, 514 U.S. at 557n2): “the existence of congressional findings is not sufficient, by itself, to sustain the constitutionality of Commerce Clause legislation. As we state in *Lopez*, ‘simply because Congress may conclude that a particular activity substantially affects interstate commerce does not necessarily make it so.’”

25. See *Morrison*, 529 U.S. at 617: “The Constitution requires a distinction between what is truly national and what is truly local. . . . The regulation and punishment of intrastate violence that is not directed at the instrumentalities, channels, or goods involved in interstate commerce has always been the province of the States.”

26. See *Lopez*, 514 U.S. at 577 (J. Kennedy, concurring): “Were the Federal Government to take over the regulation of entire areas of traditional state concern, areas having nothing to do with the regulation of commercial activities, the boundaries between the spheres of federal and state authority would blur.”

explained the key point succinctly in his concurrence in *Lopez* (at 577, emphasis supplied): “Were the Federal Government to take over the regulation of entire areas of traditional state concern, areas *having nothing to do with the regulation of commercial activities*, the boundaries between the spheres of federal and state authority would blur.”

To uphold medical malpractice reform or any other federal reform initiative against a new commerce clause challenge, one must show that a legitimate and substantial federal purpose exists and that the effect on commerce argument is not a mere ruse being used to take over a traditional area of state concern.<sup>27</sup> In the case of medical malpractice reform, the key to upholding a federal statute is to make a strong case factually that medical malpractice litigation does in fact have a substantial effect<sup>28</sup> on the national economy, including indirect effects such as changing the quality and cost of health care and increasing costs and federal medical spending.<sup>29</sup> This should not be too difficult to do, because the principal modern *raison d’être* for medical malpractice litigation is deterrence: namely, to affect the conduct of others. A modest empirical literature is developing, with some studies showing that malpractice litigation may have effects on medical care including on physician supply, availability of some forms of health care in certain areas and increasing costs for defensive medicine.<sup>30</sup>

That a substantial effect on commerce is a legitimate federal purpose that will save a statute from challenge under *Lopez* and *Morrison* is illustrated by the recent decision in the medical marijuana case, *Gonzales v. Raich* (545 U.S. 1 [2005]). There, a panel of the Ninth Circuit Court of Appeals quoted back at the Supreme Court its own language from *Lopez* and *Morrison* to support a holding that the federal government lacked power to regulate sales of marijuana for medical purposes in California

27. The Supreme Court has upheld a wide variety of congressional acts regulating intrastate economic activity when they have concluded that the activity substantially affected interstate commerce (*Morrison*, 529 U.S. at 611, citing *Lopez* at 559).

28. The Supreme Court has held that Congress’s power to regulate interstate commerce includes the power to regulate any activity that “exerts a substantial effect on interstate commerce” (*Wickard v. Filburn*, 317 U.S. 111, 125 [1942]) or is within a “class of activities . . . within the reach of federal power” (*Perez v. United States*, 402 U.S. 146, 154 [1971], emphasis in original). Furthermore, “when Congress has determined that an activity affects interstate commerce, the courts need inquire only whether the finding is rational” (*Hodel v. Virginia Surface Mining & Reclamation Ass’n, Inc.*, 452 U.S. 264, 277 [1981]). See *Lopez*, 514 U.S. at 560: “Where economic activity substantially affects interstate commerce, legislation regulating that activity will be sustained.”

29. For the samples of the developing academic literature on this subject, see note 30.

30. For a review and synthesis of the empirical literature, see Mello (2006).

because the marijuana was grown in California, prescribed in California, and consumed in California, and therefore (argued the Ninth Circuit), it was beyond Congress’s power to regulate the activity under the commerce clause (352 F.3d 1222 [9th Cir. 2003]). A majority of the Supreme Court squarely rejected the Ninth Circuit’s attempt to place local decisions regarding medical care treatment options beyond the reach of federal authority under the commerce clause (*Raich*, 545 U.S. 1 [2005]).

The key to the holding was well summarized by the reporter of decisions in the following headnote from the syllabus:

Congress’ power to regulate purely local activities that are part of an economic “class of activities” that have a substantial effect on interstate commerce is firmly established. *See, e.g., Perez v. United States*, 402 U.S. 146, 151. If Congress decides that the “‘total incidence’” of a practice poses a threat to a national market, it may regulate the entire class. *See, e.g., id.*, at 154–155. Of particular relevance here is *Wickard v. Filburn*, 317 U.S. 111, 127–128, where, in rejecting the appellee farmer’s contention that Congress’ admitted power to regulate the production of wheat for commerce did not authorize federal regulation of wheat production intended wholly for the appellee’s own consumption, the Court established that Congress can regulate purely intrastate activity that is not itself “commercial,” *i.e.*, not produced for sale, if it concludes that failure to regulate that class of activity would undercut the regulation of the interstate market in that commodity. The similarities between this case and *Wickard* are striking. In both cases, the regulation is squarely within Congress’ commerce power because production of the commodity meant for home consumption, be it wheat or marijuana, has a substantial effect on supply and demand in the national market for that commodity. In assessing the scope of Congress’ Commerce Clause authority, the Court need not determine whether respondents’ activities, taken in the aggregate, substantially affect interstate commerce in fact, but only whether a “rational basis” exists for so concluding. *E.g., Lopez*, 514 U.S., at 557.

If decisions to prescribe marijuana for medical purposes have a sufficient effect on interstate commerce in the aggregate to justify federal regulation, it seems likely that malpractice litigation over the consequences of decisions about what to prescribe or not to prescribe would as well.

Medical injury litigation in the aggregate almost certainly has a sufficiently substantial effect on interstate commerce that federal authority

to regulate under the commerce clause would be upheld.<sup>31</sup> The best way to make the necessary factual showing would be through congressional hearings and findings, because such findings would receive substantial deference from the courts. But even in the absence of congressional findings, the courts would probably uphold federal authority based on the developing academic literature showing that medical malpractice litigation is a multibillion-dollar business with secondary effects that radiate throughout the economy.

### **Is There Federal Authority to Condition Federal Funding on Reforms to State Medical Injury Law (the Spending Clause Issue)?**

While we firmly believe that federal authority to regulate medical injury claims would be upheld under the commerce clause, an even stronger ground for federal authority to regulate medical malpractice litigation would be the spending clause.<sup>32</sup> The same argument also holds true for funding pilot programs to study administrative health courts.

The necessary and proper clause in article 1, section 8 of the U.S. Constitution empowers the Congress to make all laws necessary for executing its other powers and those of the federal government as a whole.<sup>33</sup> The idea that this clause is an enlargement of the powers expressly granted to Congress was established long ago by Chief Justice John Marshall's opinion in *McCulloch v. Maryland* (17 U.S. 316 [1819]). "Let the end be

31. See *Lopez*, 514 U.S. at 559; see also Rotunda and Nowak (1999: sec. 4.8): "the majority ruled [in *Lopez*] that Congress can regulate only single state activities that as a classes have a substantial effect on interstate commerce."

32. See Tribe (2000: 833): "insofar as *Lopez* may presage a narrowing of the commerce power without a corresponding narrowing of these other powers, the latter powers—in particular, the spending and taxing powers augmented by the Necessary and Proper Clause—may allow Congress to regulate areas that the commerce power alone would not reach." In addition, conservative commentators have argued that the Court's broad interpretation of the spending power in cases such as *Dole* is a way around the increasingly restrictive limitations on federal power under the Commerce Clause and the Tenth Amendment. See Kmiec and Presser (1998: 694–695) discussing how cases such as *Dole* presumably allow Congress to commandeer state action. Some have questioned whether "one [can] really reconcile any effort by the Court to limit the scope of the commerce power in *Lopez* or to protect states from being the 'commandeered' sub-agents of the federal government with cases such as *Dole*." See also Baker (1995: 1916): "the *Lopez* majority should reinterpret the Spending Clause to work in tandem, rather than at odds, with its reading of the Commerce Clause."

33. U.S. Constitution, art. 1, sec. 8: "To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States, or in any department or officer thereof." See, e.g., *Hodel*, 452 U.S. at 276.

legitimate," Marshall wrote, "let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consistent with the letter and spirit of the Constitution, are constitutional" (ibid.: 320).

While Congress cannot commandeer the machinery of state government by requiring states to implement federal policies,<sup>34</sup> Congress may condition federal funding on the states' willingness to follow federal policies.<sup>35</sup> The spending clause thus grants broad powers to Congress to achieve its goals by giving states incentives to follow federal policies even in instances in which it cannot command them directly to do so (see, e.g., Althouse 1996).

Justice Sandra Day O'Connor's majority opinion for the Court in the low-level radioactive waste case *New York v. United States* (505 U.S. 144 [1992]) made clear that even in cases in which the federal government may not require states to establish programs to implement federal policies, the federal government is not without means to create powerful incentives for the states to follow federal policies without the fatal flaw of commanding state action. After holding that Congress could not require states to enter into federally mandated arrangements to manage low-level radioactive wastes, the majority added this important caveat: "This is not to say that Congress lacks the ability to encourage a State to regulate in a particular way, or that Congress may not hold out incentives to the States as a method of influencing a State's policy choices" (ibid.: 167, quoting *South Dakota v. Dole*, 483 U.S. 203, 206 [1987], internal quotation marks omitted). Rather, the court in *New York* continued, "Congress may attach conditions on the receipt of federal funds" (ibid.). However, "such conditions must (among other requirements) bear some relationship to the purpose of the federal spending, otherwise, of course, the spending power could render academic the Constitution's other grants and limits of federal authority" (ibid.).<sup>36</sup>

The leading case on the use of the spending power to induce states to

34. See, e.g., *New York v. United States*, 505 U.S. 144 (1992): "Congress may not simply comande[e]r the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program" (quoting *Hodel*, 452 U.S. at 288).

35. See, e.g., *New York v. United States*, which holds that Congress may condition highway funding on the states enacting a minimum drinking age. Commentators have recognized that the Court's broad interpretation of the spending power in cases such as *Dole* is a way around the increasingly restrictive limitations on federal power under the Commerce Clause and the Tenth Amendment (see note 32).

36. See also Engdahl (1994: 78): "at its origin the idea that conditions must be germane to the purpose of the particular grant was integral to, and dependent upon, the anti-Hamiltonian notion that the constitutionality of the spending itself depends on the objective at which the spending is aimed."

follow federal policies is *South Dakota v. Dole*. There, the Supreme Court upheld conditioning federal highway funding upon the states' adoption of a uniform drinking age of twenty-one, despite the states' "virtually complete control" of alcoholic beverages under the Twenty-First Amendment (*ibid.*).<sup>37</sup> Following its precedent in *United States v. Butler* (297 U.S. 1 [1936]), the *Dole* court reiterated that Congress's power to spend was not limited by the direct grants of legislative power in the Constitution (*ibid.*: 66; *Dole*, 483 U.S. at 207).

Congress' power under the spending clause is not unlimited, however. Three conditions must be met (*ibid.*: 207). First, the "exercise of the spending power must be in pursuit of the general welfare" (*ibid.*; citing *Helvering v. Davis*, 301 U.S. 619, 640–641 [1937]). Second, while Congress may condition the states' receipt of federal funds it must "do so unambiguously . . . , enabl[ing] the States to exercise their choice knowingly, cognizant of the consequences of their participation" (*ibid.*).<sup>38</sup> Finally, the Court's "cases have suggested (without significant elaboration) that conditions on federal grants might be illegitimate if they are unrelated to the federal interest in particular national projects or programs" (*Dole*, 483 U.S. at 207–208, quoting *Massachusetts v. United States*, 435 U.S. 444, 461 [1978] [plurality opinion], internal citations marks omitted). In *Dole*, the Court held the condition on the receipt of federal funding is "directly related to one of the main purposes for which highway funds are expended—safe interstate travel" (*ibid.*: 208). Congress found that the "differing drinking ages in the States created particular incentives for young persons to combine their desire to drink with their ability to drive, and that this interstate problem required a national solution" (*ibid.*).

If congressional judgments about highway safety and the drinking age are sufficient to justify federal action under the spending clause, then congressional judgments about improving medical safety by modifying the current corrosive atmosphere engendered by medical malpractice litigation should be also sufficient. The nexus requirement between the conditions

37. See also *Oklahoma v. Civil Service Comm.*, 330 U.S. 127 (1947), which holds that Congress may condition acceptance of federal funds on states imposing restrictions on political activity by members of state highway commission paid partly out of federal funds.

38. Citing *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 17 (1981): the "legitimacy of Congress' power to legislate under the spending power thus rests on whether the State voluntarily and knowingly accepts the terms of the contract." Constitutional law professor Denis Binder (2001: 151) argues that "legislation pursuant to the Spending Clause can be analogized to a contract. The states agree to federally imposed conditions in exchange for the receipt of federal funds. Therefore, the disclosure of conditions must be unambiguous." This requires "sufficient clarity . . . not only as to the fact that an obligation is being assumed, but also as to the scope or scale of that obligation" (Engdahl 1994: 78). See also *Butler*, 297 U.S. at 83: "the Constitution requires that public funds shall be spent for a defined purpose."



on accepting federal funds and a legitimate federal interest could almost certainly be satisfied by the federal interest in ensuring that Medicare and Medicaid funding is not wasted. In *Sabri v. the United States* (124 U.S. 1941 [2004]), a unanimous Supreme Court held that Congress could make it a federal crime to bribe a state official of an agency that receives partial federal funding: “Congress has authority under the Spending Clause to appropriate federal monies to promote the general welfare, and it has corresponding authority under the Necessary and Proper Clause to see to it that taxpayer dollars appropriated under that power are in fact spent for the general welfare, and not frittered away in graft or on projects undermined when funds are siphoned off or corrupt public officers are derelict about demanding value for dollars.”

The same logic argues that Congress could determine that taxpayer dollars should not be frittered away by a wasteful medical malpractice litigation system or in unnecessary defensive medicine that results from the incentives that medical malpractice litigation may create. Thus, we believe that Congress could, if it so chose, condition receipt of federal funding for medical purposes on states accepting federally mandated reforms to their medical malpractice systems. For political as well as constitutional reasons, the reforms upon which federal aid would be conditioned are more likely to be objective performance standards that give states some flexibility in implementation rather than micromanaging the details of state medical malpractice systems. But under *Dole*, there is little doubt that Congress could attach relatively specific conditions to the receipt of federal funding for medical purposes. Or, alternatively, Congress could provide bonuses in terms of increased federal funding for states that are particularly successful in reforming their medical malpractice systems.

### **May Jurisdiction Be Given to Non–Article 3 Tribunals and May Claims Be Decided without Jury Trials (Separation of Powers and Seventh Amendment)?**

Perhaps the most difficult issue raised by the proposal for administrative health courts is whether Congress may substitute new remedies for medical injuries in an administrative forum for medical malpractice cases that are currently heard in state court by juries.<sup>39</sup> This is not, however, because

39. See Widman (2006: 84–86) for an analysis of the state constitutional issues raised by eliminating the right to jury trials. While Widman’s article is persuasive, it is, by its own

the question is really a close one. On the contrary, on numerous occasions throughout American history, areas of law that were formerly heard by civil juries have been supplanted by new administrative remedies that do not use juries. Perhaps the clearest historical precedent is workers' compensation claims. Early in the twentieth century, the common-law system for workplace injury claims was replaced by an administrative system of workers' compensation, and the courts upheld the change against claims that it deprived claimants and/or defendants of their right to trial by jury (*Second Employers' Liability Cases*, 223 U.S. 1 [1912]; *New York Central RR v. White*, 243 U.S. 188 [1917]; *Arizona Employers' Liability Cases*, 250 U.S. 400 [1919]). Nor is workers' compensation unique. There are numerous areas—including black lung and vaccine injury compensation funds—in which claims formerly handled by common-law juries have been rerouted into administrative systems that apply somewhat different standards of law (*Black Lung Compensation Insurance Fund*, 30 U.S.C. § 943 [2006]; *Black Lung Disability Trust Fund*, 26 U.S.C. § 9501 [2006]; *Vaccine Injury Compensation Trust Fund*, 26 U.S.C. § 9510 [2006]).

Rather, the issues may seem more confusing than they really are because there are relatively few Supreme Court cases on the subject, and the few that do exist are somewhat internally inconsistent and confusing in their rationales. But the message of history is clear: if Congress chooses to replace claims in front of juries with an administrative system, it may do so provided that the new system is fair, benefits all categories of interested parties, and involves important public policies.<sup>40</sup> In concept, administrative health courts for processing medical injury claims would clearly satisfy all of those criteria, although the features of each legislative proposal would have to be analyzed specifically.

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admission, limited to state constitutional rights—"this article analyzes the possible application of state constitutional rights to jury trials because to date the main push for health courts has been on the state level" (ibid.: 84). We are concerned with whether federal, as opposed to state, legislation may be used constitutionally to make more fundamental reforms to the system for delivering civil justice. We, however, recognize that Widman states, without much support, that federal legislation establishing administrative health courts "would encounter serious Seventh Amendment problems" (ibid.: 86). For the reasons outlined in the third section of this article, we believe a proposal to establish administrative health courts, such as that proposed by Common Good, could survive a Seventh Amendment challenge.

40. But see Widman (2006: 63): "health courts represent a new model that draws from both the administrative and specialized court models, while neglecting to incorporate the constitutional safeguards within each of those models [vaccine injury compensation program, workers' compensation scheme]." For the reasons discussed in the third section of this article, replacing common-law litigation with an administrative system for regulating and compensating victims of medical treatment injuries should be constitutional, provided that certain findings are made and safeguards are met.

Replacing common-law litigation with an administrative system for regulating and compensating victims of medical treatment injuries is even more clearly constitutional if four features are included: (1) it is part of a comprehensive reform of the medical delivery and injury compensation system; (2) it includes a different substantive standard for compensation, such as avoidable injuries, that is arguably more favorable to claimants; (3) an appeal on the record of the results of the administrative proceeding is provided to an article 3 court; and (4) compensation is paid out of a governmental fund that aggregates contributions rather than making awards against individual defendants in specific cases. However, none of these conditions is absolutely required.

A statute substituting a federal administrative remedy for medical injuries for state medical malpractice litigation could be challenged under two different constitutional provisions. The first is the limit that article 3 places on Congress’s power to assign judicial functions to bodies that do not comply with the requirements for the judiciary as required by article 3 (U.S. Constitution, art. 3; see also *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 [1982]). The second is the Seventh Amendment’s guarantee to the right of trial by jury in suits at common law (U.S. Constitution, amend. 7; see also *Atlas Roofing Co. v. Occupational Safety and Health Review Ass’n*, 430 U.S. 442 [1977]). Although these two issues are analytically distinct, both questions are reviewed under similar tests to determine whether the reforms involve public or private rights (*Granfinanciera SA v. Paul C. Nordberg Creditor Trustee*, 492 U.S. 33 [1989]). Whether medical malpractice reform would be seen as falling on the private or public side of the line will likely hinge on whether a particular statute is perceived as narrowly targeting the province of article 3 courts and depriving plaintiffs of their procedural rights or, alternatively, whether it is part of a comprehensive package of reforms of the medical care delivery system that benefits patients by lowering costs and improving regulation of patient safety.

### Article 3

Article 3 of the U.S. Constitution vests the judicial power in the Supreme Court and in such inferior courts as Congress may create (U.S. Constitution, art. 3, sec. 1). Article 3 judges are given guarantees of life tenure during good behavior and fixed salaries “which shall not be diminished during their Continuance in Office” (*ibid.*). Judicial life tenure and fixed salaries help to protect the Framers’ system of separation of powers and

checks and balances by preventing the political branches from exerting pressure on the judiciary (see *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 848, 848–851 [1986]). The resulting judicial independence is also an institutional value in itself as it benefits all litigants to know that their cases will be impartially assessed without interference from the political branches (Sward 1999).

The jurisprudence in this area began with a formal categorical approach, creating a division between private-rights cases and public-rights cases. Only cases involving public rights, a narrowly defined category in which a party asserts claims against the government, could permissibly be adjudicated by non–article 3 tribunals (*Crowell v. Benson*, 285 U.S. 22 [1932]). While the current approach has not entirely abandoned the public-private distinction, the Court now draws the line between the two categories by means of a balancing test that weighs the interests that Congress seeks to advance in its use of non–article 3 courts against the possible infringement on the article 3 values.

A comprehensive administrative medical compensation system should be upheld for two separate reasons: (1) it would involve the type of rights that, under the Court's current balancing test, would fall into the public-rights category; and (2) Congress would be creating new federal substantive rights to compensation for medical injuries on a different basis than under state law and assigning them to administrative enforcement.<sup>41</sup> As long as administrative medical tribunals were part of a larger, comprehensive health care reform package, courts should conclude that the scheme does not “create a substantial threat to the separation of powers” and does not violate article 3 (*Schor*, 478 U.S. at 854). In addition, a court is more likely to find administrative medical tribunals constitutional under article 3 if provisions are made for full or partial review of the tribunals' decisions by article 3 courts.

*The Formal Categorical Approach to Article 3.* One of the first cases dealing with the question of assigning judicial power to non–article 3 courts was *Murray's Lessee v. Hoboken Land Co.* (59 U.S. [18 How.] 272 [1855]). There, the Court drew a line between public-rights cases and private-rights cases and defined public-rights cases as those involving

41. There are dicta by some members of the Court suggesting that the concept of public rights may also limit what kinds of new remedies may be assigned to administrative agencies, but there is no case in the Supreme Court actually holding that Congress may not create new remedies and assign their administration to an administrative agency rather than a court.

federally created privileges, such as the federal land grant at issue in that case. The Court held that article 3 only permitted public-rights cases to be heard by non–article 3 tribunals (*ibid.*).

This formal categorical approach was then expanded by the Court in *Crowell v. Benson*. There, the Court examined the Longshoremen’s and Harbor Worker’s Compensation Act provision, giving the Deputy Commissioner of the United States Employees’ Compensation Commission the power to hear and determine all questions in respect to workers’ compensation claims brought by maritime workers (*ibid.*: 42–43). The act, however, also allowed federal district courts to overturn a compensation order if it “was not in accordance with law” (*ibid.*: 44). The Court found that the workers’ compensation claims were private-rights cases between the employer and the employee but held that “there is no requirement that, in order to maintain the essential attribute of the judicial power, all determinations of fact in constitutional courts shall be made by judges” (*ibid.*: 51). *Crowell* also held that article 3 courts must be permitted to make a full and independent review of the facts that establish the administrative court’s jurisdiction over the matter at hand (*ibid.*: 63–64), a proposition that has been substantially eroded by subsequent cases.<sup>42</sup>

For over two generations, *Crowell* appeared to provide a stable and serviceable answer to the question of whether and how Congress could reassign matters to administrative agencies. Two decisions, both written by Justice William J. Brennan in the 1980s and both involving bankruptcy courts, appeared at least briefly to have unsettled this stable regime. The first was *Northern Pipeline v. Marathon Pipe Line* (458 U.S. at 67, 70), in which Justice Brennan’s plurality opinion asserted that the only situations “not subject to th[e] command” of article 3 were (1) military courts, (2) territorial courts, and (3) courts created to adjudicate public rights. At issue was the Bankruptcy Act of 1978 (28 U.S.C. § 1471 [b] [1976]), which established a federal bankruptcy court in each judicial district and granted these courts jurisdiction over “all civil proceedings arising under [the bankruptcy title of the United States Code] or arising in or related to cases under the [bankruptcy title].” After filing a petition for reorganization in one of the bankruptcy courts, Northern Pipeline filed a suit against

42. A contemporary administrative law text warns that this aspect of *Crowell* “should be approached with extreme care. It does establish the authority of courts to review an agency’s jurisdiction, but much of the language in the case dealing with the concept of ‘constitutional’ or ‘jurisdictional’ fact (suggesting that a court can review these matters *de novo*, i.e., with no reference whatsoever to what the agency said) is probably not acceptable today” (Fox 2000: 76n2).

Marathon in the same court, alleging breach of contract and warranty, misrepresentation, coercion, and duress. Marathon sought to dismiss Northern Pipeline's suit on the grounds that the scheme created by the Bankruptcy Act violated article 3 (ibid.: 50).

The Court first found that the bankruptcy courts at issue clearly did not fit into the first two categories described above. Further, the plurality would have held that the substantive legal rights at issue were not public rights (ibid.: 71). Although the Court acknowledged that "the restructuring of debtor-creditor relations, which is at the core of the federal bankruptcy power," could be seen as a public right, "the adjudication of *state-created private rights*, such as the right to recover contract damages that [was] at issue in this case" did not involve public rights (ibid., emphasis supplied).<sup>43</sup> While Justice Brennan did not clearly define what constitutes a public right, he observed that "a matter of public rights must arise 'between the government and others.' . . . In contrast, 'the liability of one individual to another *under the law as defined*' . . . is a matter of private rights" (ibid.: 69–70, quoting *Crowell*, 285 U.S. at 51, 52, emphasis supplied). Because the bankruptcy courts were being given jurisdiction over controversies between individuals concerning preexisting state-created rights, they were in violation of article 3 (ibid.: 70).

Under the *Northern Pipeline* approach, it is debatable whether administrative health tribunals would be upheld if they were merely applying preexisting state law as the basis for claims between private individuals. Medical injury claims are clearly not within Justice Brennan's first two categories and could well be found to involve private rights because medical malpractice claims are not "between the government and others" but involve "the liability of one individual to another" (ibid.: 70). However, the rigid categorical approach proposed by the plurality in *Northern Pipeline* has never been adopted by a majority of the Court and has been heavily criticized for being fraught with inconsistencies and analytical deficiencies. Perhaps the most significant difficulty was Justice Brennan's refusal to clearly delineate the boundaries of the public-rights category (Bator 1990). Although in the plurality's view, claims that involve the government are automatically public-rights cases, it also stated that "the presence of the United States as a proper party to the proceeding is a necessary but not sufficient means of distinguishing 'private rights' from

43. As we indicate, a crucial distinction between Common Good's proposal for administrative health courts and the situation at issue in *Northern Pipeline* is that the administrative health courts would *not* be adjudicating "state-created" rights but rather new federal substantive rights for compensation of medical injuries.

‘public rights’” (*Northern Pipeline*, 458 U.S. at 70n23; see also Bator 1990: 249).

Further confusion was created by the inconsistency between the plurality’s approach and the holding in *Crowell*, in which administrative tribunals were permitted to adjudicate private rights cases between employers and employees, provided that there was an appeal on the record to an article 3 court (see *Northern Pipeline*, 458 U.S. 50). In attempting to explain the apparent inconsistency between his approach in *Northern Pipeline* and *Crowell*, Justice Brennan admitted that there was “still another category of valid administrative adjudication” in which Congress may assign certain fact-finding functions to administrative tribunals, even in circumstances in which the claim involved the liability of one individual to another (see Bator 1990: 252). The *Northern Pipeline* plurality recognized that when Congress creates new federal rights, as opposed to merely providing for the application of existing law (“the law as defined” in the words of *Crowell*), Congress may have greater flexibility to assign the administration of the new rights to administrative, as opposed to article 3 tribunals: when “Congress creates a substantive federal right, it possesses substantial discretion to prescribe the manner in which that right may be adjudicated—including the assignment to an adjunct of some functions historically performed by judges. . . . [But] the functions of the adjunct must be limited in such a way that ‘the essential attributes’ of judicial power are retained in the article 3 court” (*Northern Pipeline*, 458 U.S. at 77–81, quoting *Crowell*, 285 U.S. at 51, emphasis added).

Because the substantive rights at issue in *Northern Pipeline* were not new federal rights but ordinary preexisting state law tort and contract claims rather than new rights created by Congress, they could not be adjudicated by non–article 3 courts (*ibid.*). By contrast, *Crowell* involved claims stemming from a new federal statute requiring employers to compensate their employees for work-related injuries under a new standard and was therefore “the adjudication of congressionally created rights” (*ibid.*: 78).

*More Recent Article 3 Cases.* The rigid, categorical approach proposed by Justice Brennan in *Northern Pipeline* has been rejected in the Court’s subsequent article 3 jurisprudence in cases such as *Thomas v. Union Carbide Agric. Prod. Co.* (473 U.S. 568 [1985]) and *Schor* (478 U.S. 833). Since *Northern Pipeline*, the Court has moved toward a more functional test that asks whether a measure threatens the policy purposes underlying article 3. This resembles the approach originally advocated by Justice Byron White

in his dissent in *Northern Pipeline* (458 U.S. at 92–118). White argued that “Article III is not to be read out of the Constitution; rather it should be read as expressing one value that must be balanced against competing constitutional values and legislative responsibilities” (ibid.: 113).

White’s approach ultimately won the day in *Thomas v. Union Carbide Agric. Pro. Co.*, in which the Court upheld the validity of the Federal Insecticide, Fungicide, and Rodenticide Act’s (FIFRA) requirement that disputes arising under it between private parties be arbitrated rather than litigated. Justice O’Connor’s majority opinion held that “the Court has long recognized that Congress is not barred from acting pursuant to its powers under Article I to vest decision making authority in tribunals that lack the attributes of Article III courts” (ibid.: 583). Emphasizing that the *Northern Pipeline* decision did not command a majority of the Court and thus was not binding precedent, the majority in *Thomas* criticized Justice Brennan’s “bright-line” test for defining the public/private rights dichotomy and returned to Chief Justice Charles Evans Hughes’s holding in *Crowell* that explicitly rejected a formalistic approach to article 3 (ibid.: 586). Rather, the *Crowell* Court stated that “In deciding whether the Congress, in enacting the statute under review, has exceeded the limits of its authority to prescribe procedure . . . , regard must be had, as in other cases where constitutional limits are invoked, not to mere matters of form but to the substance of what is required” (ibid.: 586, quoting *Crowell*, 285 U.S. at 53, emphasis in original). Thus, “the enduring lesson of *Crowell* is that practical attention to substance rather than doctrinaire reliance on formal categories should inform application of Article III” (ibid.: 587).

The majority opinion in *Thomas* also rejected relying on the identity of the parties alone to determine the requirements of article 3. The Court did not want to allow the parties’ identities to define what constitutes a public right, as doing so would throw doubt on the constitutionality of many quasi-adjudicative activities currently carried on by administrative agencies (ibid.). Rather, the appropriate inquiry was to look “beyond form to the substance of what [the act at issue] accomplishes” (ibid.: 589).

*Thomas* also expanded the definition of public rights. The Court concluded that, although the claims at issue under FIFRA were between private parties, the claims nevertheless had the characteristics of public rights because they were created by Congress and were invested with a public rather than private purpose (ibid.: 589). In doing so, the Court found that FIFRA did not contravene article 3 for several reasons. First, “the right created by FIFRA is not a purely ‘private’ right, but bears many of the characteristics of a ‘public’ right . . . [including] serv[ing] a public pur-



pose as an integral part of a program safeguarding the public health” (ibid.: 589, emphasis supplied). Second, Congress had the power, under article 1, to authorize an agency to distribute the costs and benefits of a complex regulatory scheme among voluntary participants without having to provide for article 3 adjudication. Third, the Court found that the danger of Congress or the executive encroaching on the article 3 judicial powers was minimal, given that “no unwilling defendant is subjected to judicial enforcement power as a result of the agency ‘adjudication’ ” (ibid.: 591). The Court also found that FIFRA’s provisions affording article 3 review of the arbitrator’s findings for “fraud, misconduct, or other misrepresentation” (7 U.S.C. § 136a [c] [1] [D] [ii] [1982]) preserves the “appropriate exercise of the judicial function” (*Thomas*, 473 U.S. at 592; quoting *Crowell*, 285 U.S. at 54).

The more flexible approach was further elaborated in *Commodity Futures Trading Commission v. Schor*, in which the Court upheld a statutory scheme that would allow the Commodity Futures Trading Commission (CFTC) to hear claims for reparations in proceedings brought by customers against brokers who were alleged to have violated the Commodity Exchange Act (CEA) (*Schor*, 478 U.S. at 833). The article 3 controversy arose around a provision of the act that allowed the commission to adjudicate common-law counterclaims arising out of the same transaction or occurrence as the reparations claim (7 U.S.C.A. § 12 [5]). Following *Thomas*, and to avoid “unduly constricting Congress,” the Court declared that the key issue is the “practical effect that the congressional action will have on the constitutionally assigned role of the federal judiciary” (*Schor*, 478 U.S. at 851). The Court enumerated a number of factors to be taken into consideration when deciding whether non–article 3 adjudication was permitted: (1) the extent to which the essential attributes of judicial power are reserved to article 3 courts, (2) the extent to which the non–article 3 forum exercises the range of jurisdiction and powers normally vested only in article 3 courts, (3) the origins and importance of the right to be adjudicated, and (4) the concerns that drove Congress to depart from the requirements of article 3 (ibid.). Moreover, the Court stated that no single factor was determinative (ibid.).

Applying these factors, the Court found that the CEA preserved the essential attributes of judicial power because it (1) dealt only with one particularized area of law, (2) CFTC orders were only enforceable by order of the district court, (3) CFTC orders were subject to de novo review, and (4) the CFTC did not exercise all ordinary powers of the district court as it did not preside over jury trials and could not issue writs of habeas corpus

(*ibid.*: 852–853). In addition, the Court held that “where private common law rights are at stake, our examination of the congressional attempt to control the manner in which those rights are adjudicated has been searching” (*ibid.*: 854). However, the CFTC’s jurisdiction over a “narrow class of common law claims as an incident to the CFTC’s primary, and unchallenged adjudicative function” was not found to pose a threat to the federal judiciary or the separation of powers (*ibid.*). The Court found that the separation of powers concerns were particularly diminished because “the decision to invoke [the CFTC’s jurisdiction] is left entirely to the parties and the power of the federal judiciary to take jurisdiction of these matters is unaffected” (*ibid.*: 855). Finally, this *de minimis* intrusion on the judicial branch was supported by Congress’s desire to create an efficient alternative forum to facilitate a specific and limited federal regulatory scheme (*ibid.*: 855–856). As such, the CFTC and its jurisdiction over common-law counterclaims were upheld as being consistent with article 3 (*ibid.*: 859).

Most commentators have read *Schor* as finally laying to rest the uncertainties regarding congressional power to choose administrative enforcement of new federal rights that had arguably been created by *Northern Pipeline*. For example, one of the leading administrative law casebooks proclaims that, “as a practical matter, *Schor* seems to have shut the constitutional Pandora’s box opened four years earlier by *Northern Pipeline*” (Strauss, Rakoff, and Farina 2003: 127). However, neither Justice Brennan, who authored *Northern Pipeline*, nor Justice O’Connor, who wrote *Schor*, is any longer on the Court and as yet we have no clear indication of how more recent appointees such as Chief Justice John Roberts and Justice Samuel Alito will approach these issues.

Assuming the new justices follow prior precedents, under the article 3 analysis employed in *Thomas* and *Schor*, administrative medical tribunals applying new federal rights to compensation for medical injuries should clearly be held constitutional. First, these tribunals would “preserve the essential attributes of judicial power” (*Schor*, 478 U.S. at 851). They would deal only with one particularized area of the law: medical malpractice claims (*ibid.*: 852). This will particularly be true if the drafters of a health care reform statute that includes administrative medical tribunals narrowly tailor the tribunals’ jurisdiction. For example, the type of language struck down in *Northern Pipeline*, which grants the bankruptcy courts jurisdiction over “all civil proceedings arising under title 11 or arising in or *related to* cases under title 11,” should be avoided (*ibid.*: 852, emphasis in original). Moreover, if these health tribunals have the same procedural

limitations as the CFTC in *Schor*, they are likely to survive scrutiny. First, the orders of the health courts should only be enforceable by order of an article 3 court (*ibid.*: 853). Second, there should be review of the tribunals' legal decisions on the record as in *Crowell* (285 U.S. at 44). The extent to which the medical tribunals would exercise the range of jurisdiction and powers normally vested only in article 3 courts would be minimal (*Schor*, 478 U.S. at 854).

If administrative medical courts are set up to adjudicate claims between private individuals (as opposed to claims against a fund), they could be questioned under the categorical approach proposed by Justice Brennan in *Northern Pipeline* but never adopted by a majority of the Court. However, under *Schor*, even when claims among individuals are at stake, the Court will not automatically invalidate the scheme but will only undertake a more searching inquiry than if the claim involved purely public rights (*ibid.*: 854). Because it is likely that administrative medical courts would be created as part of a larger health care reform package, as in *Thomas*, the rights to be adjudicated by the health tribunals should not be considered purely private. Rather, as in *Schor*, they would bear "many of the characteristics of a 'public right . . . [including] serv[ing] a public purpose as an integral part of a program safeguarding the public health'" (*Thomas*, 473 U.S. at 589). In this regard, the medical tribunals would also closely resemble the administrative tribunals approved in *Crowell*. There, the adjudicative functions performed by the deputy commissioner were an integral part of the overall scheme contained in the Longshoremen's and Harbor Workers' Compensation Act (*Crowell*, 285 U.S. at 22). Similarly, administrative medical tribunals would be an integral component of an overall effort to reform health care and improve both compensation and prevent avoidable medical injuries.

Finally, the concerns that would cause Congress to provide for enforcement of the new system of medical injury compensation by administrative experts rather than by lay judges and juries would be substantial. Not only would Congress seek to enhance the efficiency of how medical malpractice claims are adjudicated (*ibid.*), but there is also evidence that the use of medical tribunals would create a more just and predictable system and significantly reduce overall medical costs. The importance of the tribunals as part of a larger effort to reform the health care system would weigh heavily in favor of finding that the tribunals are constitutional under article 3.

### The Seventh Amendment

The Seventh Amendment of the U.S. Constitution guarantees that “in suits at common law,” citizens suing or being sued in the federal courts shall have the right to a jury trial.<sup>44</sup> This has been interpreted to require a jury trial in civil cases, including those involving both legal and equitable issues (see *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 508 [1959]), that would have required one in England at the time the amendment was ratified (see *Dimick v. Schneider*, 293 U.S. 474, 476 [1935]). When Congress creates new remedies that did not exist previously, it must provide for a jury trial “if the statute creates legal rights and remedies, enforceable in an action for damages in the ordinary courts of law” (*Curtis v. Loether*, 415 U.S. 189, 195 [1974]) but not if the new remedy is administered by an administrative agency (*Atlas Roofing*, 430 U.S. 22).

Underlying the Seventh Amendment is the obvious requirement for a decision maker that is independent from both the political and judicial branches. Preserving the role of the civil jury has also been given many other justifications including “that the jury is a good decision maker; that it offers protection against abuse of power by governmental and other institutional authorities; that it brings community values into the judicial process; that it checks the bureaucratization of the judiciary; that it helps to legitimate judicial decisions; and that it educates the citizenry” (Sward 1999: 1057).

In addition to answering the question of whether Congress may take jurisdiction over medical malpractice cases out of the hands of article 3 courts, the issue of whether such cases can be heard without a jury must also be addressed. In *Granfinanciera* (492 U.S. at 43), the Court articulated the following test to be used in determining when a jury trial was necessary:

First, we compare the statutory action to 18th-century actions brought in the courts of England prior to the merger of the courts of law and equity. Second, we examine the remedy sought and determine whether it is legal or equitable in nature. *Tull v. United States*, 481 U.S. 412, 417–418 (1987) (citations omitted). The second stage of this analysis is more important than the first. *Id.* at 421. If, on balance, these two factors indicate that a party is entitled to a jury trial under the Seventh

44. U.S. Constitution, amend. 7: “In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of the trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.”

Amendment, we must decide whether Congress may assign and has assigned resolution of the relevant claim to a non–Article III adjudicative body that does not use a jury as fact finder.

There can be no doubt that actions for negligence were brought in eighteenth-century courts of England and that actions for damages are legal in nature (*ibid.*). However, we must still determine “whether the Seventh Amendment confers . . . a right to a jury trial in the face of Congress’ decision to allow a non–Article III tribunal to adjudicate the claims” (*ibid.*: 50). In *Granfinanciera*, the Court concluded that the answer to this type of question turned on whether public or private rights were in dispute. The case again involved a claim by a bankruptcy trustee against a third party who had allegedly received property in a fraudulent manner (*ibid.*: 64). The Court concluded that this was a private rights claim brought in court and held that the Seventh Amendment required a jury trial (*ibid.*: 57–58).

Despite the seemingly formalistic application of the distinction between public and private rights in *Granfinanciera*, nothing in that case overruled *Thomas* and *Schor*. Therefore, because administrative medical tribunals will likely be found not to violate article 3, they should also be found to be in keeping with the Seventh Amendment.<sup>45</sup> Moreover, the Court in *Granfinanciera* acknowledged there that “in certain situations, of course, Congress may fashion causes of action that are closely analogous to common-law claims and place them beyond the ambit of the Seventh Amendment by assigning their resolution to a forum in which jury trials are unavailable” (*ibid.*; citing *Atlas Roofing*, 430 U.S. 442, 450–461 on workplace safety regulations).<sup>46</sup>

In creating the program for administrative medical courts, Congress should avoid merely taking traditional common-law causes of action for

45. The majority held that

indeed, our decisions point to the conclusion that, if a statutory cause of action is legal in nature, the question whether the Seventh Amendment permits Congress to assign its adjudication to a tribunal that does not employ juries as factfinders requires the same answer as the question whether Article III allows Congress to assign adjudication of that cause of action to a non–Article III tribunal. . . . [I]f the action must be tried under the auspices of an Article III court, then the Seventh Amendment affords the parties a right to a jury trial whenever the cause of action is legal in nature. Conversely, if Congress may assign the adjudication of a statutory cause of action to a non–Article III tribunal, then the Seventh Amendment poses no independent bar to the adjudication of that action by a nonjury factfinder. (*Granfinanciera SA v. Paul C. Nordberg Creditor Trustee*, 492 U.S. 33, 53–54 [1989])

46. See also *Block v. Hirsh*, 256 U.S. 135, 158 (1921) on temporary emergency regulation of rental real estate.

medical malpractice and placing them under the jurisdiction of administrative judges. While new rights to compensation created by the reforms may be somewhat analogous to current medical malpractice torts, Congress should ensure that it is fashioning a new scheme with significant differences from existing state causes of action. Just as workers' compensation was regarded as a new system because it modified the existing standard for liability, a medical injury compensation system that is triggered by whether an injury "should have been avoidable," as opposed to whether the doctor committed professional malpractice, is likely to be regarded as a new federal cause of action that Congress may assign to an expert administrative tribunal as opposed to a court and jury. As the Supreme Court wrote in 1977:

Thus our history and our cases support the proposition that the right to a jury trial turns not solely on the nature of the issue to be resolved *but also on the forum in which it is to be resolved. Congress found the common-law and other existing remedies for work injuries resulting from unsafe working conditions to be inadequate to protect the Nation's working men and women. It created a new cause of action, and remedies therefore, unknown to the common law, and placed their enforcement in a tribunal supplying speedy and expert resolutions to the issues involved. The Seventh Amendment is no bar to the creation of new rights or to their enforcement outside of the regular courts of law.* (*Atlas Roofing*, 430 U.S. at 479, emphasis added)

This is the same point that even the *Northern Pipeline* court acknowledged when it wrote that when "*Congress creates a substantive federal right, it possesses substantial discretion to prescribe the manner in which that right may be adjudicated—including the assignment to an adjunct of some functions historically performed by judges. . . . [But] the functions of the adjunct must be limited in such a way that 'the essential attributes' of judicial power are retained in the Article III court*" (458 U.S. at 80, quoting *Crowell*, 285 U.S. at 51, emphasis added).

Thus, there are two conceptually distinct bases on which administrative health courts might be upheld by the Supreme Court against article 3 and Seventh Amendment challenges: (1) the Court might find that they involve public rights, because compensation for medical injuries is integral to a comprehensive system for regulating patient safety and regulating health care costs; or (2) even if they are considered private rights, if the federal government is creating a new federal cause of action that is substantively different from state medical malpractice law, Congress has discretion to

assign fact finding and claims administration to administrative as opposed to judicial institutions, provided that review on the record in an article 3 court is preserved.

The chances that the Supreme Court will regard the new medical injury system as involving public rights are enhanced if compensation is paid out of a public fund that aggregates payments instead of being recovered from each individual defendant on a case-by-case basis. For example, a system in which each participating hospital pays into a compensation fund every year based on the number of injuries that occurred during a base period (as in the proposed asbestos trust fund S.852) is more clearly a public right than a system in which the defendant pays directly whatever compensation is awarded in each individual case. The public-fund approach satisfies even Justice Brennan’s talismanic approach that a public right has a governmental defendant. But as subsequent cases such as *Schor* and *Granfinanciera* make clear, a governmental defendant, such as a compensation fund, is helpful to show the public nature of a claims system, but it is not absolutely necessary.

As discussed in relation to the article 3 concerns, combining the creation of administrative medical courts with other sizable reforms to the health care system will help to convince a court that Congress is not trying to usurp traditional legal claims from either article 3 judges or from juries. If one pays attention to the substance and form of these reforms, particularly to avoid the appearance that Congress seeks merely to take traditional legal claims away from juries by placing them under the jurisdiction of administrative medical courts, the tribunals should pass constitutional muster and be found to be consistent with the Seventh Amendment.

**Could Pilot Programs Constitutionally Require Some Claims to Be Pursued in a Federal Administrative Forum while Leaving Others in State Court (the Equal Protection Issue)?**

Is the federal government required to replace state medical malpractice litigation all at once? Or may it experiment with pilot programs through legislation that directs some claimants to pursue their medical injury claims in administrative health courts while leaving others to pursue their claims in the traditional way? The question is trivially easy if the claimants before the administrative health courts are all volunteers who have chosen to bypass traditional litigation and pursue an administrative rem-

edy instead. But, unfortunately, the voluntary approach could invalidate any comparisons between the two systems because of what is called selection bias, the claim that the group that voluntarily chose the health courts was somehow different from those who litigated.

The question becomes, then, may the federal government create two parallel systems for processing medical injury claims during an experimental or transitional period and lead one group of people into one system while leaving others to pursue their claims in the traditional way? Surprisingly, we found relatively few cases directly on point, but based on analogous cases we believe that government is generally free to experiment or to try to solve problems one step at a time. Therefore, a system of pilot programs to test the administrative medical courts concept should be constitutional,<sup>47</sup> provided that there is no racial or other invidious distinction between the two groups.

A pilot program would permit some claimants to litigate their claims in a federal administrative forum, while other claimants would still only be eligible to pursue traditional tort law remedies. The most likely approach would permit certain hospitals or medical centers to opt in to the health courts program, and persons choosing to patronize those medical providers would be required to pursue any medical injury claims that might later arise through the administrative health court system. A pilot program thus making administrative health courts available to some people but not to others might conceivably be challenged as denying one group or the other equal protection of the laws.<sup>48</sup>

While we have found no reported cases directly on point in which a pilot program exactly like the one that we are envisioning was challenged on equal protection grounds, there are a number of analogous cases in which similar government programs were upheld despite classifications

47. Pilot programs are nothing new to American society. Rather, both state and federal governments have utilized pilot programs in the past (e.g., Cleveland School Voucher System, Worker's Compensation System, U.S. Trustee Program, and Employment Eligibility Pilot Program). Pilot programs are essentially "test" programs, which enable the government to study a plan's effectiveness before initiating wide scale implementation of the particular program in question. By way of example, the United States Trustee program, which restructured the bankruptcy system, was implemented on a trial basis for a six-year period to determine its effectiveness before deciding whether national implementation was appropriate. See Schulman (1995: 121), who provides an overview of the United States Trustee program, stating that "the United States Trustee program was commenced as a pilot program in eighteen of the ninety-four judicial districts."

48. The equal protection clause of the Fourteenth Amendment by its literal terms applies only to state and local governments. Rotunda and Nowak (1999: sec. 18.1): "there is no Equal Protection Clause that governs the action of the federal government." However, "if the federal government classifies individuals in a way which would violate the Equal Protection Clause, it will be held to contravene the due process clause of the Fifth Amendment."



resulting in disparate treatment of particular groups.<sup>49</sup> Based upon the reasoning in these cases, it seems clear that establishing pilot programs in select medical centers, localities, and/or states to determine the effectiveness of specialized health courts would survive an equal protection challenge. Such programs would not involve a suspect classification, and the government would have a rational basis for the classifications drawn.<sup>50</sup> Second, these programs would not infringe upon a fundamental right.<sup>51</sup>

As one leading treatise points out, the equal protection clause (or the equal protection component of the due process clause, in the case of the federal government) does not guarantee that the government will literally treat all its citizens in exactly the same way, but rather only that “those classifications will not be based upon impermissible criteria or arbitrarily used to burden a group of individuals” (Rotunda and Nowak 1999: sec. 18.2). Where no suspect classification is involved, a classification will be upheld if it is rationally related to a legitimate state interest.<sup>52</sup>

49. See, e.g., *Kimbrough v. Holiday Inn*, 478 F.Supp. 566, 575 (E.D. Pa. 1979): “reform can proceed one stage at a time, despite the fact that there may be ‘temporary disparity’”; *Firelock Inc. v. District Court*, 776 P.2d 1090, 1098, which holds that conducting a pilot mandatory arbitration program in only one part of the state does not violate equal protection; *Lyng v. Castillo*, 477 U.S. 635 (1986), which holds that an equal protection challenge brought by families arguing that Congress’s amended definition of “household,” which governed eligibility and benefits received under the federal food stamp program, was unconstitutional as violative of the equal protection clause. See also *Schweiker v. Wilson*, 450 U.S. 221 (1981), which denies equal protection argument of residents in public institutions who did not receive Medicaid funds as not violative of the equal protection clause, because there was no suspect classification and the classification was rationally related to the government interest in reducing the federal financial burden in providing benefits to the mentally ill.

50. See, e.g., *Lipscomb v. Simmons*, 962 F.2d 1374 (9th Cir. 1992): “legislative classifications are subject to a heightened standard of scrutiny when they disadvantage a ‘suspect’ class or ‘quasi-suspect’ class or burden the exercise of fundamental rights independently protected against governmental interference.”

51. The “fundamental right” recognized by the Supreme Court that comes closest is the right to fairness in procedures against governmental deprivations of life, liberty, or property. See, e.g., *Youngberg v. Romeo*, 457 U.S. 307 (1982), which concerns persons committed to mental institutions. It is arguable that a person who is injured during medical treatment by a government that has waived its sovereign immunity may have a right to seek redress through a procedure that complies with due process requirements, but there is no basis to contend that all such procedures must be identical for all claimants.

52. See, e.g., *Lyng*, 477 U.S. at 640–641, which holds that close relatives are not a suspect or quasi-suspect class, thus, a rational-basis review was appropriate. In this case, Congress had revised the definition of “household” to treat close relatives living together as a single household and to treat more distant relatives—cousins, aunts, uncles, etc.—as a separate household entitled to separate benefits. The court held that the distinction between family members and nonfamily members was rational, because it was reasonable to assume that more closely related relatives purchased and ate more meals together than less closely related relatives. Additionally, the Court noted that Congress had a strong incentive in eliminating excess costs and fraud within the food stamp program and that the classification helped further that interest. *Schweiker*, 450 U.S. at 226, rejected a claim by those confined to a mental institution that Congress’s reduction of Supplemental Security Income benefits violated the equal protection

Here the government's legitimate purpose is to gather data to determine whether administrative health courts are in fact more effective than traditional malpractice litigation so that it can eventually improve the system for all citizens. That purpose should be sufficient to justify temporarily treating some groups differently than others.

Moreover, it is well established that the equal protection clause does not require a legislature to address an economic problem all at once, but rather it may regulate one step at a time. For example, against an equal protection challenge, the Supreme Court upheld a ban on advertising on delivery vehicles which left other, equally distracting forms of advertising unaddressed (*Railway Express Agency v. New York*, 336 U.S. 106 [1949]). The Court, per Justice William Orville Douglas, wrote: "The fact that New York City sees fit to eliminate from traffic this kind of distraction but does not touch what may be even greater ones in a different category, such as vivid displays on Times Square, is immaterial. It is no requirement of equal protection that all evils of the same genus be eradicated or none at all" (*ibid.*: 1092).

Similarly, in *New Orleans v. Dukes*, 427 U.S. 297 (1976) (per curiam), New Orleans banned pushcart vendors from the French Quarter but exempted those who had operated there for eight or more years. A challenge to the difference in treatment as arbitrary under the equal protection clause was rejected by a unanimous Supreme Court, saying, "Legislatures may implement their program step by step in such economic areas, adopting regulations that only partially ameliorate a perceived evil and deferring complete elimination of the evil to future regulations" (427 U.S. at 303).

Restricting eligibility for a federal compensation system for medical injuries through administrative health courts initially to some people through pilot programs at certain participating medical centers while retaining the traditional system for others is constitutional. It can be viewed as implementing reforms "step by step" in the way that the Supreme Court has specifically approved in cases like *Dukes* and *Railway Express*.

Additionally, the case of *Firelock v. The District Court* provides a useful analogy regarding whether a pilot program could survive an equal

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clause. The court found no suspect classification existed, because the statute did not "classify directly on the basis of mental health." Rather, the statute distinguished between those living in public institutions receiving Medicaid funds for their care and those living in such institutions not receiving funds for their care. Consequently, the court determined that Congress had a significant and legitimate interest in reducing the federal financial burden in providing benefits to the mentally ill and upheld the statute.

protection challenge. In this case, Firelock challenged a state statute that created mandatory arbitration in “eight pilot judicial districts” for any civil action seeking money damages less than \$50,000 as violative of equal protection (776 P.2d 1090 at 1092). Firelock argued, among other things, that the state statute violated the equal protection clause because it treated litigants in the pilot districts differently than it did those litigants in the nonpilot districts (*ibid.*: 1097).

In holding that the pilot program did not violate the equal protection clause, the court stated that “the Fourteenth Amendment does not prohibit legislation merely because it is special, or limited in its application to a particular geographical or political subdivision of the state. Rather, the Equal Protection Clause is offended only if the ‘statute’s’ classification rests on grounds wholly irrelevant to the achievement of the State’s objectives” (*ibid.*: 1098; citing *Holt Civic Club v. City of Tuscaloosa*, 439 U.S. 60, 70–71 [1978]).

As the Court noted, the Colorado General Assembly chose to “examine the success or failure of the Act by implementing its provisions in several judicial districts for a limited period of time during which evidence could be gathered to determine whether the Act would be beneficial on a statewide basis” (*ibid.*: 1098). Such a statute was rationally related to the achievement of the state’s objectives and therefore did not violate equal protection.

Similarly, in *Kimbrough v. Holiday Inn* (478 F.Supp. 566 [E.D. Pa. 1979]), hotel owners challenged a pilot program instituted by the Department of Justice in certain localities to test the feasibility of compulsory arbitration in civil suits as violative of equal protection. In ruling that the program did not violate equal protection, the court stated that “the allegedly ‘unequal treatment’ in the government’s plan has a rational basis far outweighing any possible equal protection violation. The local arbitration rule is a first step to develop a fast, efficient, and inexpensive system of dispute-resolution on a national scale. Reform can proceed one stage at a time. Unfortunately, the price of planned progress may be temporary disparity” (478 F.Supp. at 575). The pilot program in our particular situation could be seen as the first step in developing a faster, more efficient national system.<sup>53</sup>

53. Other courts have reached the same conclusion. See, e.g., *In Re Senate*, 135 N.H. 549 (Sup. Ct. N.H. 1992), which concluded that conducting a pilot program to eliminate trial de novo appeal in one county but not another did not violate equal protection, because a “pilot program is specifically created to determine whether the elimination of trial de novo system will actually reduce State expenditures and deliver just more efficiently as intended. The classification created by the program is thus perforce rationally related to a legitimate state interest.”

Based on the reasoning in these cases, establishing pilot programs in select medical centers, localities, and/or states to determine the effectiveness of specialized health courts would seemingly survive an equal protection challenge and would be viewed as implementing reforms step by step in the way that the Supreme Court has specifically approved in cases like *Dukes* and *Railway Express*.

### **Conclusion: Administrative Health Courts Should Be Constitutional**

In the immortal words of Nobel-prize winning physicist Neil Bohr, “prediction is always difficult—particularly when it is about the future.” Much depends on the specifics of a particular statute and the legislative findings that accompany it. As a general matter, however, it seems relatively clear that a properly drafted federal statute creating a new federal right to compensation for avoidable medical injuries could be administered through a system of specialized federal administrative tribunals.

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