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Medical Malpractice as Workers' Comp: Overcoming State Constitutional Barriers to Tort Reform

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MEDICAL MALPRACTICE AS WORKERS' COMP: OVERCOMING STATE CONSTITUTIONAL BARRIERS TO TORT REFORM

*Alexander Volokh**

ABSTRACT

This Article discusses the intersection of torts, administrative law, and constitutional law—a surprisingly understudied area, given its importance for modern-day tort reform efforts.

In several states, based on perceptions of a medical malpractice liability and insurance crisis, reformers have sought to abolish tort liability for medical malpractice—replacing it with an administrative compensation system not based on negligence and roughly similar to workers' compensation.

Tort reformers have, in the past, been hindered by state courts that have struck down damages caps and similar reforms on state constitutional theories. Some of the main theories have been state constitutional jury trial rights, access-to-courts rights, and due process/equal protection.

Surprisingly, it turns out that workers'-comp-like administrative systems, though more radical than damages caps and similar reforms, seem to have a better chance of being held constitutional—in part because of their similarities with workers' comp, which also abolished certain tort actions and replaced them with a non-negligence-based administrative system, and which has been universally held to be constitutional.

This Article analyzes the constitutionality of this sort of administrative compensation system under the Florida, Alabama, and Georgia constitutions, focusing on jury trial rights, access-to-courts rights, and due process/equal protection.

* Associate Professor, Emory Law School, avolokh@emory.edu. I am grateful to Sarah M. Shalf for her input and assistance. I conducted the bulk of this research on behalf of Patients for Fair Compensation, a proponent of Georgia's S.B. 141 and the similar Florida and Alabama bills described in this Article. I testified on behalf of S.B. 141 before the Health and Human Services Committee of the Georgia Senate on October 22, 2013. *See infra* note 155. While Patients for Fair Compensation paid for the time I spent researching and testifying, they did not exercise any control over the content of my work, and all opinions in my research and testimony and in this Article are my own.

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INTRODUCTION

A surprising fact lives at the intersection of torts, administrative law, and constitutional law. For years, many states have been striking down tort reform measures on various state constitutional grounds, relying on rights that are unknown to the Federal Constitution (like “access to justice” or “right to a remedy”), rights that have been interpreted far beyond their federal counterparts (like jury trial rights), or old-fashioned rights that state supreme courts merely apply more rigorously than one might expect (like due process or equal protection rights). In fact, it wouldn’t be unfair to think of state constitutional law as the enemy of the modern tort reform movement.

In recent years, tort reformers have introduced a new sort of bill in various state legislatures: one that would entirely abolish tort liability for medical malpractice (med mal) injuries and replace it with an administrative compensation system that looks more or less like the workers’ compensation system.

This proposal is far more radical than the sorts of proposals, such as damages caps or statutes of limitations, that have routinely been struck down. And yet—at least in the states whose constitutional law I examine in this Article—it is probably entirely constitutional.

The moral is that torts, state administrative law, and state constitutional law intersect in interesting and unexpected ways. In particular, the story of administrative med-mal compensation systems shows why we should all know more state constitutional law.

* * *

First, torts. Medical malpractice has long been the subject of critical inquiry.¹ Critics have argued that lay juries, unqualified to opine on the complicated question of whether doctors have been negligent—and moved by hindsight bias and venal expert witnesses—hand down excessively large damages verdicts. The fear of being found negligent drives the practice of “defensive medicine,” whereby doctors order useless and costly tests to insulate themselves from being second-guessed at trial. All this, in turn, drives

¹ See F. Patrick Hubbard, *The Nature and Impact of the “Tort Reform” Movement*, 35 HOFSTRA L. REV. 437, 469–70 (2006) (dating the med-mal-focused tort reform movement to the 1970s); see also *infra* Section I.A.

increases in medical malpractice insurance premiums and reduces the availability of affordable medical care.²

Not all plaintiffs benefit from these large verdicts, though: the expense of litigation means that many deserving plaintiffs with moderate claims can't find legal representation and thus go uncompensated; and even those who do get compensation have to wait years.³

* * *

Defenders of the med-mal system have disputed these critiques, and the empirical evidence is complicated.⁴ Still, these concerns—and broader concerns related to tort law and civil liability more generally—have driven the tort reform movement for the last forty years.⁵ The tort reform movement has featured damages caps (whether on noneconomic or punitive damages), alterations in the standard of proof for applying punitive damages (with several states adopting a “clear and convincing evidence” standard), provisions diverting all or a portion of punitive damages to the government, and so on.⁶ Some of these provisions have been targeted to medical malpractice; others haven't.

But one development is fairly new: the complete replacement of medical malpractice tort liability with an administrative compensation system. (Or perhaps everything old is new again—we've already seen something like this in the 1910s, when most states replaced most employer–employee litigation

² See, e.g., H.R. 739, 2014 Leg., Reg. Sess. § 766.403(1) (Fla. 2014) (giving reasons for the bill, including defensive medicine); S. 141, 152d Gen. Assemb., Reg. Sess. § 51-13-3 (Ga. 2013) (same); Patricia M. Danzon, *Liability for Medical Malpractice*, J. ECON. PERSP., Summer 1991, at 51, 60–63; Eric Helland & Seth A. Seabury, *Tort Reform and Physician Labor Supply: A Review of the Evidence*, 42 INT'L REV. L. & ECON. 192, 193, 199–200 (2015) (finding some evidence that noneconomic damages caps increase physician supply in high-risk specialties); David A. Hyman et al., *Does Tort Reform Affect Physician Supply? Evidence from Texas*, 42 INT'L REV. L. & ECON. 203, 204, 212–13 (2015) (finding no evidence that tort reform in Texas increased physician supply); Elizabeth Blair Weatherly, Legislative Summary, *Senate Bill 141: Patient Injury Act*, 7 J. MARSHALL L.J. 183, 203–05 (2013) (describing sponsors' arguments in favor of the Georgia bill); Kathryn Zeiler, *Medical Malpractice Liability Crisis or Patient Compensation Crisis?*, 59 DEPAUL L. REV. 675, 679–80 (2010) (describing high jury awards and increasing insurance premiums).

³ See Ga. S. 141, § 51-13-3(a)(2)–(3); Weatherly, *supra* note 2, at 205.

⁴ See Zeiler, *supra* note 2, at 679–86 (describing some claims of tort reformers that are not supported by evidence, some that are, and other claims where the evidence is mixed); see also *infra* Section I.A.

⁵ See, e.g., PETER W. HUBER, *LIABILITY: THE LEGAL REVOLUTION AND ITS CONSEQUENCES* (1988); WALTER K. OLSON, *THE LITIGATION EXPLOSION: WHAT HAPPENED WHEN AMERICA UNLEASHED THE LAWSUIT* (1991); Hubbard, *supra* note 1, at 469–79.

⁶ See Hubbard, *supra* note 1, at 483–524; *infra* text accompanying notes 32–42.

over workplace injuries with administrative workers' compensation systems.)⁷ A typical example of such an administrative compensation system is the one proposed in S.B. 141, the Patient Injury Act, introduced in 2013 in the Georgia Senate but never enacted;⁸ similar bills have been introduced (but also never enacted) in Florida and Alabama.⁹

The arguments against such schemes are mostly policy-based. For instance, if one believes that the tort crisis or med-mal crisis is basically illusory, then such an administrative compensation system is a solution in search of a problem.¹⁰ (I myself express no position on the merits of these schemes in this Article.) But one particular set of arguments relates to the constitutionality of the system.¹¹

* * *

This is how the first two pieces of the story—torts and administrative law—get us to the third piece: constitutional law.

Constitutional law has often been the enemy of tort reform: damages caps and similar measures have been struck down on constitutional grounds in many states.¹² But the roadblock to tort reform has not generally been the Federal Constitution, but rather state constitutions, which contain provisions that either

⁷ See generally Richard A. Epstein, *The Historical Origins and Economic Structure of Workers' Compensation Law*, 16 GA. L. REV. 775, 797–800 (1982) (discussing the English statute, the Workmen's Compensation Act of 1897, which "in many ways served as the model for the subsequent American statutes"); Price V. Fishback & Shawn Everett Kantor, *Did Workers Pay for the Passage of Workers' Compensation Laws?*, 110 Q.J. ECON 713, 716–24 (1995) [hereinafter Fishback & Kantor, *Did Workers Pay*]; Price V. Fishback & Shawn Everett Kantor, *The Adoption of Workers' Compensation in the United States, 1900–1930*, 41 J.L. & ECON. 305, 314 (1998) [hereinafter Fishback & Kantor, *Adoption of Workers' Comp*]. More recently, examples of non-tort, insurance-like compensation systems have been mandatory no-fault auto insurance schemes and the federal National Childhood Vaccine Injury Act of 1986, 42 U.S.C. §§ 300aa-1 to -34 (2012). See Hubbard, *supra* note 1, at 469.

⁸ Ga. S. 141. The bill was introduced again as S.B. 86 in the 2015–2016 Regular Session, see *SB 86 "Patient Compensation Act,"* GA. GEN. ASSEMBLY, <http://www.legis.ga.gov/legislation/en-US/Display/20152016/SB/86> (last visited Mar. 7, 2018), but again not enacted.

⁹ See S. 413, 2016 Leg., Reg. Sess. (Ala. 2016); H.R. 739, 2014 Leg., Reg. Sess. (Fla. 2014); *Alabama Senate Bill 413*, LEGISCAN, <https://legiscan.com/AL/text/SB413/2016> (last visited Mar. 7, 2018) (noting that the Alabama bill is dead); *Florida House Bill 739*, LEGISCAN, <https://legiscan.com/FL/text/H0739/2014> (last visited Mar. 7, 2018) (noting that the Florida bill died in the Judiciary Committee).

¹⁰ See Weatherly, *supra* note 3, at 207–09.

¹¹ See *id.* at 206–07 (discussing the argument of former Georgia Attorney General Bowers).

¹² See, e.g., J. Chase Bryan et al., *Are Non-Economic Caps Constitutional?*, 80 DEF. COUNS. J. 154, 154 (2013); Bryan A. Jones, Comment, *The End of Tort Reform?: The Constitutional Battle Looms over Mississippi*, 80 MISS. L.J. SUPRA 87, 88, 97 (2011); see also *infra* Section I.B.

are entirely unknown to the Federal Constitution or have been interpreted by state supreme courts very differently from their federal counterparts.¹³

To give just a couple of recent examples: In *Atlanta Oculoplastic Surgery, P.C. v. Nestlehutt*, the Supreme Court of Georgia struck down a statute capping noneconomic damages under the Georgia Constitution's jury trial clause.¹⁴ And in *Estate of McCall v. United States*, the Florida Supreme Court struck down a *per-incident* cap on noneconomic damages in a wrongful death case arising from medical malpractice, holding that it was "arbitrary and unrelated to a true state interest" and therefore violated the Florida Constitution's Equal Protection Clause.¹⁵

State constitutional law is an understudied area. The reasons are understandable: We have fifty states but only one federal government. Researching California con law might be about as easy as researching federal constitutional law, but for one's analysis to be interesting outside of a single state, one will have to engage in comparative analysis, which is more time-consuming and sounds (is?) more tedious than just understanding one national jurisdiction. In part because of its national scope and in part because many people already know something about the Federal Constitution,¹⁶ the U.S. Supreme Court is more politically salient, more prestigious, and sexier.

This is an excuse for not knowing state constitutional law, but not a good one. Justice William Brennan famously argued that state constitutions were a "font of individual liberties" and that state courts should interpret their constitutions to protect rights that the U.S. Supreme Court, interpreting the Federal Constitution, would not.¹⁷ Indeed, he argued that the trend for states to read their constitutions more broadly than the Federal Constitution—what state

¹³ One exception is the Due Process and Equal Protection Clauses: as I explain below, *see infra* Part IV, states usually have their own due process and equal protection provisions, and states often aren't clear whether their decisions are based on the federal or state clauses. So a state supreme court might strike down a state law on due process or equal protection grounds, and its analysis might seem stricter than one would expect from a federal court, but in some cases it might be hard to rigorously tell that analysis apart from a "rational basis with teeth" theory that federal courts occasionally apply.

¹⁴ 691 S.E.2d 218 (Ga. 2010).

¹⁵ 134 So. 3d 894, 901 (Fla. 2014) (plurality opinion); *see also id.* at 919–20 (Pariente, J., concurring in result).

¹⁶ *But see Area Man Passionate Defender of What He Imagines Constitution to Be*, ONION (Nov. 14, 2009, 8:02 AM), <http://www.theonion.com/article/area-man-passionate-defender-of-what-he-imagines-c-2849>.

¹⁷ William J. Brennan Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 491 (1977).

con-law scholars call the “New Judicial Federalism”¹⁸—was “the most important development in constitutional jurisprudence of our times.”¹⁹

We needn't praise state constitutions indiscriminately to recognize their importance. Like federal con law, state con law has something for everyone.²⁰ Some praise state constitutions' potential to protect economic liberty through substantive due process or to closely scrutinize governments' claims that a taking of property is for a public use.²¹ Those from a different philosophical perspective praise state constitutional provisions that provide positive rights, such as to government-supplied housing for the poor and equal public funding for abortions as for childbirth.²² Like the Federal Constitution, state constitutions can function both as heroic barriers to oppressive majoritarianism and as unjustified obstructions to democratically enacted policy. Examining state constitutional reactions to the recent wave of tort reform is a good case study in an active area of law.

* * *

This Article's interesting news is that—even in states that have had significant anti-tort-reform doctrine and where tort reform measures have recently been struck down—the new crop of administrative compensation systems is likely fully constitutional. (Is this good or bad news? I report, you decide.) The basic reason goes back to the 1910s, the age of workers' comp.

Before workers' comp laws, a worker injured on the job couldn't recover against his employer unless he could prove his employer's negligence. Not only was this expensive in itself, but various tort doctrines of the time—the

¹⁸ See, e.g., ROBERT F. WILLIAMS, *THE LAW OF AMERICAN STATE CONSTITUTIONS* (2009); Lawrence Friedman, *The Once and Future Constitutional Law: On The Law of American State Constitutions*, 74 ALB. L. REV. 1671, 1672 (2011). For a few examples of states reading their constitutions more broadly than the Federal Constitution, even in areas where there is some overlap in subject matter, see ALEXANDER VOLOKH, *OVERPROTECTING PUBLIC EMPLOYEE PENSIONS: THE CONTRACT CLAUSE AND THE CALIFORNIA RULE* (2014) (discussing California's and other states' interpretation of state and federal contract clauses); David Schuman, *The Right to “Equal Privileges and Immunities”: A State's Version of “Equal Protection,”* 13 VT. L. REV. 221 (1988) (discussing Oregon's equality jurisprudence).

¹⁹ *State Constitutional Law*, NAT'L L.J. (D.C.), Sept. 29, 1986, at S-1 (quoting Justice Brennan).

²⁰ For a sense of the diversity of state constitutions, see G. Alan Tarr, *Understanding State Constitutions*, 65 TEMPLE L. REV. 1169 (1992); Robert F. Williams, *The Brennan Lecture: Interpreting State Constitutions as Unique Legal Documents*, 27 OKLA. CITY U. L. REV. 189 (2002).

²¹ See Clint Bolick, *State Constitutions: Freedom's Frontier*, CATO POL'Y REP., Nov./Dec. 2016, at 9, 10–11.

²² See Helen Hershkoff, *State Constitutions: A National Perspective*, 3 WIDENER J. PUB. L. 7, 12–13, 19–20 (1993).

“Unholy Trinity” of assumption of risk, the fellow-servant rule, and contributory negligence—meant that the employee would often lose.²³

Dissatisfaction with this state of events led judges to moderate or abolish some of the employer-friendly tort doctrines. Legislatures started to do the same. Some employers, seeing the writing on the wall, tried to implement insurance-like compensation schemes as a substitute for tort liability, but this involved prospective liability waivers, which courts generally held to be unenforceable.

The grand legislative compromise was workers’ compensation: now, employers paid into a fund, and employees were compensated without regard to fault, usually by a state administrative agency.²⁴

It’s true that workers “paid” for their workers’ comp benefits in the form of lower salaries.²⁵ But they also benefited by having access to a cheap form of insurance that didn’t require them to litigate their employers’ negligence. Today, workers’ comp benefits are often lower than what a victorious tort plaintiff could get at trial (before subtracting attorneys’ fees)—but these benefits (since they don’t rely on negligence) are also much more certain than tort recoveries.

Employers had to pay into the workers’ comp system, but, as noted above, they passed on most of these costs to their workers; and they also “bought” labor peace and reduced their liability risk.

²³ On the history of workers’ comp discussed in this and the following paragraphs, see generally Evelyn Atkinson, *Out of the Household: Master-Servant Relations and Employer Liability Law*, 25 YALE J.L. & HUMAN. 205 (2013); Epstein, *supra* note 7; Fishback & Kantor, *Did Workers Pay*, *supra* note 7; Fishback & Kantor, *Adoption of Workers’ Comp*, *supra* note 7.

²⁴ In Alabama, though, the agency doesn’t resolve workers’ compensation benefit disputes. The agency gives nonbinding recommendations; disputes are handled by the judiciary. See ALA. CODE § 25-5-88 (2016); Steven W. Ford & James A. Abernathy II, *Historical Development of Alabama’s Workers’ Compensation Law: Remedies Existing Prior to Workers’ Compensation Legislation*, 61 ALA. LAW. 48, 51 (2000); *Frequently Asked Questions*, ALA. DEP’T LAB., <https://labor.alabama.gov/wc/faq.aspx> (last visited Mar. 7, 2018).

²⁵ See, e.g., Fishback & Kantor, *Did Workers Pay*, *supra* note 7, 724–36; Fishback & Kantor, *Adoption of Workers’ Comp*, *supra* note 7, 309–10; cf. Jonathan Gruber & Alan B. Krueger, *The Incidence of Mandated Employer-Provided Insurance: Lessons from Workers’ Compensation Insurance*, 5 TAX POL’Y & ECON. 111, 139 (1991) (similarly finding cost-shifting to workers using modern data); Michael J. Moore & W. Kip Viscusi, *Promoting Safety Through Workers’ Compensation: The Efficacy and Net Wage Costs of Injury Insurance*, 20 RAND J. ECON. 499, 501, 510, 512 (1989) (same); W. Kip Viscusi & Michael J. Moore, *Workers’ Compensation: Wage Effects, Benefit Inadequacies, and the Value of Health Losses*, 69 REV. ECON. & STAT. 249, 259–60 (1987) (same).

In the end, everyone got something, which is why there is no broad movement today to abolish the system.²⁶ At the time, concerns about constitutionality led many states to adopt “voluntary” workers’ comp laws, in which employers could elect between workers’ comp coverage and traditional tort liability (although without the traditional employer defenses).²⁷ But modern-day workers’ comp laws are generally compulsory, and these laws are now universally recognized as constitutional.²⁸

The proposed administrative med-mal compensation systems are basically similar to workers’ comp in many states. They abolish common-law negligence tort actions and replace them with an agency-based, juryless administrative compensation procedure where the standard of liability is different than traditional negligence.²⁹ Workers’ comp is constitutional everywhere, suggesting that these compensation systems are probably also constitutional.³⁰

* * *

²⁶ See Michael C. Duff, *Worse Than Pirates or Prussian Chancellors: A State’s Authority to Opt-Out of the Quid Pro Quo*, 17 MARQ. BENEFITS & SOC. WELFARE L. REV. 123, 123 (2016) (calling workers’ comp “the quid pro quo/Grand Bargain of the early twentieth century”). *But cf.*, e.g., Robert H. Ashford & William G. Johnson, *Negligence vs. No-Fault Liability: An Analysis of the Workers’ Compensation Example*, 12 SETON HALL L. REV. 725, 766 (1982) (“[D]espite approximately three-quarters of a century of public concern and controversy, one cannot conclude, on the basis of data generally cited to demonstrate the superiority of workers’ compensation over negligence, that workers’ compensation has effected an improvement in terms of the wage loss compensation and deterrence objectives over the evolving negligence system it replaced.”); Duff, *supra*, at 134 (discussing erosion in several states); *id.* at 149–50 (discussing erosion in Florida); *id.* at 184–85; Paul C. Weiler, *Workers’ Compensation and Product Liability: The Interaction of a Tort and a Non-Tort Regime*, 50 OHIO ST. L.J. 825, 829 (1989) (discussing erosion of workers’ comp benefits).

²⁷ See, e.g., *Ives v. S. Buffalo Ry.*, 94 N.E. 431 (N.Y. 1911) (striking down compulsory workers’ comp law); see also Duff, *supra* note 26, at 136–37 (noting that Texas has always had a voluntary workers’ comp law, although all other states have switched to compulsory systems); *id.* at 141 (noting that Oklahoma has recently allowed employers to opt out of workers’ comp).

²⁸ See, e.g., *N.Y. Cent. R.R. v. White*, 243 U.S. 188, 208 (1917). Not that all tort litigation is precluded: an employee injured on the job by a defective product, for instance, can still sue the product manufacturer. See, e.g., W. Kip Viscusi, *The Interaction Between Product Liability and Workers’ Compensation as Ex Post Remedies for Workplace Injuries*, 5 J.L. ECON. & ORG. 185, 186–87 (1989); Weiler, *supra* note 26, at 825, 834–38.

²⁹ See *infra* text accompanying notes 66–68.

³⁰ But one shouldn’t push the workers’ comp analogy too far: in Alabama, workers’ comp has been upheld on the theory that it’s a *voluntary* substitute for common-law tort actions. See, e.g., *Grantham v. Denke*, 359 So. 2d 785 (Ala. 1978); *Pipkin v. Elec. & Pipefitting Co.*, 358 So. 2d 1015 (Ala. 1978). The voluntary aspect of workers’ comp may no longer be true, see *Reed v. Brunson*, 527 So. 2d 102, 121–22 (Ala. 1988) (Jones, J., concurring in the result), but the Supreme Court of Alabama has apparently never abandoned this rationale.

This Article focuses on the law of Georgia, Florida, and Alabama, three states where med-mal compensation systems have been proposed. Part I summarizes such systems. The following Parts analyze how challenges to these systems would fare under jury trial clauses (Part II), access-to-courts/right-to-a remedy clauses (Part III), and due process/equal protection clauses (Part IV).³¹

I. MED-MAL REFORM: PAST AND FUTURE

A. *The Movements for Tort Reform and Med-Mal Reform*

The tort reform and med-mal reform movements have been ably summarized and discussed elsewhere,³² so I'll just note some of the most important features. Much of the impetus for the med-mal reform movement has stemmed from rising med-mal liability premiums, which were blamed on an out-of-control liability system that produced "outrageously large damages awards" for "sympathetic plaintiffs who brought frivolous claims."³³ Some reformers advocated, and various states passed, a number of measures, including:

- capping noneconomic damages;³⁴
- capping or otherwise limiting punitive damages;³⁵
- increasing courts' ability to dismiss, or increasing sanctions for, frivolous claims;³⁶
- limiting joint and several liability (i.e., providing that joint tortfeasors are liable only in proportion to the degree of their fault);³⁷

³¹ State cases discussing tort reform provisions have occasionally relied on other clauses—for instance, the takings clause, separation of powers, single-subject provisions, or rules against special legislation—but these provisions are litigated more rarely, and usually don't implicate the essence of the administrative provision. *See, e.g.*, Bryan et al., *supra* note 12, at 155; David F. Maron, *Statutory Damage Caps: Analysis of the Scope of Right to Jury Trial and the Constitutionality of Mississippi Statutory Caps on Noneconomic Damages*, 32 MISS. C. L. REV. 109, 120–23 (2013); Jones, *supra* note 12, at 101–02.

³² *See, e.g.*, HUBER, *supra* note 5; OLSON, *supra* note 5; Hubbard, *supra* note 1; Zeiler, *supra* note 2.

³³ Zeiler, *supra* note 2, at 679 (first citing Eric Torbenson & Jason Roberson, *Tort Reform: Is This Change Healthy?*, DALL. MORNING NEWS, June 17, 2007, at 1A; then citing Tim Parris, *Texas Urgently Needs Tort Reform to Avert Further Damage to Healthcare System*, TEXANS FOR LAWSUIT REFORM (Nov. 1, 2002), <https://www.tortreform.com/content/texas-urgently-needs-tort-reform-avert-further-damage-health-care-system>; and then citing Mike Thomas, Op-Ed., *Medical Malpractice Needs an Overhaul*, ORLANDO SENTINEL, Sept. 6, 2009, at B1); *see also* Hubbard, *supra* note 1, at 517–18.

³⁴ Hubbard, *supra* note 1, at 492–99; Zeiler, *supra* note 2, at 679; *see also id.* at 684–85, 684 nn.56–69 (citing competing empirical studies on the effect of damages caps).

³⁵ Hubbard, *supra* note 1, at 499–509.

³⁶ *Id.* at 510–11.

- shortening statutes of limitations or statutes of repose;³⁸
- abolishing the collateral source rule (i.e., allowing plaintiffs' recoveries to be diminished by any amount recovered from other sources, like insurance payments);³⁹
- limiting attorneys' contingency fees;⁴⁰
- providing for periodic payments of future damages;⁴¹ and
- implementing pretrial screening panels.⁴²

B. *The State Con Law Rebuff*

In the Introduction, I gave a few examples of cases in which state supreme courts struck down past tort reform efforts. Here is a slightly more complete picture, which goes beyond the three states that are the subject of this Article.

The most commonly known types of med-mal reform provisions are damages caps; these have often been struck down on various constitutional theories.

For example, the Georgia Tort Reform Act of 2005 implemented several changes to the tort system. It provided for fee-shifting in certain circumstances against parties who rejected settlement offers⁴³ and against parties who presented frivolous claims or defenses;⁴⁴ it replaced joint and several liability with apportionment of fault among co-defendants;⁴⁵ it limited liability for certain providers of emergency medical care;⁴⁶ and it made various other changes. One of the most important provisions of the Act was a cap on noneconomic damages:

³⁷ *Id.* at 488–92; Zeiler, *supra* note 2, at 682; *see also id.* at 683 & nn.47–48 (citing competing sources, some suggesting “that joint and several liability limitations are associated with lower premiums,” and others suggesting “that these limitations do not decrease payouts”).

³⁸ Zeiler, *supra* note 2, at 682; *see also id.* at 683–84, 683 nn.49–54 (citing competing sources suggesting that such reforms either do or don't reduce average payouts, claim frequency, or premiums). Statutes of limitations and statutes of repose aren't the same thing. *See infra* text accompanying notes 283, 301–03.

³⁹ Hubbard, *supra* note 1, at 485–88; Zeiler, *supra* note 2, at 682.

⁴⁰ Hubbard, *supra* note 1, at 511–13; Zeiler, *supra* note 2, at 684.

⁴¹ Hubbard, *supra* note 1, at 518; Zeiler, *supra* note 2, at 684.

⁴² Hubbard, *supra* note 1, at 521–23; Zeiler, *supra* note 2, at 684; *see also id.* at 684 & n.55 (stating that “[t]he literature . . . signal[s] consensus” on the ineffectiveness of “attorney contingency fee limits, collateral source offsets, pretrial screening panels, and periodic payments” on “claim frequency, payment severity, or premiums”).

⁴³ GA. CODE ANN. § 9-11-68(b) (West Supp. 2017).

⁴⁴ *Id.* § 9-11-68(e).

⁴⁵ *Id.* § 51-12-31.

⁴⁶ *Id.* § 51-1-29.5(c).

In any verdict returned or judgment entered in a medical malpractice action, including an action for wrongful death, against one or more health care providers, the total amount recoverable by a claimant for noneconomic damages in such action shall be limited to an amount not to exceed \$350,000.00, regardless of the number of defendant health care providers against whom the claim is asserted or the number of separate causes of action on which the claim is based.⁴⁷

The Supreme Court of Georgia held that this provision violated the Georgia Constitution's jury trial provision, under which "[t]he right to trial by jury shall remain inviolate."⁴⁸ This provision had been held to preserve jury trial rights as they existed in the late eighteenth century; the court had no trouble finding that med-mal cases—including claims for noneconomic damages—were litigated to juries under eighteenth-century English and early American law, and that the Tort Reform Act, "[b]y requiring the court to reduce a noneconomic damages award determined by a jury that exceeds the statutory limit, . . . clearly nullifies the jury's findings of fact regarding damages and thereby undermines the jury's basic function."⁴⁹

The Florida Supreme Court also struck down a *per-incident* cap on noneconomic damages in wrongful death cases arising from med-mal—but on a state equal protection theory,⁵⁰ not a jury trial theory. The Supreme Court of Alabama likewise struck down a cap on noneconomic damages (including punitive damages) on a state equal protection theory⁵¹ (among other grounds)—oddly, since Alabama actually lacks equal protection language in its constitution.⁵²

Other med-mal reform provisions—aside from damages caps—have also been held unconstitutional in various states. Consider, for instance, statutes of limitations or statutes of repose. An Arizona statute provided "that a 'cause of action for medical malpractice against a licensed health care provider accrues as of the date of the injury . . . ' and, with certain exceptions[,] is barred three

⁴⁷ *Id.* § 51-13-1(b).

⁴⁸ *Atlanta Oculoplastic Surgery, P.C. v. Nestlehutt*, 691 S.E.2d 218, 221 (Ga. 2010) (alteration in original) (internal quotation marks omitted) (quoting GA. CONST. of 1983, art. I, § 1, para. XI(a)).

⁴⁹ *Id.* at 221–23 (citing *Lakin v. Senco Prods., Inc.*, 987 P.2d 463, 473 (Or. 1999)); *see also infra* text accompanying notes 146–48.

⁵⁰ *See Estate of McCall v. United States*, 134 So. 3d 894, 901 (Fla. 2014) (plurality opinion); *id.* at 919–20 (Pariente, J., concurring in result); *see also infra* text accompanying note 372.

⁵¹ *See Moore v. Mobile Infirmary Ass'n*, 592 So. 2d 156 (Ala. 1991) (plurality opinion).

⁵² *See infra* Section IV.D.

years thereafter.”⁵³ The statute was challenged on an equal protection theory.⁵⁴ The Arizona Supreme Court held that, in light of the state constitutional guarantee that “[t]he right of action to recover damages for injuries shall never be abrogated,”⁵⁵ the statute of limitations burdened a fundamental right.⁵⁶ Accordingly, it applied strict scrutiny and struck down the statute.⁵⁷

Arizona’s approach is probably stronger than most other states’. But Alabama also has an access-to-courts provision,⁵⁸ and the Supreme Court of Alabama has also struck down statute-of-limitations provisions on these sorts of grounds.⁵⁹

Another sort of provision is a prohibition on filing a med-mal claim in court before it has been submitted to, and ruled on, by some sort of screening panel—a medical review commission or arbitration panel. The supreme courts of New Mexico and Missouri have struck down such statutes under an access-to-courts constitutional provision,⁶⁰ and the Supreme Court of Pennsylvania has struck down such a statute under a jury trial provision.⁶¹

C. *What Do Patient Compensation Systems Look Like?*

So much for *past* med-mal reform efforts—the few cases discussed in the last section were merely a small sample. Administrative patient compensation schemes are an effort to craft an alternative regime that—although it works a much more radical change to the med-mal compensation system as we know it—may be at the same time more likely to withstand constitutional attack.

In this section, I use Georgia’s S.B. 141 to illustrate what patient compensation systems look like, although other state bills are broadly similar. Knowing the structure of these bills is important for understanding what state

⁵³ *Kenyon v. Hammer*, 688 P.2d 961, 964 (Ariz. 1984) (en banc) (citations omitted) (quoting ARIZ. REV. STAT. § 12-564(A) (repealed 1985)).

⁵⁴ *Id.* at 969.

⁵⁵ ARIZ. CONST. art. XVIII, § 6.

⁵⁶ *See Kenyon*, 688 P.2d at 970–75.

⁵⁷ *See id.* at 975–79.

⁵⁸ ALA. CONST. art. I, § 13; *see infra* Section III.B.

⁵⁹ *See Lankford v. Sullivan, Long & Hagerty*, 416 So. 2d 996 (Ala. 1982); *infra* text accompanying notes 275–83; *see also* Peter Zablotsky, *From a Whimper to a Bang: The Trend Toward Finding Occurrence Based Statutes of Limitations Governing Negligent Misdiagnosis of Diseases with Long Latency Periods Unconstitutional*, 103 DICK. L. REV. 455 (1999).

⁶⁰ *See State ex rel. Cardinal Glennon Mem’l Hosp. for Children v. Gaertner*, 583 S.W.2d 107 (Mo. 1979) (en banc); *Jiron v. Mahlab*, 659 P.2d 311 (N.M. 1983).

⁶¹ *See Mattos v. Thompson*, 421 A.2d 190 (Pa. 1980).

constitutional provisions will feature most prominently in plaintiffs' potential challenges.

In the first place, S.B. 141 preempts any common-law or other rights by injured parties⁶² against medical providers "directly involved in providing the medical treatment from which such injury or death occurred, arising out of or related to a medical negligence claim."⁶³ This is the fundamental feature of the scheme—which gives rise to constitutional claims related to access to courts or the right to a remedy.⁶⁴

Next, S.B. 141 creates a Patient Compensation System, to be administered by a Patient Compensation Board.⁶⁵ The bill defines a "medical injury" (in the case of an individual provider) as "a personal injury or wrongful death due to medical treatment, including a missed diagnosis, which would have been avoided . . . under the care of an experienced specialist provider practicing in the same field of care under the same or similar circumstances."⁶⁶

So the key is that an injury is not a "medical injury" (and is therefore not compensable through the system)⁶⁷ unless it was *avoidable*. It need not have been negligent, but it must have been avoidable⁶⁸: after all, nature is already trying to kill you when you come into the doctor's office, so a completely no-fault system might be infeasible.

⁶² Or their representatives and families. S. 141, 152d Gen. Assemb., Reg. Sess. § 51-13-3(c) (Ga. 2013). Proposed section 51-13-3(c) only purports to make the administrative system exclusive for *applicants*, defined as people who file an application under this chapter, *id.* § 51-13-2(1). But, "[i]n order to obtain compensation for a medical injury, a person . . . shall file an application with the Patient Compensation System," *id.* § 51-13-5(a), so in effect the administrative system is exclusive for all victims of med-mal. *See also* H.R. 739, 2014 Leg., Reg. Sess. § 766.405(1) (Fla. 2014).

⁶³ Ga. S. 141 § 51-13-3(c); *see also* Fla. H.R. 739 § 766.403(3).

⁶⁴ *See infra* Part III.

⁶⁵ The details of the administrative agency are described at length in S.B. 141 section 51-13-4. *See also* S. 413, 2016 Leg., Reg. Sess. § 4 (Ala. 2016); Fla. H.R. 739 § 766.404.

⁶⁶ Ga. S. 141 § 51-13-2(9)(A)(i). The same section goes on to specify that, in the case of a *general practitioner provider*, "medical injury" is an injury that would have been avoided "under the care of . . . an experienced general practitioner provider practicing under the same circumstances." *Id.* And, in the case of "care provided by a provider in a system of care," a "medical injury" is defined as an injury that would have been avoided "if rendered within an optimal system of care under the same or similar circumstances." *Id.* § 51-13-1(9)(A)(ii); *see also* Fla. H.R. 739 § 766.402(9)(a).

⁶⁷ *See* Ga. S. 141 § 51-13-6(a)(2) ("If the Office of Medical Review determines that the application does not, prima facie, constitute a medical injury, the office shall send a rejection letter . . ."); *see also* Ala. S. 413 § 6(a)(3); Fla. H.R. 739 § 766.406(1)(b).

⁶⁸ *See* Fla. H.R. 739 § 766.403(2)(c); Ga. S. 141 § 51-13-3(b)(2) ("The General Assembly intends that the definition of 'medical injury' encompass a broader range of personal injuries as compared to a negligence standard, such that a greater number of applications qualify for compensation under this chapter as compared to claims filed under a negligence standard."). Alabama's S.B. 413 contains a "proximate cause" requirement rather than an "avoidability" requirement. Ala. S. 413 § 3(9)(c).

Moreover, the concept of avoidability is limited:

A medical injury shall only include consideration of an alternate course of treatment if the harm could have been avoided through a different but equally effective manner with respect to the treatment of the underlying condition. In addition, a medical injury shall only include consideration of information that would have been known to an experienced specialist or readily available to an optimal system of care at the time of the medical treatment.⁶⁹

Applications are reviewed by an Office of Medical Review and (under some circumstances) by an independent medical review panel.⁷⁰ There are no juries involved; this is what gives rise to constitutional claims related to the jury trial right.⁷¹ Payments are made pursuant to a compensation schedule, which is initially determined based on average medical malpractice costs for the previous year, and afterwards is increased based on inflation.⁷² Payments are also reduced to the extent the patient has gotten payments from collateral sources, including insurance.⁷³ Doctors pay contributions into the Patient Compensation System Trust Fund, which is used to fund payouts according to the compensation schedule.⁷⁴

Challenges under due process or equal protection theories⁷⁵ may stem from any aspect of such a statute, since any government action violates due process or equal protection if it is irrational.

The following Parts discuss the constitutional barriers to statutes like this one and explain why these statutes will likely survive constitutional challenges.

II. THE JURY TRIAL RIGHT

As I've explained above,⁷⁶ constitutional civil jury trial provisions have been a frequent stumbling block for tort reform proposals. But not all jury trial

⁶⁹ Ga. S. 141 § 51-13-2(9)(B); *see also* Fla. H.R. 739 § 766.402(9)(b). "Medical injury" is defined to exclude injuries caused by product defects in drugs or devices. Ga. S. 141 § 51-13-2(9)(C).

⁷⁰ *See* Ala. S. 413 § 6(b)-(c); Fla. H.R. 739 § 766.406; Ga. S. 141 § 51-13-6.

⁷¹ *See infra* Part II.

⁷² *See* Fla. H.R. 739 § 766.404(4)(f)(2)(a); Ga. S. 141 § 51-13-4(d)(5)(B)(i).

⁷³ *See* Ala. S. 413 §§ 3(4), 6(f); Fla. H.R. 739 §§ 766.402(4), .406(5); Ga. S. 141 §§ 51-13-2(4), -6(e).

⁷⁴ *See* Fla. H.R. 739 § 766.408(1), (5); Ga. S. 141 §§ 51-13-8, -10. Alabama's S.B. 413 provides that contribution amounts should be based on anticipated payouts, *see* Ala. S. 413 § 8(a), but also provides, more restrictively, that the amounts collected can't exceed certain listed amounts, *see id.* § 8(b), and that the amounts paid out can't exceed the amounts collected, *see id.* § 4(d)(6)(b), 8(e).

⁷⁵ *See infra* Part IV.

⁷⁶ *See supra* Section I.B.

provisions are created (or have been interpreted) equally. This Part describes the civil jury trial right in the federal, Florida, Alabama, and Georgia constitutions, and how they differ.⁷⁷

Many American constitutions contain a civil jury trial right.⁷⁸ The Federal Constitution's Seventh Amendment right doesn't apply to the states,⁷⁹ so one wouldn't use it in challenging state patient compensation systems. But it's still useful to compare Seventh Amendment doctrine with similar-looking state civil jury trial rights.

All four of the jury trial provisions (federal, Florida, Alabama, and Georgia) discussed here are preservationist in the sense that their goal is to preserve the jury trial right as it existed in some reference year (for instance, 1791). Looking in-depth at jury trial case law shows us that jury trial rights can differ on a number of dimensions.

Let's consider four specific questions, as applied to a type of case that would have been litigated in court, with a jury trial, if it had arisen in the reference year:

- (1) Can the legislature do away with juries in a common-law case, if the case continues to be litigated in court? Generally, the answer is no.
- (2) Can the legislature abolish the cause of action entirely? Generally, the answer is yes (although other provisions, like access-to-courts/right-to-a-remedy clauses, may impose stricter limitations in places where they exist).⁸⁰
- (3) Can the legislature cap damages for cases that are litigated in court? The answer is yes under the Federal Constitution, but no under the Florida, Alabama, and Georgia jury trial rights.⁸¹

⁷⁷ See Maron, *supra* note 31, at 112–19 (discussing Mississippi jury trial right).

⁷⁸ See, e.g., Bryan et al., *supra* note 12, at 154–56; Jones, *supra* note 12, at 97–100.

⁷⁹ See *Colgrove v. Battin*, 413 U.S. 149, 169 n.4 (1973) (Marshall, J., dissenting); *Hardware Dealers Mut. Fire Ins. v. Glidden Co.*, 284 U.S. 151, 158 (1931); *Wagner Elec. Mfg. Co. v. Lyndon*, 262 U.S. 226, 232 (1923); *N.Y. Cent. R.R. v. White*, 243 U.S. 188, 208 (1917); *Minneapolis & St. Louis R.R. v. Bombolis*, 241 U.S. 211, 217–19 (1916); see also Randy J. Holland, *State Constitutions: Purpose and Function*, 69 TEMP. L. REV. 989, 1003 (1996) (“[T]he right to a jury trial in [state] civil proceedings has always been and remains exclusively protected by provisions in the state constitutions.” (first citing *McCool v. Gehret*, 657 A.2d 269, 281 (Del. 1995); then citing Richard S. Arnold, *Trial by Jury: The Constitutional Right to a Jury of Twelve in Civil Trials*, 22 HOFSTRA L. REV. 1 (1993))).

⁸⁰ See *infra* Part III.

⁸¹ For an argument that Federal Sixth Amendment principles relevant to criminal sentencing be used to inform the permissibility of civil liability caps in states with constitutional civil jury trial rights, see Shaakirrah R. Sanders, *Deconstructing Juryless Fact-Finding in Civil Cases*, 25 WM. & MARY BILL RTS. J. 235 (2016).

- (4) Can the legislature withdraw a cause of action from the courts entirely and commit it to an administrative agency?

Only question (4) is relevant here. Perhaps surprisingly—given that all three states discussed here say no for question (3)—the answer is yes. In the federal and Florida systems, courts have said that the administrative tribunal must answer a legal question sufficiently different from the traditional common-law question. But this isn't a significant limitation for patient compensation systems, which are not negligence-based.

A. *The Federal Seventh Amendment Right*

The Seventh Amendment's civil jury trial guarantee provides that "[i]n Suits at common law . . . , the right of trial by jury shall be preserved."⁸² This is, by its terms, a preservationist provision, which looks to the practices of the English courts in 1791, when the Bill of Rights was ratified. If a particular sort of claim would have been heard at law in 1791, the jury right applies, while if it would have been heard in equity, the jury right doesn't.⁸³ In practice, the distinction tends to come down to an analysis of the remedy sought: damages cases are legal, while injunction or specific performance cases are equitable.⁸⁴

The Supreme Court has thus held that the Seventh Amendment demands a jury trial even for newly created statutory actions—such as under Title VIII of the Civil Rights Act,⁸⁵ § 1983,⁸⁶ or for statutory damages under the Copyright Act⁸⁷—where the relief provided is tort-like damages, a sort of relief traditionally provided by law courts. On the other hand, back pay under Title VII is an equitable remedy, so the jury trial right doesn't apply to those sorts of cases.⁸⁸

⁸² U.S. CONST. amend. VII.

⁸³ See, e.g., *Pernell v. Southall Realty*, 416 U.S. 363, 374–75 (1974); *Dimick v. Schiedt*, 293 U.S. 474, 490–91 (1935) (Stone, J., dissenting).

⁸⁴ See Martin H. Redish & Daniel J. La Fave, *Seventh Amendment Right to Jury Trial in Non-Article III Proceedings: A Study in Dysfunctional Constitutional Theory*, 4 WM. & MARY BILL RTS. J. 407, 413–14 (1995); Suja A. Thomas, *A Limitation on Congress: "In Suits at Common Law,"* 71 OHIO ST. L.J. 1071 (2010).

⁸⁵ See *Curtis v. Loether*, 415 U.S. 189 (1974).

⁸⁶ See *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 707–11 (1999) (plurality opinion).

⁸⁷ See *Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340, 347–55 (1998).

⁸⁸ *Curtis*, 415 U.S. at 196–97.

Medical malpractice clearly falls on the “law” side, because med-mal suits always seek damages, and such suits were tried at common law in 1791.⁸⁹ However, the abolition of causes of action probably doesn’t raise any Seventh Amendment issues,⁹⁰ nor do damages caps.⁹¹

The Seventh Amendment may erect some bar to removing cases from courts and giving them to administrative agencies or specialized courts, when doing so results in eliminating the jury.⁹²

It’s true that in *NLRB v. Jones & Laughlin Steel Corp.*,⁹³ the Supreme Court held “that the Seventh Amendment is generally inapplicable in administrative proceedings, where jury trials would be incompatible with the whole concept of administrative adjudication and would substantially interfere with the NLRB’s role in the statutory scheme.”⁹⁴ This was reaffirmed in *Atlas Roofing Co. v. Occupational Safety & Health Review Commission*.⁹⁵

But this doesn’t mean administrative (juryless) adjudication is generally permissible: when true private rights are involved, the Seventh Amendment prevents Congress from depriving parties of their right to a jury trial.⁹⁶ Congress has more leeway when it “creates new statutory ‘public rights’”—meaning rights “where the Government is involved in its sovereign capacity under an otherwise valid statute creating enforceable public rights”⁹⁷ (or at least rights that are “closely integrated into a public regulatory scheme”).⁹⁸ Congress may assign public-rights cases to juryless agencies or specialized courts, even if those rights are “closely *analogous* to common-law claims.”⁹⁹

In other words, for the juryless administrative forum to be consistent with the Seventh Amendment, the right being litigated there must be sufficiently

⁸⁹ See 8 JOHN WENTWORTH, A COMPLETE SYSTEM OF PLEADING 416–17 (London, Bunney, Thomson & Co. 1798) (documenting a 1777 action for negligence by a male midwife); 3 WILLIAM BLACKSTONE, COMMENTARIES *122 & n.w.–a; J.H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 415–16, 416 n.78 (4th ed. 2002).

⁹⁰ See, e.g., *Boyd v. Bulala*, 877 F.2d 1191, 1196 (4th Cir. 1989).

⁹¹ See, e.g., *Hemmings v. Tidyman’s Inc.*, 285 F.3d 1174, 1202 (9th Cir. 2002); *Davis v. Omitowoju*, 883 F.2d 1155, 1159–65 (3d Cir. 1989); *Boyd*, 877 F.2d at 1196.

⁹² See, e.g., *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 51–52 (1989); *Atlas Roofing Co. v. Occupational Safety & Health Review Comm’n*, 430 U.S. 442, 455 (1977).

⁹³ 301 U.S. 1 (1937).

⁹⁴ *Curtis v. Loether*, 415 U.S. 189, 194 (1974) (footnote omitted) (so characterizing *Jones & Laughlin*).

⁹⁵ 430 U.S. 442 (1977).

⁹⁶ See *Granfinanciera*, 492 U.S. at 51–55.

⁹⁷ *Atlas Roofing*, 430 U.S. at 455, 458.

⁹⁸ *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 593–94 (1985).

⁹⁹ *Granfinanciera*, 492 U.S. at 52.

different from the common-law right that it displaced. But even a small degree of difference might be sufficient to insulate the scheme from attack.

B. The Florida Jury Trial Right

Under the Florida Constitution, “[t]he right of trial by jury shall be secure to all and remain inviolate.”¹⁰⁰ This preserves the jury trial right as of 1845, when Florida was admitted to the Union.¹⁰¹

The outright abolition of a cause of action doesn’t raise any problems under the jury trial right.¹⁰² In *Lasky v. State Farm Insurance*, the Florida Supreme Court upheld the Florida no-fault auto insurance scheme against a jury trial challenge.¹⁰³ The court denied that the abrogation of a tort action could ever violate the jury trial right:

Does the abrogation of an existing cause of action, triable by jury, violate the right to jury trial? If such is the case, the Legislature would lose a great deal of flexibility, for it could not enact laws such as workmen’s compensation acts, which abrogate a preexisting right to jury trial. As was stated by the U.S. Supreme Court in *Mountain Timber Co. v. Washington*, with respect to the Washington workmen’s compensation law:

“[W]e find nothing in the *act* that excludes a trial by jury. As between employee and employer, the act abolishes all right of recovery in ordinary cases, and therefore leaves nothing to be tried by jury.”

Similarly here, the no-fault act abolishes *all* right of recovery of specific items of damage in specific circumstances, and, as to those areas, leaves nothing to be tried by a jury. See also, [a New Hampshire opinion], reaching a similar result as to New Hampshire’s no-fault insurance act, and our own previous decisions upholding the validity of our workmen’s compensation act. While the abolition of a *cause of action* triable by jury might in some instance be

¹⁰⁰ FLA. CONST. art. I, § 22.

¹⁰¹ See *Estate of McCall v. United States*, 134 So. 3d 894, 915 (Fla. 2014) (plurality opinion) (citing *Forfeiture of 1978 Chevrolet Van*, 493 So. 2d 433, 434 (Fla. 1986)); *Dep’t of Agric. & Consumer Servs. v. Bonanno*, 568 So. 2d 24, 28 (Fla. 1990) (quoting *Forfeiture of 1978 Chevrolet Van*, 493 So. 2d at 435).

¹⁰² But it may raise problems under the access-to-courts right, as discussed below, see *infra* Section III.A.

¹⁰³ 296 So. 2d 9 (Fla. 1974).

unconstitutional on another ground,¹⁰⁴ the present statutory provisions do not violate the *right* to trial by jury.¹⁰⁵

What about when an action isn't just abolished but is also shifted to an administrative agency? *Lasky* itself explicitly mentions workers' comp statutes (and mentions Florida's "own previous decisions upholding the validity" of the statute),¹⁰⁶ so under this dictum in *Lasky*, the shifting of on-the-job injury litigation from courts to workers' comp tribunals must have been valid.

Later case law requires us to be more careful about this conclusion, but it seems that the conclusion still holds up. In *Broward County v. La Rosa*, a county ordinance created a human rights board that was empowered "to award actual damages, including compensation for humiliation and embarrassment, to victims of race discrimination."¹⁰⁷ The Florida Supreme Court held that this violated the jury trial right because "[c]ommon law undeniably recognized actions for unliquidated damage awards. When a tribunal with the power to make such awards for humiliation and embarrassment tries an accused, that accused has an inalienable right to a jury trial."¹⁰⁸

So if, rather than altering the legal standard, a workers' comp statute took traditional negligence litigation against employers for on-the-job injuries out of courts and placed them into agencies, this would seem to be invalid under *Broward County*. But administrative actions on statutes unknown to the common law—that is, based on some legal standard other than negligence—don't violate the jury trial right.¹⁰⁹ So apparently, what saves workers' comp tribunals from invalidity under the jury trial right is that what's being handled in these tribunals is *not* the traditional negligence action, but rather a different—no-fault—action unknown to the common law.

¹⁰⁴ Here, the court cited in a footnote *Kluger v. White*, 281 So. 2d 1 (Fla. 1973), involving a challenge under the access-to-courts right. See *infra* Section III.A (discussing *Kluger*).

¹⁰⁵ *Lasky*, 296 So. 2d at 22 (citations and footnotes omitted) (first quoting *Mountain Timber Co. v. Washington*, 243 U.S. 219, 235 (1917); then citing *Op. of Justices*, 304 A.2d 881 (N.H. 1973)).

¹⁰⁶ But *Lasky* didn't cite any of these supposed decisions, and I have been unable to find pre-*Lasky* decisions opining on the validity of the workers' comp statute under the jury trial right.

¹⁰⁷ 505 So. 2d 422, 422–23 (Fla. 1987).

¹⁰⁸ *Id.* at 424; see also *Metro. Dade Cty. Fair Hous. & Emp't App. Bd. v. Sunrise Vill. Mobile Home Park, Inc.*, 511 So. 2d 962, 965–66 (Fla. 1987).

¹⁰⁹ See *Dep't of Agric. & Consumer Servs. v. Bonanno*, 568 So. 2d 24, 28 (Fla. 1990) (inverse condemnation proceedings arising from destruction of citrus plants); *Golden Dolphin No. 2, Inc. v. State*, 403 So. 2d 1372, 1374 (Fla. Dist. Ct. App. 1981) (beverage license suspension); *Robins v. Fla. Real Estate Comm'n*, 162 So. 2d 535, 537–38 (Fla. Dist. Ct. App. 1964) (real estate commission proceedings against a real estate broker accused of fraud); *Fla. Indus. Comm'n v. Mason*, 151 So. 2d 874, 876 (Fla. Dist. Ct. App. 1963).

Thus, it seems that the med-mal administrative procedure is valid under the Florida civil jury trial right because it does two valid things: (1) it abolishes the negligence action against doctors, and (2) it establishes an agency proceeding against doctors—not based on the traditional negligence standard, but based on a different, non-common law, legal standard.

C. *The Alabama Jury Trial Right*

The Alabama jury trial right—“the right of trial by jury shall remain inviolate”¹¹⁰—is likewise preservationist, and the relevant year has been held to be 1901, the year of the current constitution.¹¹¹ When the legislature has conferred a jury trial right that did not previously exist, it can later change its mind and restrict or abolish it without running afoul of the constitutional jury trial guarantee.¹¹² But where the jury trial right already existed in 1901, the Supreme Court of Alabama has been fairly strict.

In *Gilbreath v. Wallace*, the question was whether a statute could provide for a six-member jury for the trial of a will contest.¹¹³ Because will contests were tried by juries in 1901, the statute was invalid: twelve is a magic number under the Alabama Constitution.¹¹⁴

In *Clark v. Container Corp. of America*, the supreme court struck down a statute directing courts to, under certain circumstances, structure awards of future damages in periodic payments.¹¹⁵ The rule in 1901 was that the jury would reduce damages to their present value, which necessarily involves a calculation of a discount rate. The determination of the discount rate was a question of fact for the jury. And so a statute preventing the jury from reducing damages to present value “[took] away from the jury a factfinding function (when a jury is the factfinder) that was within the province of the jury [in 1901].”¹¹⁶

But note that parenthetical phrase “when a jury is the factfinder”—does that mean that the jury trial right poses no hurdle to statutes removing the jury entirely? The *Clark* court, relatedly, and tantalizingly, wrote:

¹¹⁰ ALA. CONST. art. I, § 11.

¹¹¹ See *Gilbreath v. Wallace*, 292 So. 2d 651, 653 (Ala. 1974); *Alford v. State*, 54 So. 213, 215–16 (Ala. 1910).

¹¹² See *Gilbreath*, 292 So. 2d at 652.

¹¹³ *Id.*

¹¹⁴ See *id.* at 656.

¹¹⁵ 589 So. 2d 184 (Ala. 1991).

¹¹⁶ *Id.* at 195.

We do not mean to imply that the legislative department cannot by another general act abolish the procedure or rule requiring that all damages for a decrease in future earnings be reduced to present value or even abolish all damages for loss of future earnings. That is not before us¹¹⁷

The court answered the question in *Moore v. Mobile Infirmary Ass'n*, striking down a cap on noneconomic damages (including punitive damages) under the jury trial right.¹¹⁸ For the jury trial right to remain inviolate, the right “must not diminish over time and must be protected from all assaults to its essential guaranties.”¹¹⁹ And capping the verdict “automatically and absolutely” makes the jury’s function worse than advisory.¹²⁰

But, in distinguishing this case from other cases, the *Moore* court wrote that, if a statute removed a cause of action from the jury entirely, there was no violation of the jury trial right:

[I]n *Reed v. Brunson*,¹²¹ we upheld the constitutionality of [an act that] entirely abrogated causes of action by a worker against coemployees for injuries suffered as the result of the negligence or wantonness of the coemployees. Where the legislature completely abolishes a cause of action, “the right to trial by jury becomes irrelevant.” In other words, the right to a trial by jury does not arise in the absence of a cause of action requiring a finder of fact. . . .

For the same reasons, the right to a jury trial is not impaired by [a statute] in which the legislature completely abolished a cause of action in negligence against a guest passenger.¹²²

There apparently haven’t been any cases since *Moore* contradicting this statement.¹²³

The court went on, after *Moore*, to strike down other caps.¹²⁴ (Because of this, perhaps the maximum contribution and payout amounts proposed in

¹¹⁷ *Id.* at 197 (citation omitted).

¹¹⁸ 592 So. 2d 156 (Ala. 1991).

¹¹⁹ *Id.* at 164 (internal quotation marks omitted) (quoting *Sofie v. Fibreboard Corp.*, 771 P.2d 711, 722 (Wash. 1989) (en banc)).

¹²⁰ *Id.*

¹²¹ 527 So. 2d 102 (Ala. 1988).

¹²² *Moore*, 592 So. 2d at 165 (internal quotation marks and citations omitted) (first quoting *Sofie*, 771 P.2d at 719; then citing *Mountain Timber Co. v. Washington*, 243 U.S. 219, 235 (1927); and then citing *Pickett v. Matthews*, 192 So. 261 (Ala. 1939)).

¹²³ The court dropped a footnote: “Of course, an act abolishing a cause of action must not violate [the access to courts right] or other provisions of the Constitution.” *Id.* at 165 n.5; see also *infra* Section III.B.

¹²⁴ See, e.g., *Ray v. Anesthesia Assocs. of Mobile, P.C.*, 674 So. 2d 525 (Ala. 1995) (striking down another cap); *Smith v. Schulte*, 671 So. 2d 1334 (Ala. 1995) (striking down a cap on amounts recoverable in

S.B. 413, the med-mal administrative compensation bill introduced in Alabama—which function much like caps—might be vulnerable.)¹²⁵ But the court hasn't questioned the statement in *Moore* that statutes removing causes of action from the jury entirely don't implicate the jury trial right (although they might implicate other constitutional provisions, like the access-to-courts right).¹²⁶

D. The Georgia Jury Trial Right

Georgia, like Florida and Alabama, provides that “[t]he right to trial by jury shall remain inviolate”¹²⁷—again, a preservationist provision that has been variously held to date back to 1777 or 1798.¹²⁸

The Georgia courts have been active in using this provision to strike down tort reforms such as damages caps that apply to ordinary cases brought in court.¹²⁹ But the provision doesn't apply when the state adopts new administrative procedures that are substitutes for traditional court procedures.

In *Flint River Steamboat Co. v. Foster*, a special statutory procedure for steamboat employees to recover their wages was challenged as unconstitutionally limiting the jury trial right.¹³⁰ The Supreme Court of Georgia explained:

The provision in our State Constitution, that trial by jury, as heretofore used, shall remain inviolate, means that it shall not be taken away, as it existed in 1798, when the instrument was adopted,

tort actions against medical providers), *abrogated by Ex parte Apicella*, 809 So. 2d 865 (Ala. 2001); *Henderson ex rel. Hartsfield v. Ala. Power Co.*, 627 So. 2d 878 (Ala. 1993) (striking down a cap on punitive damages), *abrogated by Ex parte Apicella*, 809 So. 2d 865; *see also* *Bozeman v. Busby*, 639 So. 2d 501 (Ala. 1994) (striking down a statute that allowed the judge to *increase* a jury's punitive award, i.e., *additur*). In *Ex parte Apicella*, a criminal case, a plurality disapproved of *Henderson* and *Schulte*, holding that the legislature may remove the unbridled right to punish from the jury, but this hasn't been treated as an actual overruling of those cases, either because *Apicella* is interpreted as being limited to the criminal context or because it wasn't a majority opinion. *See, e.g.*, *Shiv-Ram, Inc. v. McCaleb*, 892 So. 2d 299 (Ala. 2003). The court has also held that limitations on municipal liability are constitutional for reasons specifically related to avoiding strains on the government treasury. *See Garner v. Covington Cty.*, 624 So. 2d 1346 (Ala. 1993).

¹²⁵ S. 413, 2016 Leg., Reg. Sess. § 8 (Ala. 2016).

¹²⁶ *See infra* Section III.B.

¹²⁷ GA. CONST. art. I, § 1, para. XI(a).

¹²⁸ *Compare Atlanta Oculoplastic Surgery, P.C. v. Nestlehutt*, 691 S.E.2d 218, 221 (Ga. 2010), *Swails v. State*, 431 S.E.2d 101, 102–03 (Ga. 1993), *Flint River Steamboat Co. v. Foster*, 5 Ga. 194, 207–08 (1848), and *Tift v. Griffin*, 5 Ga. 185, 189 (1848) (all using 1798), *with Strange v. Strange*, 148 S.E.2d 494, 495–96 (Ga. 1966) (using 1777).

¹²⁹ *See, e.g., Nestlehutt*, 691 S.E.2d at 220.

¹³⁰ 5 Ga. 194 (1848).

and not that there must be a jury in all cases. New forums may be erected, and new remedies provided, accommodated to the ever shifting state of society.¹³¹

The court elaborated on *Foster* in *Crowell v. Akin*.¹³² *Crowell* concerned the validity of proceedings to register land under the land registration act.¹³³ Because these proceedings had limited jury trials, they were likewise challenged as violating the jury trial right. The court upheld the proceedings, holding that the constitutional jury trial provision

is uniformly construed as not conferring a right to trial by jury in all classes of cases, but merely as guaranteeing the continuance of the right unchanged as it existed either at common law or by statute in the particular state at the time of the adoption of the Constitution. Prior to the Constitution certain classes of cases were triable without a jury. All cases triable without a jury prior to the adoption of the Constitution may still be so tried. It will be conceded that it is competent for the Legislature to provide for a trial without a jury in cases similar to those in which such a trial was in use prior to the adoption of the Constitution. . . . In a number of cases in this state it has been held that in civil actions the right of jury trial exists only in those cases where the right existed prior to the first Constitution, and that the guaranty does not apply to special proceedings not then known or subsequently created or provided by statute . . .¹³⁴

The precise wording of *Crowell*, which appears in later cases, is important. The court states that (1) “the right of jury trial exists *only in those cases* where the right existed prior to the first Constitution,” and (2) “the guaranty does not apply to special proceedings not then known or subsequently created or provided by statute.”¹³⁵

Statement (1) is a criterion of exclusion, not a criterion of inclusion: The jury trial right exists *only* where it existed in the late eighteenth century, and therefore *doesn't* exist where it *didn't* exist back then. But this doesn't mean that it *necessarily* exists in all cases where it *did* exist then. Add this to statement (2), and you get that special, post-eighteenth century administrative

¹³¹ *Id.* at 207–08 (emphasis omitted).

¹³² 108 S.E. 791 (Ga. 1921).

¹³³ *Id.* at 792.

¹³⁴ *Id.* at 794–95 (citations omitted).

¹³⁵ *Id.* at 795 (emphasis added). *Benton v. Georgia Marble Co.*, 365 S.E.2d 413, 420 (Ga. 1988), is an example where the Supreme Court of Georgia has held that a juryless procedure is constitutional because the procedure at issue is of statutory origin.

proceedings that displace ancient jury proceedings (like med-mal cases) should pose no problem under the jury trial right.

Neither *Foster* nor *Crowell* involved statutory arrangements that bypassed the courts entirely and resolved cases in administrative agencies. The Supreme Court of Georgia applied the *Foster–Crowell* rule to administrative tribunals in *Metropolitan Casualty Insurance v. Huhn*, when the Georgia Workmen's Compensation Act was challenged by the employer on the grounds that it violated the jury trial right.¹³⁶

In upholding the Workmen's Compensation Act, the court first stated that “[u]nder the decisions of many courts,” employers “have waived this constitutional objection by voluntarily bringing themselves within the operation of the act.”¹³⁷ (Recall that many states had voluntary acts in the early days of workers' comp,¹³⁸ although this is no longer generally true in Georgia.)¹³⁹

But the court declined to rest its decision on the grounds of waiver. Rather, the court held:

[T]here is no constitutional guaranty of trial by jury of the issues arising under this act. The entire procedure involved in the act has been brought into existence or created by the Legislature since the adoption of our Constitution containing the provisions that the right of trial by a jury shall remain inviolate.¹⁴⁰

This is essentially the same as statement (2) of the *Crowell* language above.

Whether employees could sue their employers for unsafe workplaces in the eighteenth century, and whether such cases were subject to trial by jury, wasn't discussed by the *Huhn* court. Rather, what was relevant was that *the new statutory procedure* postdated 1798. Similarly, even though med-mal suits are ancient, what matters with the med-mal administrative system is that the statutory procedure, if adopted, will date from now.

The *Foster–Crowell–Huhn* rule continues to be valid today.¹⁴¹ In 1982, the Supreme Court of Georgia upheld the validity of juryless administrative

¹³⁶ 142 S.E. 121 (Ga. 1928).

¹³⁷ *Id.* at 123.

¹³⁸ See *supra* text accompanying note 27.

¹³⁹ See GA. CODE ANN. § 34-9-7 (West 2017).

¹⁴⁰ *Huhn*, 142 S.E. at 123.

¹⁴¹ See *Bell v. Cronic*, 283 S.E.2d 476, 477 (Ga. 1981); *Strange v. Strange*, 148 S.E.2d 494 (Ga. 1966).

proceedings to litigate overweight assessment citations for trucks.¹⁴² “There is no constitutional right to a jury trial in these administrative proceedings,” the court held.¹⁴³ “As held in *Huhn*, the right of jury trial does not apply to special proceedings not known at the time of adoption of the first Constitution, or subsequently created or provided by statute.”¹⁴⁴ Again, the question is whether the *special proceeding* was known in 1798 or created by a later statute, not whether the displaced proceeding was known in 1798.¹⁴⁵

Recently, in *Atlanta Oculoplastic Surgery, P.C. v. Nestlehutt*, the court struck down a statute capping noneconomic damages.¹⁴⁶ “By requiring the court to reduce a noneconomic damages award determined by a jury that exceeds the statutory limit,” the court wrote, the statute “clearly nullifies the jury’s findings of fact regarding damages and thereby undermines the jury’s basic function.”¹⁴⁷ This was true because there was a jury trial, the jury found an amount of noneconomic damages exceeding the cap, and the statute would have required the trial judge to override the jury’s determination.¹⁴⁸

Nestlehutt poses no barrier to a med-mal administrative system because it actually restates the *Crowell–Foster–Huhn* rule approving of giving cases to administrative agencies. Relying (at a few removes) on the statement of the rule in *Foster*,¹⁴⁹ the court stated that the jury trial right “guarantees the right to a jury trial *only with respect to cases* as to which there existed a right to jury trial at common law or by statute at the time of the adoption of the Georgia Constitution in 1798.”¹⁵⁰

This “only” language expresses the same idea as statement (1) of the *Crowell* language.¹⁵¹ If *no* jury trial right existed for a type of claim in 1798,

¹⁴² Dep’t of Transp. v. Del-Cook Timber Co., 285 S.E.2d 913, 919 (Ga. 1982).

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ See also *Atlanta Oculoplastic Surgery, P.C. v. Nestlehutt*, 691 S.E.2d 218, 221 (Ga. 2010); *Kelley v. Ga. Dep’t of Human Res.*, 498 S.E.2d 741, 743 (Ga. 1998); *Hill v. Levenson*, 383 S.E.2d 110, 111 (Ga. 1989) (requiring trial by jury in dispossessory actions, citing the rule of *Del-Cook Timber* and *Huhn*). Appellate courts have also cited the rule recently. See *Reheis v. Baxley Creosoting & Osmose Wood Preserving Co.*, 601 S.E.2d 781, 786–87 (Ga. Ct. App. 2004).

¹⁴⁶ *Nestlehutt*, 691 S.E.2d at 220.

¹⁴⁷ *Id.* at 223 (citing *Lakin v. Senco Prods., Inc.*, 987 P.2d 463, 473 (Or. 1999), *overruled by* *Horton v. Or. Health & Sci. Univ.*, 376 P.3d 998 (Or. 2016)).

¹⁴⁸ See *id.* at 220.

¹⁴⁹ *Nestlehutt* cites *Benton v. Georgia Marble Co.*, 365 S.E.2d 413, 420 (Ga. 1988), which cites *Williams v. Overstreet*, 195 S.E.2d 906, 909 (Ga. 1973), which cites *Foster*.

¹⁵⁰ 691 S.E.2d at 221 (emphasis added) (internal quotation marks omitted) (quoting *Benton*, 365 S.E.2d at 420).

¹⁵¹ See *supra* text accompanying notes 132–34.

juryless trials for the same type of claim are constitutional today. The *Nestlehutt* court didn't claim the converse—that the jury trial right guarantees the right to a jury trial for all cases as to which there *did* exist a right to jury trial in 1798.¹⁵²

The med-mal administrative compensation system would be an exercise of the legislature's "authority to modify or abrogate the common law" and "define, limit, and modify available remedies."¹⁵³ Once the previously existing common-law remedies are replaced by an administrative scheme, there is no longer a jury finding to displace; there can thus be no nullification of a jury's determination, as there could have been in *Nestlehutt*.

When the first med-mal administrative compensation bill was introduced in Georgia as S.B. 141, former Georgia Attorney General Michael Bowers misread *Nestlehutt* to mean that the test is whether the *displaced* right existed in 1798.¹⁵⁴ Under this view, a juryless scheme for medical malpractice would be invalid because injured patients had the right to a jury trial for med-mal claims in 1798—but the similar scheme for workers' comp claims is constitutional because "workers injured on the job had no right at common law to a jury trial for claims against their employer at the time."¹⁵⁵

This is incorrect for two reasons: First, as a historical matter, it is doubtful that workers really had *no right at common law* to a jury trial against their employers.¹⁵⁶ (Bowers's historical point is crucial: without it, his theory would be unable to distinguish between med-mal and workers' comp claims, and

¹⁵² See *Benton*, 365 S.E.2d at 420 ("[T]he Georgia Constitution . . . guarantees the right to a jury trial *only with respect to* cases as to which there existed a right to jury trial at common law or by statute at the time of the adoption of the Georgia Constitution in 1798." (emphasis added) (citing *Williams*, 195 S.E.2d 906)); *Williams*, 195 S.E.2d at 909 (quoting *Foster* to the effect that the trial by jury right "shall not be taken away in cases where it existed when that instrument was adopted in 1798").

¹⁵³ *Nestlehutt*, 691 S.E.2d at 223–24; see also *Teasley v. Mathis*, 255 S.E.2d 57, 58 (Ga. 1979) ("The legislature . . . may modify or abrogate common law rights of action . . ."); *Ga. Lions Eye Bank, Inc. v. Lavant*, 335 S.E.2d 127, 128 (Ga. 1985) (similar).

¹⁵⁴ Letter from Michael J. Bowers, Partner, Balch & Bingham LLP, to Donald J. Palmisano, Jr., Exec. Dir./CEO, Med. Ass'n of Ga. 2 (Nov. 28, 2012) (on file with author) (citing *Nestlehutt*, 691 S.E.2d at 221).

¹⁵⁵ *Id.* at 3 n.4 (citing *Metro. Cas. Ins. v. Huhn*, 142 S.E. 121, 123 (Ga. 1928)). I myself testified against Bowers's view before the Health and Human Services Committee of the Georgia Senate. See Kathleen Baydala-Joyner, *Med-Mal Board Would Be Legal*, 3 *Say*, DAILY REP. (Fulton County, Ga.), Oct. 23, 2013, at 1.

¹⁵⁶ The "Unholy Trinity" of employer-friendly tort doctrines discussed above, see *supra* text accompanying note 23, only made litigation against employers difficult, not impossible in principle. Moreover, these doctrines date from the nineteenth century. See *Skipp v. E. Ctys. Ry.*, (1853) 156 Eng. Rep. 95 (Ex.) (first using the maxim *volenti non fit injuria* as a master's defense against a servant); *Priestly v. Fowler*, (1837) 150 Eng. Rep. 1030 (Ex.) (stating the fellow-servant rule); *Butterfield v. Forrester*, (1809) 103 Eng. Rep. 926 (K.B.) (first clearly articulating contributory negligence).

would thus imply the radical result that workers' comp is unconstitutional.) But second, even if Bowers is correct about that historical point, his view about its relevance is contrary to the *Crowell–Foster–Huhn* rule, which asserts that the correct inquiry is whether the *displacing* procedure is post-1798, not whether the *displaced* action had juries in 1798.¹⁵⁷

E. Doesn't the Greater Power Include the Lesser?

In all three state systems, various non-fundamental alterations to the existing system—like keeping a jury but capping damages—have been held unconstitutional. But I have argued that a major, fundamental change—like abolishing an action entirely and shifting responsibility for the subject matter to an agency—is constitutional. Even in the federal system, keeping a case in an Article III court but abolishing a jury can violate the jury trial right, but leaving Article III courts entirely and adopting an Article I tribunal that decides a slightly different legal question doesn't violate the jury trial right.¹⁵⁸

This may seem odd. If a less radical reform is unconstitutional, shouldn't a more radical reform—which ignores juries even more fundamentally by not impaneling them in the first place—be even worse?

But one can answer the question in two ways. First, it's not clear that the administrative procedure is in fact a greater imposition on the jury. Caps (under the view of some courts, as in *Nestlehurst*)¹⁵⁹ allow the jury to make a determination and then nullify it. The administrative procedure, by contrast, doesn't consult juries at all, so there's no jury determination to nullify.

¹⁵⁷ There is one other bit of language in *Nestlehurst* that could be misinterpreted in a way hostile to the constitutionality of a med-mal administrative system. In dictum (while rejecting a counterargument), the court suggested that the jury trial right might attach in an action if it “would constitute an analogue to a 1798 common law cause of action.” *Nestlehurst*, 691 S.E.2d at 224. The full quote is: “Nor does, as appellant asserts, the existence of statutes authorizing double or treble damages attest to the validity of the caps on noneconomic damages. *While it is questionable whether any cause of action involving an award thereof would constitute an analogue to a 1798 common law cause of action so as to trigger the right to jury trial in the first place*, to the extent the right to jury trial did attach, treble damages do not in any way nullify the jury's damages award but rather merely operate upon and thus affirm the integrity of that award.” *Id.* (emphasis added) (footnotes omitted). Could med-mal administrative proceedings be considered “analogue[s]” to medical malpractice common-law suits as they existed in 1798? If so—and if the statement were not dictum—one could read this language to invalidate the administrative proceeding. But, even if this were not dictum and contrary to the *Foster–Crowell–Huhn* rule, it is nonetheless clear that the administrative proceeding, which is not negligence-based, is *not* an analogue to a common-law med-mal suit.

¹⁵⁸ As in Florida. See *supra* text accompanying note 109.

¹⁵⁹ See *supra* text accompanying notes 147–53.

Which is worse for the jury? The administrative scheme consults juries fewer times (i.e., never), but caps nullify jury determinations more times. The jury has no necessary interest in being consulted more times: after legislatures abolished the “amatory torts” of adultery, alienation of affections, and criminal conversation,¹⁶⁰ juries were presented with fewer questions, but this was merely an exercise in the legislature’s power to alter the common law. As *Foster* put it, “[n]ew forums may be erected, and new remedies provided, accommodated to the ever shifting state of society.”¹⁶¹ From the perspective of the dignity of jury determinations, caps may be worse by asking the jury a question and then nullifying its answer.

Second—and relatedly—the law is filled with cases in which the government is prohibited from doing something but not prohibited from doing something “worse.” For instance, a land-use agency can deny you a permit entirely, but it can’t attach conditions to the grant of the permit unless there is an “essential nexus” and “rough proportionality” between the conditions and the state interest served.¹⁶² The public school system could deny you a job as a schoolteacher altogether, but it can’t grant you the job on the condition that you refrain from criticizing the government.¹⁶³ Many conditional grants of benefits can be unconstitutional¹⁶⁴ even though the government isn’t required to grant the benefit.

The reason is that it isn’t obvious what’s “worse.” Often, the conditional grant is in fact worse than the denial: getting the job on condition that one not criticize the government is “better” from the applicant’s point of view than being denied the job, but “worse” from the perspective of government manipulation of the marketplace of ideas. Similarly, one may coherently argue that caps harm the institution of juries in a way that an administrative scheme doesn’t: by consulting the jury and then nullifying its determination.

¹⁶⁰ See, e.g., GA. CODE ANN. § 51-1-17 (West 2003) (“Adultery, alienation of affections, or criminal conversation with a wife or husband shall not give a right of action to the person’s spouse. Rights of action for adultery, alienation of affections, or criminal conversation are abolished.”).

¹⁶¹ *Flint River Steamboat Co. v. Foster*, 5 Ga. 194, 208 (1848).

¹⁶² See *Dolan v. City of Tigard*, 512 U.S. 374, 386 (1994); *Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825, 837 (1987).

¹⁶³ See *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968).

¹⁶⁴ See generally Richard A. Epstein, *The Supreme Court, 1987 Term—Foreword: Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 HARV. L. REV. 4 (1988) (discussing the unconstitutional conditions doctrine); Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413 (1989) (same).

III. ACCESS-TO-COURTS AND RIGHT-TO-A-REMEDY PROVISIONS

We've seen that the Florida and Alabama supreme courts have upheld tort-reform measures under the jury trial clause, while making clear that the measures might yet violate different provisions, like access-to-courts or right-to-a-remedy clauses.¹⁶⁵ And, indeed, where an access-to-courts clause exists, it has often been interpreted fairly broadly to invalidate a variety of types of tort reform.¹⁶⁶ Access-to-courts provisions are entirely absent from the Federal Constitution, where a statute abolishing certain causes of action would just be evaluated under the Due Process or Equal Protection Clauses.¹⁶⁷ Or, rather, the U.S. Supreme Court has interpreted the Federal Constitution to include an access-to-courts right, but it's limited to the formal right to access a court¹⁶⁸ and doesn't protect any substantive rights. This sort of provision is also absent from the Georgia Constitution.¹⁶⁹

This suggests that the med-mal administrative compensation scheme might run into access-to-courts problems in Florida and Alabama. This Part discusses the access-to-courts and right-to-a-remedy cases in those two states, concluding that the med-mal compensation scheme is likely constitutional.

Section A discusses how the Florida courts have developed a fairly coherent framework for evaluating access-to-courts claims—the *Kluger* test. Section A.1 gives an overview of the test, which has two prongs. Section A.2 discusses prong one of the *Kluger* test, which looks to whether the legislature has provided a reasonable alternative to the abolished action. Section A.3 discusses prong two of the *Kluger* test, which looks to whether (if no reasonable alternative exists) the abolition was justified by overpowering public necessity.

Section B discusses how, by contrast, the Alabama case law lacks coherence and is in a state of disarray. This section breaks down the Alabama case law into the early cases that provided little protection against prospective changes in the law (section B.1), the period of time when Alabama courts

¹⁶⁵ See *supra* text accompanying notes 105, 123.

¹⁶⁶ See, e.g., Bryan et al., *supra* note 12, at 155; Duff, *supra* note 26, at 162–72; Jones, *supra* note 12, at 97, 102–03. On such clauses generally, see Thomas R. Phillips, Speech, *The Constitutional Right to a Remedy*, 78 N.Y.U. L. REV. 1309 (2003).

¹⁶⁷ See *infra* Section IV.A.

¹⁶⁸ See, e.g., *Bounds v. Smith*, 430 U.S. 817, 821 (1977); *McKnett v. St. Louis & S.F. Ry.*, 292 U.S. 230, 233 (1934); *Chambers v. Balt. & Ohio R.R.*, 207 U.S. 142, 148 (1907).

¹⁶⁹ See, e.g., *State v. Moseley*, 436 S.E.2d 632, 634 (Ga. 1993) (declining to find a substantive right against legislative alterations of causes of action in the Georgia Constitution's "right to prosecute or defend . . . [one's] own cause in any of the courts of this state" (quoting GA. CONST. art. I, § 1, para. XII)).

applied a stricter mode of analysis (section B.2), and the more recent decisions that have seemed to apply conflicting strands of case law simultaneously (section B.3).

A. *The Florida Access-to-Courts Clause*

1. *The Kluger Test*

The Florida Constitution states that “[t]he courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay.”¹⁷⁰

In *Kluger v. White*, a section of the Florida Automobile Reparations Act was challenged under this access-to-courts provision.¹⁷¹ The challenged section abolished tort actions for property damage arising from car accidents: henceforth, one’s own insurance would generally have to pay for one’s property damages.¹⁷² One exception was that motorists who didn’t buy property damage insurance could still sue if their damage was above \$550.¹⁷³ Motorists not insured for property damage thus couldn’t sue at all if their damages were \$550 or less.¹⁷⁴

One could imagine a number of reactions to such an abolition of a traditional common-law cause of action. At one extreme, one could hold that the legislature could *never* abolish a right of action without providing an alternative. At the other extreme, one could hold that the legislature could “destroy a traditional and long-standing cause of action upon mere legislative whim,”¹⁷⁵ or that the existence of some alternative (no matter how inadequate) would always justify such an abolition. The Florida Supreme Court adopted neither of these extremes, and instead held:

[W]here a right of access to the courts for redress for a particular injury has been provided by statutory law predating the adoption of the Declaration of Rights of the Constitution of the State of Florida, or where such right has become a part of the common law of the [s]tate . . . ,¹⁷⁶ the [l]egislature is without power to abolish such a

¹⁷⁰ FLA. CONST. art. I, § 21.

¹⁷¹ 281 So. 2d 1, 2 (Fla. 1973).

¹⁷² *See id.*

¹⁷³ *See id.* at 3.

¹⁷⁴ *See id.*

¹⁷⁵ *Id.* at 4.

¹⁷⁶ At this point, the *Kluger* court cites Florida Statutes section 2.01, which adopts the common law of England as of July 4, 1776. Nonetheless, Florida cases seem to look to whether the common-law right existed

right without providing a reasonable alternative to protect the rights of the people of the [s]tate to redress for injuries, unless the [l]egislature can show an overpowering public necessity for the abolishment of such right, and no alternative method of meeting such public necessity can be shown.¹⁷⁷

There are thus two ways to justify abolishing a traditional common-law right: (1) providing a reasonable alternative or (2) showing an overpowering public necessity that can't be met by any alternative method.¹⁷⁸

In this case, it was clear that, for uninsured motorists suffering \$550 or less in property damage, the traditional common-law action was totally abolished with no alternative procedure at all, nor did the legislature make a case for overpowering public necessity.¹⁷⁹ Therefore, the court had no trouble finding that this section violated the access-to-courts right.¹⁸⁰

The *Kluger* approach to determining whether a denial of judicial remedies violates the access-to-courts provision has now become standard.¹⁸¹

How would the administrative med-mal patient compensation system fare under the *Kluger* test? It should be on fairly solid ground on prong one, as the Florida Supreme Court has shown itself rather willing—even recently—to uphold alternative compensation schemes. The administrative scheme offers real benefits to injured patients: the new legal standard will probably be somewhat easier to meet than the traditional negligence standard. And even if

as of 1968. See *Estate of McCall v. United States*, 134 So. 3d 894, 915 (Fla. 2014) (plurality opinion); *Smith v. Dep't of Ins.*, 507 So. 2d 1080, 1087 (Fla. 1987); *Lifemark Hosps. of Fla., Inc. v. Afonso*, 4 So. 3d 764, 769 (Fla. Dist. Ct. App. 2009).

¹⁷⁷ *Kluger*, 281 So. 2d at 4. States differ on whether their right-to-a-remedy clause applies to statutory rights in addition to common-law rights. See Phillips, *supra* note 166, at 1337 (first citing *Olson v. Ford Motor Co.*, 558 N.W.2d 491, 497 (Minn. 1997); then citing *Moreno v. Sterling Drug Inc.*, 787 S.W.2d 348, 355 (Tex. 1990); and then citing *Kluger*, 281 So. 2d at 4).

¹⁷⁸ See also Nicole M. Zomberg, Comment, *Workers Compensation Law: Constitutionality of the 1993 Kansas Workers Compensation Act*, 37 WASHBURN L.J. 829, 829, 838 (1998) (citing *Injured Workers v. Franklin*, 942 P.2d 591, 603 (Kan. 1997)) (similar two-part test in Kansas under due process analysis); *id.* at 842 (citing *Franklin*, 942 P.2d at 603) (in Kansas, the first prong resembles rational basis for equal protection).

¹⁷⁹ *Kluger*, 281 So. 2d at 4–5.

¹⁸⁰ *Id.* at 5.

¹⁸¹ See *infra* Sections III.A.2–3. There is, of course, the antecedent question of whether the right in question is abolished outright, or merely curtailed. See, e.g., *Bauld v. J.A. Jones Constr. Co.*, 357 So. 2d 401, 402–03 (Fla. 1978) (upholding a statute whose effect in that case was merely to reduce the period within which a suit could be filed from four years to three and a half years). Also, the *Kluger* rule doesn't apply to the abolition of affirmative defenses. See *Agency for Health Care Admin. v. Associated Indus. of Fla., Inc.*, 678 So. 2d 1239, 1253 (Fla. 1996). In the case of the med-mal system, the right is definitely abolished; moreover, here we're considering challenges from potential plaintiffs, not from potential defendants. So for purposes of challenges by plaintiffs, we go directly to the *Kluger* test.

the legal standard were the same, the cost of the administrative system to the patient would be lower and the speed of resolution of claims would be greater, which means more claims would be processed more quickly and with greater certainty.

On prong two—should it come to that—the administrative scheme could likewise do well, since the court is willing to defer to legislative judgment on overpowering public necessity. However, on this prong, courts *will* probe whether there's an alternative method, so even if a public necessity is found, the administrative scheme may still be struck down. Therefore, if the legislature wants to be more certain that the system will be upheld, it should be appropriately clear in the legislative language that there's not only an overwhelming public necessity but also that there's no alternative method.

2. Kluger Prong One: Reasonable Alternative

Various cases since *Kluger* have relied on the first approach, finding that the challenged statute provided a “reasonable alternative” or “commensurate benefit”¹⁸² in exchange for the denial of court access.

a. Workers' Comp Fares Very Well Under Kluger Prong One

The *Kluger* court itself wrote that the workers' compensation statute was valid because, in “abolish[ing] the right to sue one's employer in tort for a job-related injury, [it] provided adequate, sufficient, and even preferable safeguards.”¹⁸³ After all, the point of the workers' comp system was, among other things, “to replace an unwieldy tort system that made it virtually impossible for businesses to predict or insure for the cost of industrial accidents.”¹⁸⁴

The later cases—too many to discuss at length¹⁸⁵—have virtually unanimously agreed that the workers' comp system is fully consistent with the

¹⁸² *Smith v. Dep't of Ins.*, 507 So. 2d 1080, 1088 (Fla. 1987).

¹⁸³ *Kluger*, 281 So. 2d at 4; *see also* *Carter v. Sparkman*, 335 So. 2d 802, 805 (Fla. 1976) (generally mentioning validity of workers' comp); *Mullarkey v. Fla. Feed Mills, Inc.*, 268 So. 2d 363 (Fla. 1972) (pre-*Kluger* case generally upholding aspects of workers' comp law without being clear on the precise constitutional challenge rejected).

¹⁸⁴ *De Ayala v. Fla. Farm Bureau Cas. Ins.*, 543 So. 2d 204, 206 (Fla. 1989) (citing *McLean v. Mundy*, 81 So. 2d 501, 503 (Fla. 1955)).

¹⁸⁵ *See* *Fabre v. Marin*, 623 So. 2d 1182 (Fla. 1993); *Smith*, 507 So. 2d at 1091; *Walker & LaBerge, Inc. v. Halligan*, 344 So. 2d 239, 244 (Fla. 1977); *Scholastic Sys., Inc. v. LeLoup*, 307 So. 2d 166, 168–69 (Fla. 1974); *Strohm v. Hertz Corp./Hertz Claim Mgmt.*, 685 So. 2d 37, 39 (Fla. Dist. Ct. App. 1996); *Burdick v. Bob's Space Racers*, 659 So. 2d 351, 352 (Fla. Dist. Ct. App. 1995); *Montgomery Ward v. Lovell*, 652 So. 2d

access-to-courts right under prong one of *Kluger*.¹⁸⁶ This is good news for the med-mal administrative scheme.

Most significantly, over a series of several decisions, the court has continued to uphold the workers' comp statute under prong one of *Kluger*—even when a class of benefits was denied entirely to particular groups or people or when legislative changes made the system less generous. The cases discussed below—*Acton*, *Sasso*, *Newton*, and *Martinez*—suggest that the bar for the adequacy of the alternative scheme isn't very high.¹⁸⁷

In *Acton v. Fort Lauderdale Hospital*, the court considered a change to the workers' comp system whereby “lump sum payments for permanent partial disability” were no longer available.¹⁸⁸ Instead, now “permanent impairment” benefits were available only for three types of injuries (“amputation[s], loss of vision, or serious facial or head disfigurements”), leaving only “wage-loss benefits” for other types of partial disability.¹⁸⁹ The court upheld this change against an access-to-courts challenge, writing that such a change “may disadvantage some workers” but “offers greater benefits” to others.¹⁹⁰ “The Workers' Compensation Law,” the *Acton* court wrote, “continues to afford substantial advantages to injured workers, including full medical care and wage-loss payments for total or partial disability without their having to endure the delay and uncertainty of tort litigation.”¹⁹¹ The appellate court whose judgment was affirmed in *Acton* had similarly written:

Workers' compensation provides a more certain, although not as lucrative, payment to the injured worker. Litigation expenses,

509, 512 (Fla. Dist. Ct. App. 1995); *Rodriguez v. Prestress Decking Corp.*, 611 So. 2d 59 (Fla. Dist. Ct. App. 1992); *Whitely v. U.S. Fid. & Guar. Co.*, 454 So. 2d 63, 65 (Fla. Dist. Ct. App. 1984).

¹⁸⁶ The Florida Supreme Court did invalidate the employer immunity to the extent it prevented the employer from being sued by a *third-party tortfeasor*—there, the workers' comp statute did extinguish a right to sue without any reasonable alternative. *Sunspan Eng'g & Constr. Co. v. Spring-Lock Scaffolding Co.*, 310 So. 2d 4 (Fla. 1975); see also *City of Clearwater v. L.M. Duncan & Sons, Inc.*, 466 So. 2d 1116, 1118 (Fla. Dist. Ct. App. 1985). In another case, an appellate court had to interpret the statute to avoid possible unconstitutionality related to the very idiosyncratic context of the interaction between workers' comp and incarceration. *Monroe Furniture Co. v. Bonner*, 509 So. 2d 1264, 1266 (Fla. Dist. Ct. App. 1987). But these cases are both far from the core of the workers' comp statute: none of them relates to the immunity of the employer from suit by the employee for on-the-job injuries.

¹⁸⁷ See also *Bradley v. Hurricane Rest.*, 670 So. 2d 162, 163–64 (Fla. Dist. Ct. App. 1996) (upholding a provision providing for a benefit of 66% of wages in the case of total temporary disability, then half of that after reaching maximum medical improvement).

¹⁸⁸ 440 So. 2d 1282, 1284 (Fla. 1983).

¹⁸⁹ *Id.* at 1283–84.

¹⁹⁰ *Id.* at 1284.

¹⁹¹ *Id.*; see also *Mahoney v. Sears, Roebuck & Co.*, 440 So. 2d 1285, 1286 (Fla. 1983); *Beauregard v. Commonwealth Elec.*, 440 So. 2d 460 (Fla. Dist. Ct. App. 1983).

including those borne by the claimant[,] are reduced by the administrative handling of claims. Litigation delays are also reduced. The cost of inevitable injury is spread throughout the industry. The employee is further benefited by not having any recoverable damages reduced by the proportionate fault of the employee. Certainty and efficiency are given in exchange for potential recovery. This satisfies the requirements of [a]rticle I, [s]ection 21, Florida Constitution.¹⁹²

In *Sasso v. Ram Property Management*, the court even upheld a provision of the workers' comp statute denying wage-loss benefits entirely to claimants above age sixty-five,¹⁹³ reasoning:

[The claimant's] medical expenses were covered by workers' compensation benefits, and he received temporary total disability benefits during his convalescence. Permanent total disability benefits were available to him if he had qualified and any future medical expenses related to his injury are also covered. [The claimant] thus has received some of the compensation which a tort suit might have provided had he been forced to pay his own expenses and subsequently seek redress in court. Such partial remedy does not constitute an abolition of rights without reasonable alternative as contemplated in *Kluger v. White*.¹⁹⁴

And in *Martinez v. Scanlan*, the court considered a challenge to the 1990 revisions to the workers' comp statute.¹⁹⁵ The challengers had "claim[ed] that, because the cumulative effect [of the revision was] to substantially reduce preexisting benefits to employees without providing any countervailing advantages," the workers' comp statute was "no longer a reasonable alternative to common-law remedies" and thus violated the access-to-courts provision.¹⁹⁶ The Florida Supreme Court disagreed:

Although [the revised statute] undoubtedly reduces benefits to eligible workers, the workers' compensation law remains a reasonable alternative to tort litigation. It continues to provide injured workers with full medical care and wage-loss payments for total or

¹⁹² *Acton v. Ft. Lauderdale Hosp.*, 418 So. 2d 1099, 1101 (Fla. Dist. Ct. App. 1982), *aff'd*, 440 So. 2d 1282 (Fla. 1983); *see also* *Noel v. M. Ecker & Co.*, 422 So. 2d 1062, 1063 (Fla. Dist. Ct. App. 1982).

¹⁹³ 452 So. 2d 932, 933 (Fla. 1984).

¹⁹⁴ *Id.* at 933-34; *see* *Morrow v. Amcon Concrete, Inc.*, 433 So. 2d 1230, 1232 (Fla. Dist. Ct. App. 1983); *see also* *Newton v. McCotter Motors, Inc.*, 475 So. 2d 230, 231 (Fla. 1985) (approving of and incorporating a district court analysis that relied on *Acton*, *Sasso*, and *Morrow*, where the challenged statute denied compensation for deaths that followed accidents by more than five years); *Wood v. Harry Harmon Insulation*, 511 So. 2d 690, 693 (Fla. Dist. Ct. App. 1987) (relying on *McCotter*, where the statute provided a 350-week limitation for occupational diseases rather than accidents).

¹⁹⁵ 582 So. 2d 1167 (Fla. 1991).

¹⁹⁶ *Id.* at 1171.

partial disability regardless of fault and without the delay and uncertainty of tort litigation. Furthermore, while there are situations where an employee would be eligible for benefits under the pre-1990 workers' compensation law and now, as a result of [the revisions], is no longer eligible, that employee is not without a remedy. There still may remain the viable alternative of tort litigation in these instances.¹⁹⁷ As to this attack, the statute passes constitutional muster.¹⁹⁸

The general idea is encapsulated in *Eller v. Shova*.¹⁹⁹ In *Eller*, the court upheld a provision increasing the degree of negligence one had to prove to successfully sue policymaking employees (when workers' comp was already available).²⁰⁰ The court cited with approval the dissenting judge in the lower court, who had written: "I conclude that, *so long as the benefits are substantial*, workers' compensation benefits are an acceptable, reasonable alternative to most tort remedies that were available to an employee in 1968 against both employers and coemployees."²⁰¹

b. Other Alternative Schemes Are Also Treated Charitably Under Prong One

Workers' comp isn't the only access-to-court-limiting system that has been upheld under prong one of *Kluger*. In addition to *Lasky v. State Farm Insurance*—a case, like *Kluger*, about auto accident litigation and insurance—the Florida Supreme Court has upheld alternative schemes in the context of the Citrus Canker Eradication Program, medical malpractice, and the Florida Birth-Related Neurological Injury Compensation Plan. Notably, the last of these cases is from 2013, so the court's willingness to approve reasonable alternatives to court litigation continues to this very day.

In *Lasky v. State Farm Insurance*, the court upheld a different section of the same statute that was at issue in *Kluger*.²⁰² While the section challenged in *Kluger* didn't require motorists to carry property insurance, the section challenged in *Lasky* did require insurance, and denied tort immunity for car

¹⁹⁷ The court said in a footnote: "We are referring to, for example, amendments to provisions regarding recreational and social activities, personal comfort, travelling employees, and the going and coming rule." *Id.* at 1172 n.4.

¹⁹⁸ *Id.* at 1171–72.

¹⁹⁹ 630 So. 2d 537 (Fla. 1993).

²⁰⁰ *See id.* at 538, 542.

²⁰¹ *Id.* at 542 (emphasis added) (quoting *Shova v. Eller*, 606 So. 2d 400, 408 (Fla. Dist. Ct. App. 1993) (Altenbernd, J., dissenting)); *see also* *Iglesia v. Floran*, 394 So. 2d 994 (Fla. 1981).

²⁰² 296 So. 2d 9 (Fla. 1974).

owners who lacked the required insurance.²⁰³ In addition, the section made pain and suffering damages unavailable unless there was at least \$1,000 in medical benefits, a permanent injury or death occurred, or certain listed injuries (such as fractures of weight-bearing bones or compound fractures) were present.²⁰⁴

The section challenged in *Lasky* thus contained a combination of insurance requirements, immunities, and abolition of tort actions. Of course, the abolition of a tort suit from the plaintiff's perspective means an immunity from suit from the defendants' perspective—and, in auto accidents, plaintiffs and defendants are largely the same group. This ended up being important: Motorists lost a tort action but also gained a tort immunity, which was the “reasonable alternative” required by *Kluger*. In exchange for forgoing certain rights to sue on a negligence theory, the accident victim would get not only “speedy payment by his own insurer of medical costs, lost wages, etc.”—even when he himself was at fault—but also an immunity from suit for those elements of damages (to the extent of the victim's policy limits), as well as an immunity from suit for pain and suffering damages in those cases where they were unavailable.²⁰⁵ This quid pro quo was enough to distinguish *Lasky* from *Kluger* and save the statutory section from an access-to-courts challenge.

The same pattern can be observed in the following cases involving administrative agencies or medical malpractice.

In *Department of Agricultural & Consumer Services v. Bonanno*, the court upheld the Citrus Canker Eradication Program's compensation system.²⁰⁶ Under that program, citrus growers whose diseased plants were destroyed could seek compensation only through an administrative hearings process with exclusive appellate review in the First District Court of Appeal.²⁰⁷ The *Bonanno* court added that the statute even granted additional benefits that wouldn't otherwise be available, like a minimum value for destroyed plants and compensation for claims that would otherwise be time-barred.²⁰⁸

In *University of Miami v. Echarte*, the court considered a statute providing that in medical malpractice cases, if a plaintiff rejected a defendant's offer to participate in binding arbitration, noneconomic damages at trial would be

²⁰³ *See id.* at 13–14.

²⁰⁴ *Id.* at 18.

²⁰⁵ *Id.* at 14.

²⁰⁶ 568 So. 2d 24 (Fla. 1990).

²⁰⁷ *Id.* at 27.

²⁰⁸ *Id.* at 30.

capped at \$350,000.²⁰⁹ The court upheld the statute, holding that the reasonable alternative was “the opportunity to receive prompt recovery [through binding arbitration] without the risk and uncertainty of litigation or having to prove fault in a civil trial.”²¹⁰ The statute regulated the arbitration process in ways that the court held were pro-plaintiff: by providing time limits for the defendant’s investigation to determine its own liability, by requiring that the defendant “provide a verified written medical expert opinion corroborating a lack of reasonable grounds to show a negligent injury” before “deny[ing] the claimant’s reasonable grounds for finding medical negligence,” by establishing a “relaxed evidentiary standard” and “joint and several liability,” and so on.²¹¹ The court found that this system restricted the claimant’s rights less than workers’ comp—since, unlike in workers’ comp, some noneconomic damages were compensable. Admittedly, this system (unlike workers’ comp) wasn’t no-fault, but the court reasoned that a no-fault system is harder to implement for medical malpractice than for workplace injuries.²¹²

In *Samples v. Florida Birth-Related Neurological Injury Compensation Ass’n*, the court considered the Florida Birth-Related Neurological Injury Compensation Plan, which provided for a \$100,000 no-fault payment for parents of a child born with a birth-related neurological injury.²¹³ The court held that:

The Plan as a whole—including the parental award provision—provides an alternative remedy to the uncertain and speculative compensation parents might receive through traditional tort remedies. As well as providing the \$100,000 parental award, the Plan specifically provides for particular expenses incurred by parents due to the child’s injury. Additionally, the Plan does not act as the exclusive remedy in cases “where there is clear and convincing evidence of bad faith or malicious purpose or willful and wanton disregard of human rights, safety, or property.”²¹⁴

3. Kluger *Prong Two: Public Necessity*

Just in case the med-mal administrative scheme isn’t validated at prong one of *Kluger* (as providing a reasonable alternative), it’s helpful to observe the

²⁰⁹ 618 So. 2d 189 (Fla. 1993).

²¹⁰ *Id.* at 194.

²¹¹ *Id.*

²¹² *Id.* at 194–95.

²¹³ 114 So. 3d 912, 921 (Fla. 2013).

²¹⁴ *Id.* at 921 (quoting FLA. STAT. ANN. § 766.303(2) (West 2010)); *see also* Macri v. Clements & Ashmore, P.A., 15 So. 3d 762, 766 (Fla. Dist. Ct. App. 2009).

fate of access-to-court-limiting systems under prong two, which requires an overpowering public necessity with no alternative method.²¹⁵

Obviously, a statute that on its face restricts access and doesn't even bother showing necessity fails both prongs of *Kluger* and is struck down easily.²¹⁶ But when the act does recite findings of overwhelming public necessity, especially when supported by a task force study or something similar, these findings are likely to get deference from courts.²¹⁷ Still, the "no alternative method" subprong can be restrictive. Courts can be willing to second-guess whether the necessity identified could have been addressed without limiting access to courts, so it's probably prudent for the legislative findings to explicitly state that the new scheme is a unified approach, along the lines of the *Echarte* decision discussed below.

As an example of the second prong, the *Kluger* court itself referred to the 1945 abolition of the damages actions for "alienation of affections, criminal conversation, seduction or breach of promise."²¹⁸ As the court had explained in *Rotwein v. Gersten*,²¹⁹ the legislature showed public necessity by explaining, in the preface to the statute abolishing the actions, that these actions had

been subject to grave abuses, causing extreme annoyance, embarrassment, humiliation and pecuniary damages to many persons wholly innocent and free from wrongdoing, that they have been exercised by the unscrupulous for their own enrichment and that the best interests of the people of Florida will be served by the abolition of such remedies.²²⁰

The *Rotwein* court continued, in language quoted and approved in *Kluger*:

The causes of action proscribed by the act under review were a part of the common law and have long been a part of the law of the country. They have no doubt served a good purpose, but *when they*

²¹⁵ See Phillips, *supra* note 166, at 1336 (noting the "overpowering public necessity" standard that exists in some states).

²¹⁶ See, e.g., Mitchell v. Moore, 786 So. 2d 521 (Fla. 2001); Nationwide Mut. Fire Ins. v. Pinnacle Med., Inc., 753 So. 2d 55 (Fla. 2000); Smith v. Dep't of Ins., 507 So. 2d 1080 (Fla. 1987); Overland Constr. Co. v. Simons, 369 So. 2d 572, 574–75 (Fla. 1979); Sunspan Eng'g & Constr. Co. v. Spring-Lock Scaffolding Co., 310 So. 2d 4 (Fla. 1975); City of Clearwater v. L.M. Duncan & Sons, Inc., 466 So. 2d 1116, 1118 (Fla. Dist. Ct. App. 1985). Some of these cases, like *Sunspan* and *Clearwater*, involved the workers' comp statute, but they arose far from the core of workers' comp—in the specialized context of the employer's amenability to suit by third-party tortfeasors, not by employees.

²¹⁷ See *infra* text accompanying notes 222–34.

²¹⁸ 281 So. 2d 1, 4 (Fla. 1973).

²¹⁹ 36 So. 2d 419 (Fla. 1948) (en banc).

²²⁰ *Id.* at 420.

*become an instrument of extortion and blackmail, the legislature has the power to, and may, limit or abolish them.*²²¹

Maybe *Rotwein* isn't a good example because it doesn't clearly show how the "no alternative method" subprong works. But *Psychiatric Associates v. Siegel*²²² is a better example, and shows how the "no alternative method" subprong can be restrictive.

In that case, the court struck down a statute "requir[ing] a plaintiff bringing an action against someone who participated in a medical review board process to post a bond sufficient to cover the defendant's costs and attorney's fees."²²³ On prong one, there was clearly no reasonable alternative to the court action for those who couldn't post the bond; "the statutes lack[ed] reciprocity because they [did] not require defendants to pay a plaintiff's costs and attorney's fees if the claim prove[d] meritorious."²²⁴

As to the second prong, the court found that:

[T]he legislature enacted the bond requirement statutes pursuant to an overpowering public purpose. The Task Force's report and the legislature's preamble to enacting the bond requirements clearly outline the existence of a medical malpractice crisis in the state. The legislature acted within its police powers to protect the health and welfare of its citizens by enactment of the statutes.²²⁵

But the court struck the statute down anyway because "the record in the case [did] not show that the bond requirement [was] the only method of meeting the medical malpractice crisis and encouraging peer review."²²⁶

Siegel shows the importance of having the statute recite legislative findings not only that there was an overwhelming public necessity but also that there was no alternative method. *University of Miami v. Echarte*²²⁷ is a good example of this. We've already seen *Echarte* at prong one: this is the challenge to the statute that capped medical malpractice noneconomic damages at trial after the plaintiff rejected the defendant's binding arbitration request.²²⁸

²²¹ *Kluger*, 281 So. 2d at 4 (quoting *Rotwein*, 36 So. 2d at 421).

²²² 610 So. 2d 419 (Fla. 1992).

²²³ *Id.* at 421.

²²⁴ *Id.* at 424.

²²⁵ *Id.* (footnote omitted).

²²⁶ *Id.* at 425.

²²⁷ 618 So. 2d 189 (Fla. 1993).

²²⁸ *See supra* text accompanying notes 209–12.

Right after upholding the statute under the first prong, the court also upheld it under the second prong (though this wasn't strictly necessary). The legislature had recited factual findings about the extent of a medical malpractice insurance crisis in the preamble of the statute; these were based on the findings of the Academic Task Force for Review of the Insurance and Tort Systems (Task Force), which the legislature had established by statute.²²⁹ The lower court had held that the legislature hadn't shown the necessary "overpowering public necessity," but the supreme court disagreed:

The [l]egislature has the final word on declarations on public policy, and the courts are bound to give great weight to legislative determinations of facts. Further, legislative determinations of public purpose and facts are presumed correct and entitled to deference, unless clearly erroneous. Because the [l]egislature's factual and policy findings are presumed correct and there has been no showing that the findings in the instant case are clearly erroneous, we hold that the [l]egislature has shown that an "overpowering public necessity" exists.²³⁰

As for whether there was an alternative method, the lower court had held that this subprong wasn't satisfied because the legislature hadn't *expressly* found that no alternative method existed.²³¹ The supreme court disagreed because the Task Force had stated that "'reforms of the civil justice system, of the medical regulatory system, and of the insurance system complement each other' and that '[a]ll are necessary to address the complex problems with multiple causes analyzed in [its report].'"²³² Thus, it was necessary to consider "the plan as a whole, rather than focusing on one specific part of the plan."²³³ After rejecting a particular claim by the challengers—that "strengthen[ing] professional discipline of physicians with numerous claims" would have been sufficient to meet the public necessity—the court concluded that "no alternative or less onerous method of meeting the crisis has been shown."²³⁴

²²⁹ *Echarte*, 618 So. 2d at 191 n.11, 196.

²³⁰ *Id.* at 196–97 (citations omitted) (first quoting *Univ. of Miami v. Echarte*, 585 So. 2d 293, 301 (Fla. Dist. Ct. App. 1991); then citing *Am. Liberty Ins. v. W. & Conyers Architects & Eng'rs*, 491 So. 2d 573 (Fla. Dist. Ct. App. 1986); then citing *State v. Div. of Bond Fin.*, 495 So. 2d 183 (Fla. 1986); and then citing *Miami Home Milk Producers Ass'n v. Milk Control Bd.*, 169 So. 541 (Fla. 1936)).

²³¹ *See id.* at 197.

²³² *Id.* (first alteration in original) (citing *ACAD. TASK FORCE FOR REVIEW OF THE INS. & TORT SYS., MEDICAL MALPRACTICE RECOMMENDATIONS 9* (1987)).

²³³ *Id.*

²³⁴ *Id.*; *see also* *Estate of McCall v. United States*, 134 So. 3d 894, 933–36 (Fla. 2014) (Polston, C.J., dissenting).

Recently, in *Estate of McCall v. United States*, a plurality opinion of the Florida Supreme Court engaged in an extremely searching review of the legislative findings supporting a cap on noneconomic damages—concluding that the supposed medical insurance crisis supporting the cap was illusory.²³⁵ But that plurality opinion represents the views of only two out of seven justices: Justices Lewis and Labarga.²³⁶

Nonetheless, both the plurality and the concurrence in the result—five out of seven justices in all—agreed that if a crisis can justify a particular scheme, that scheme may no longer be justifiable once the crisis is over.²³⁷ Even though the three concurring justices would have given substantially more deference to legislative findings than the two plurality justices, greater deference may not be good enough if it's obvious (one day) that a crisis is past and there's no evidence to support the continuing necessity of the scheme. So, just to be safe, any recitation of legislative need should include not only descriptions of a crisis that might someday pass (like a medical insurance crisis) but also eternal problems of negligence-based actions, which have been with us for as long as the negligence system has been in existence: the randomness and arbitrariness of negligence determinations and damages judgments imposed by juries without any medical expertise.²³⁸

B. Alabama's Right to a Remedy and Access to Courts

Article I, section 13 of the Alabama Constitution states: “That all courts shall be open; and that every person, for any injury done him, in his lands, goods, person, or reputation, shall have a remedy by due process of law; and right and justice shall be administered without sale, denial, or delay.”²³⁹

The section 13 case law is confusing, and to this day there doesn't seem to be a consensus approach on how to apply section 13. It makes more sense if one understands the history of the doctrine, so here is a short history.

²³⁵ *McCall* arose in the context of an equal protection challenge and is discussed further in that section. See *infra* Section IV.C. But the court's attitude toward deference to legislative factual findings in equal protection cases is likely to influence its attitude in access-to-courts cases.

²³⁶ Compare *McCall*, 134 So. 3d at 905–12 (plurality opinion) (reexamining factual bases of statute), with *id.* at 921–22 (Pariente, J., concurring in the result) (disapproving of this reexamination), and *id.* at 931–32 (Polston, C.J., dissenting).

²³⁷ See *id.* at 913–15 (plurality opinion); *id.* at 920–21 (Pariente, J., concurring in the result).

²³⁸ See *supra* text accompanying notes 1–3.

²³⁹ ALA. CONST. art. I, § 13; see also Ford & Abernathy, *supra* note 24, at 51.

The main feature of the history is that, in the early cases, the court applied a “vested rights” approach, under which the legislature could restrict or abolish any common-law cause of action as long as it did so prospectively. In the late 1970s and early 1980s, the court switched course and adopted the “common-law rights” approach, under which the legislature couldn’t abolish a common-law right unless (1) there was a voluntary quid pro quo or (2) the legislature was using its police power to eradicate a perceived social evil. The second prong was applied several times without much deference to legislative judgment, but other cases do defer to the legislature. Occasional cases continue to use the vested-rights approach, and several cases have listed the vested-rights and common-law-rights approaches as though they were both good law.

As a result, there is continuing uncertainty about the true state of doctrine in this area, and for purposes of the med-mal administrative scheme, who knows what rule might be applied.

1. *The Early Cases*

The early cases analyzing section 13 (or its equivalents under prior constitutions) adopted a number of principles. First, statutes that don’t abolish a cause of action but merely regulate or tax it are upheld.²⁴⁰ Second, causes of action aren’t extinguished unless a statute has explicitly said so.²⁴¹ Third, one can waive one’s rights, so statutes that provide a voluntary alternative to one’s common-law rights are upheld.²⁴²

And fourth—and most importantly—the legislature can abolish a common-law right, as long as it does so prospectively; section 13 only provides protection if the right was “vested,” i.e., if the cause of action had accrued before the legislature abolished it.

Thus, in *Pickett v. Matthews*, the court analyzed a statute abolishing the liability of a car driver for injuries to guests transported without payment, unless there was willful or wanton conduct.²⁴³ The Supreme Court of Alabama wrote:

²⁴⁰ See, e.g., *Plant v. R.L. Reid, Inc.*, 313 So. 2d 518, 522–23 (Ala. 1975); *Swann v. Kidd*, 79 Ala. 431 (1885) (per curiam); *Martin’s Executrix v. Martin*, 25 Ala. 201 (1854).

²⁴¹ See, e.g., *Ivey v. Dixon Inv. Co.*, 219 So. 2d 639 (Ala. 1969); *Henley v. Rockett*, 8 So. 2d 852 (Ala. 1942); *Gentry v. Swann Chem. Co.*, 174 So. 530 (Ala. 1937), *abrogated by Ex Parte Harris*, 590 So. 2d 285 (Ala. 1991).

²⁴² See *Gentry*, 174 So. 2d at 534; *Chapman v. Ry. Fuel Co.*, 101 So. 879, 881 (Ala. 1924).

²⁴³ 192 So. 261 (Ala. 1939).

It will be noticed that [section 13] preserves the right to a remedy for an injury. That means that when a duty has been breached producing a legal claim for damages, such claimant cannot be denied the benefit of his claim for the absence of a remedy. But this provision does not undertake to preserve existing duties against legislative change made before the breach occurs.²⁴⁴

The vested-rights approach is, of course, very charitable to statutory regimes that abolish common-law actions and replace them with administrative proceedings, as long as the regime works prospectively only. So the Alabama bill would likely be upheld if the vested-rights approach were applied.²⁴⁵

Some years before *Pickett*, the court had upheld the workers' comp law on a similar theory. *Chapman v. Railway Fuel Co.* upheld the statute on a voluntary waiver theory.²⁴⁶ The challenger there had also argued that the act wasn't really voluntary, because "it undertakes to control the rights of employer and employee, even though both elect not to come under its provisions, in the one case by abolishing defenses, in the other by remitting the employee to his common-law rights and remedies."²⁴⁷ But even then, the court wrote, "no one has any vested right under the Constitution to the maintenance of common-law doctrines in statutory provisions regulating the relations between employer and employee in respect of rights and liabilities growing out of accidental injuries."²⁴⁸ Thus, the right to a remedy, in its vested-rights aspect, provides no protection against prospective legislative changes in the common law.²⁴⁹

2. *The Turn to Stricter Analysis*

If a med-mal administrative scheme had been passed in 1977, one would clearly expect it to be upheld (as to later injuries) based on the vested-rights approach of the section 13 case law. True, it abolishes causes of action rather than merely regulating them, and it does not establish a voluntary regime. But

²⁴⁴ *Id.* at 263.

²⁴⁵ See S. 413, 2016 Leg., Reg. Sess. § 12(a) (Ala. 2016).

²⁴⁶ *Chapman*, 101 So. at 880–81.

²⁴⁷ *Id.* at 881.

²⁴⁸ *Id.*; see also *Slagle v. Reynolds Metals Co.*, 344 So. 2d 1216, 1218 (Ala. 1977) (dismissing the section 13 argument without any analysis except for a citation to *Chapman*).

²⁴⁹ According to *Reed v. Brunson*, 527 So. 2d 102, 108 (Ala. 1988), the vested-rights approach in section 13 cases goes all the way back to *Coosa River Steamboat Co. v. Barclay & Henderson*, 30 Ala. 120 (1857), and *Peevey v. Cabaniss*, 70 Ala. 253 (1881).

it's a policy clearly stated by the legislature, and, most importantly, it's valid as long as it operates purely prospectively.²⁵⁰

But the section 13 cases took a turn for the stricter between 1978 and 1982, with the *Grantham–Fireman’s Fund–Lankford* trilogy of cases. In *Grantham v. Denke*, the court examined the aspect of the workers’ comp law that abolished an injured employee’s recovery against an officer, director, or fellow employee of the company.²⁵¹ That the employee’s right of recovery against the *company* was now replaced by an administrative action was fine—it was a voluntary quid pro quo, and that elective aspect of the statute reconciled it with section 13.²⁵² But “[t]he quid pro quo is solely between employer and employee”;²⁵³ as to third parties, including officers or fellow employees, there was no elective substitute remedy that would justify depriving the injured worker of his common law remedies.²⁵⁴ Nor was the statute an exercise of the state’s police power to eradicate a “perceived social evil,”²⁵⁵ as was the case with the motor vehicle guest statute upheld in *Pickett*.²⁵⁶

Grantham was clearly a departure from the older approach: the vested-rights approach seemed to have been abandoned. The injury in *Grantham* occurred after the statute was passed,²⁵⁷ so *Pickett*’s vested-rights approach should have controlled; but instead, the fellow-employee immunity section was invalidated, and *Pickett* was reinterpreted as being justified by the state’s need to use its police power to eradicate a perceived social evil.²⁵⁸

After *Grantham*, though, the law remained uncertain, since the vested-rights approach wasn’t really abandoned. Just the next year, in *Mayo v. Rouselle Corp.*, the court examined a statute providing a four-year statute of limitations for breach of contract for sale.²⁵⁹ One might think that the statute would be easily upheld based on the very traditional view that it is constitutional to regulate (rather than abolish) a common-law cause of

²⁵⁰ See Ala. S. 413 § 12(a).

²⁵¹ 359 So. 2d 785 (Ala. 1978).

²⁵² *Id.* at 787 (first citing *Gentry v. Swann Chem. Co.*, 174 So. 530 (Ala. 1937); then citing *Chapman*, 101 So. 879).

²⁵³ *Id.* (emphasis omitted).

²⁵⁴ *Id.* at 788.

²⁵⁵ *Id.*

²⁵⁶ See *Pickett v. Matthews*, 192 So. 261, 266 (Ala. 1939).

²⁵⁷ See *Reed v. Brunson*, 527 So. 2d 102, 109 (Ala. 1988).

²⁵⁸ See *Grantham*, 359 So. 2d at 788.

²⁵⁹ 375 So. 2d 449 (Ala. 1979).

action.²⁶⁰ And the court did indeed uphold the statute, but on a different theory: the supposedly discredited vested-rights theory. The court held that section 13 “preserves to all persons a remedy for accrued or vested causes of action. Therefore, the right to bring an action for breach of warranty by a third person can be modified, limited or repealed as the legislature sees fit, except where such cause of action has already accrued.”²⁶¹ And this was the year after *Grantham* had apparently abandoned the vested-rights theory!

Also, the vested-rights theory remained viable in cases in which it was *statutory* rights being abolished, not common-law rights. *Grantham* had struck down the workers’ comp law’s grant of immunity for coworkers, but in *Slagle v. Parker*, the court held that coworker immunity was still valid for *wrongful death* actions.²⁶² Wrongful death actions were unknown to the common law (where your tort claims died with you) and are products of statute: therefore, the wrongful death action “can be modified, limited, or repealed as the legislature sees fit, except as to causes of action which have already accrued.”²⁶³

The court continued to not give much guidance on section 13 cases. In *Thompson v. Wiik, Reimer & Sweet*, the court upheld a statute generally barring contracts in restraint of a lawful profession (i.e., non-compete agreements).²⁶⁴ The court held that the legislature has the “prerogative to effect public policy relative to such contractual rights and obligations,” and that “[s]ection 13 only restricts the legislature from making unreasonable, arbitrary and oppressive modifications of fundamental rights contemplated by [section 13’s] constitutional guarantees.”²⁶⁵ But this endorsement of an “unreasonable, arbitrary and oppressive” standard was the year after the court, in *Mayo*, had declined to rely on a similar standard for judging the validity of statutes of limitations under section 13.

Starting with *Fireman’s Fund American Insurance v. Coleman*,²⁶⁶ the court began to take steps toward potentially clarifying doctrine. *Grantham* had decided that injured employees could still sue their fellow employees but

²⁶⁰ See *Reese v. Rankin Fite Mem’l Hosp.*, 403 So. 2d 158, 162–63 (Ala. 1981) (Jones, J., concurring specially); *Plant v. R.L. Reid, Inc.*, 313 So. 2d 518, 522–23 (Ala. 1975).

²⁶¹ *Mayo*, 375 So. 2d at 451 (citing *Pickett*, 192 So. 261).

²⁶² 370 So. 2d 947 (Ala. 1979).

²⁶³ *Id.* at 949 (first citing *Slagle v. Reynolds Metals Co.*, 344 So. 2d 1216 (Ala. 1977); then citing *Pickett*, 192 So. 261).

²⁶⁴ 391 So. 2d 1016 (Ala. 1980).

²⁶⁵ *Id.* at 1020.

²⁶⁶ 394 So. 2d 334 (Ala. 1980) (plurality opinion).

hadn't decided whether that was still true if those fellow employees were supervisory employees and corporate officers.²⁶⁷ *Fireman's Fund* resolved that question: it held that *Grantham's* section 13 analysis applied to all parties other than the employer, including the workers' comp carrier.²⁶⁸

The *Fireman's Fund* plurality opinion didn't have much analysis in it.²⁶⁹ But Justice Shores's concurrence in the result was very influential and was later adopted by the court.²⁷⁰ She believed that the vested-rights approach was inadequate and should be abandoned: it was merely a type of ex post facto clause, which provided insufficient protection for constitutional rights and was moreover unnecessary in light of the Alabama Constitution's explicit prohibition of ex post facto laws.²⁷¹ *Grantham's* common-law rights approach is better, even though it can lead to formalistic distinctions like *Slagle v. Parker's* distinction between common-law and statutory actions.²⁷² Justice Shores argued that when *common-law rights* are abolished, the abolition should be held automatically suspect under section 13, but could be saved from invalidity (1) if the right was "voluntarily relinquished . . . in exchange for equivalent benefits or protection," or (2) if the government is using its police power to eradicate a perceived social evil.²⁷³ When *non-common-law rights* (i.e., statutory rights) are abolished, the statute should be upheld if it's reasonable and nonarbitrary.²⁷⁴

The court adopted Justice Shores's concurrence in *Lankford v. Sullivan, Long & Hagerty*.²⁷⁵ This case involved a statute of limitations for products liability cases.²⁷⁶ First, the court used Justice Shores's two-part test for

²⁶⁷ *Grantham v. Denke*, 359 So. 2d 785 (Ala. 1978). The issue was raised but not decided in *Jones v. Watkins*, 364 So. 2d 1144, 1146 (Ala. 1978), which suggested that maybe the answer might turn on what function these officers and directors performed in the company.

²⁶⁸ *Fireman's Fund*, 394 So. 2d at 336.

²⁶⁹ Justice Jones concurred in the result, repeating the reasoning of *Grantham*: The voluntary quid pro quo theory only applies between employer and employee, and not between the employee and anyone else. It doesn't save the statute to argue that it helps people overall, in a collective sense—section 13's protections are individual, not collective. *Id.* at 341–43 (Jones, J., concurring in the result).

²⁷⁰ See *Lankford v. Sullivan, Long & Hagerty*, 416 So. 2d 996 (Ala. 1982).

²⁷¹ ALA. CONST. art. I, § 22. But the court noted in *Reed v. Brunson* that this wasn't true, as the ex post facto clause only applies to criminal laws. 527 So. 2d 102, 114 n.5 (Ala. 1988).

²⁷² See *Fireman's Fund*, 394 So. 2d at 352 (Shores, J., concurring in the result).

²⁷³ *Id.*

²⁷⁴ See *id.* at 353.

²⁷⁵ 416 So. 2d 996 (Ala. 1982).

²⁷⁶ *Id.* at 998–99.

abrogations of common-law rights. Second, it used her test for abrogations of non-common-law rights.²⁷⁷

On abrogations of common-law rights: (1) there's no voluntary quid pro quo here, so we look to (2) whether the statute eradicates a perceived social evil.²⁷⁸ Here, the court examined the legislature's reasons—without much deference to the legislature's judgment—and concluded that its rationale was deficient.²⁷⁹ The legislature identified the evil of the increasing cost of products liability actions and the effect of the increased cost on product prices and the availability of insurance.²⁸⁰ But it's unreasonable to think that a ten-year statute of limitations will have an effect on that; there's no documentation of the effect of the “long tail” (i.e., those cases that show up after ten years) or the extent of the crisis in Alabama.²⁸¹ Moreover, insurance rates are set nationally, so individual state tort reforms can do little to affect the products liability problem.²⁸²

On abrogations of non-common-law rights, Justice Shores's standard is more forgiving—only requiring that the statute not be arbitrary and capricious. But here, too, the statute is arbitrary because it ties the limitations period to the date of use, not the date of accrual of the action—it's thus a statute of repose, not a statute of limitations—and there's no saving clause for injuries that occur toward the end of the period.²⁸³

3. *The Move Back to Confusion*

After the *Grantham–Fireman's Fund–Lankford* trilogy from 1978 to 1982, then, one might have thought that the law was clear: The vested-rights approach was out and Justice Shores's common-law rights approach from *Fireman's Fund* was in, with the strict two-part test for abrogations of common-law rights (plus a loose arbitrary and capricious test for abrogations

²⁷⁷ This is because the defendant argued that privity was required for products liability actions at common law; no privity was present in this case. Therefore, this was actually a case of an abrogation of a non-common-law right. The court noted that some such cases will have privity and others won't, so just in case, it did both analyses. *Id.* at 1000.

²⁷⁸ *See id.* at 1001.

²⁷⁹ *Id.* at 1001–03.

²⁸⁰ *Id.* at 1001.

²⁸¹ *Id.*

²⁸² *Id.* at 1002.

²⁸³ *Id.* at 1003–04; *see also* Phillips, *supra* note 166, at 1337 (noting that Justice Jones, in his *Lankford* concurrence, 416 So. 2d at 1007 (Jones, J., concurring), would look not to whether a right derived from the “common law” in a narrow sense, but to whether a right was “engrained into the fabric of the law [so] as to acquire a fundamental and basic status” (alteration in original) (internal quotations marks omitted)).

of non-common-law rights). Moreover, as *Lankford* showed, the court was willing to apply this approach without deference to legislative judgment and was even willing to apply the nominally loose arbitrary and capricious test in a sort of strict way.

For a while, the cases were consistent with this view.²⁸⁴ But then came *Reed v. Brunson*.²⁸⁵ In *Reed*, the court examined a statute preventing an employee receiving workers' comp from suing his fellow employees except when there was willful conduct.²⁸⁶ After a lengthy discussion of the history of the cases,²⁸⁷ *the court applied both approaches*—the vested-rights approach and the common-law rights approach.

Under the vested-rights approach, the statute was valid because the plaintiff's injuries occurred after the statute became law.²⁸⁸ And under the common-law rights approach: (1) There was mutuality because the employee giving up the right to others gets the corresponding benefit that others won't sue him.²⁸⁹ And (2) on the eradication of a social evil, the court deferred to the legislature's judgment (as expressed in the lengthy findings included in the statute).²⁹⁰

Reed is a weird case because (1) it seems to be more deferential to the legislature than previous cases like *Lankford*, and, more importantly, (2) even though it seemed like the vested-rights approach was gone, the opinion still did the vested-rights analysis (just in case?).

Shortly after *Reed*, the court looked at a workers' comp provision preventing a father from suing for his son's wrongful death. In *Yarchak v.*

²⁸⁴ See *Barlow v. Humana, Inc.*, 495 So. 2d 1048 (Ala. 1986); *Jackson v. Mannesmann Demag Corp.*, 435 So. 2d 725 (Ala. 1983); see also *Home Indem. Co. v. Anders*, 459 So. 2d 836, 840–41 (Ala. 1984) (upholding a statute limiting municipal liability, based on municipal liability-specific analysis); *Scott v. Dunn*, 419 So. 2d 1340, 1345–46 (Ala. 1982) (upholding a statute that provided that there would be no liability for damage caused by cows to cars, based on a cow-specific analysis).

²⁸⁵ 527 So. 2d 102 (Ala. 1988).

²⁸⁶ *Id.* at 113–14.

²⁸⁷ *Id.* at 107–12.

²⁸⁸ *Id.* at 114.

²⁸⁹ *Id.* at 115 & n.7. Was this correct? As in *Grantham*, the court relied on the theory that choosing workers' comp was voluntary. See *id.* at 109, 115; see also *Grantham v. Denke*, 359 So. 2d 785, 787 (Ala. 1978). But, as Justice Jones, concurring in the result, pointed out, the voluntary nature of workers' comp was by no means clear after the 1973 amendments. See *Reed*, 527 So. 2d at 121–22 (Jones, J., concurring in the result); see also *Ford & Abernathy*, *supra* note 23, at 51. Justice Jones himself would have found mutuality even without voluntary election—unlike the similar statute struck down in *Grantham*, this statute also gave the employee other benefits, like increased benefits, a longer statute of limitations, and preservation of the cause of action for willful injury. See *Reed*, 527 So. 2d at 121–22 (Jones, J., concurring in the result).

²⁹⁰ *Reed*, 527 So. 2d at 116.

Munford, Inc., the father argued that a wrongful death action was common-law in nature, so abolishing it in his case required the strict two-prong test, but the court disagreed, saying that wrongful death was statutory in nature.²⁹¹ Recall that, in 1979, in *Slagle v. Parker*, the court had upheld an abolition of wrongful death actions against coworkers in the workers' comp context, reasoning that since wrongful death actions were statutory in nature, the legislature could abrogate them as long as it didn't touch *vested rights* (citing *Pickett*).²⁹² The *Yarchak* court upheld this statute too, but *not* on a vested-rights theory (although it briefly mentioned that a vested-rights approach had been applied in *Reed*). Since it was an abrogation of a non-common-law right, all that was required (under *Lankford*) was that the statute not be arbitrary and capricious, and indeed that's what the court found.²⁹³

The *Yarchak* court's failure to rely on vested rights suggested that maybe *Reed* might have been a fluke—perhaps vested rights were clearly out the window after all. But several later cases continued to use the *Reed* approach of looking to vested rights just in case. For instance, in *Murdock v. Steel Processing Services, Inc.*, the court again looked at the exclusivity provisions of the workers' comp law—this time the provision barring the non-workers'-comp rights and remedies of the worker's spouse.²⁹⁴ The court held that this was valid under *both* the vested-rights approach *and* the common-law rights approach.²⁹⁵ The analysis under the common-law rights approach was very deferential to the legislative judgment of treating the husband and wife as a single entity for workers' comp purposes.²⁹⁶

Kruszewski v. Liberty Mutual Insurance was along the same lines.²⁹⁷ Here, the issue was the validity of the immunity of the workers' comp insurance carrier.²⁹⁸ (*Reed* had upheld the immunity of co-employees.) The court applied *both* the vested-rights approach *and* the common-law rights approach, again being extremely deferential to the legislature's judgment.²⁹⁹ Indeed, there was virtually no analysis here.

²⁹¹ 570 So. 2d 648 (Ala. 1990).

²⁹² 370 So. 2d 947, 949–50 (Ala. 1979) (citing *Pickett v. Matthews*, 192 So. 261 (1939)).

²⁹³ *Yarchak*, 570 So. 2d at 649–50.

²⁹⁴ 581 So. 2d 846 (Ala. 1991).

²⁹⁵ *Id.* at 848.

²⁹⁶ *Id.*

²⁹⁷ 653 So. 2d 935 (Ala. 1995).

²⁹⁸ *See id.* at 937.

²⁹⁹ *See id.* at 937–38.

The court continued to nod in the direction of vested rights in the following years.³⁰⁰ And in *Baughner v. Beaver Construction Co.*, the court looked at a construction industry statute of repose, like the one invalidated in *Lankford*.³⁰¹ The *Baughner* court said that, in the past, the court had applied *both* the vested-rights approach *and* the common-law rights approach, and it then upheld the statute under both approaches, deferring to the legislature (and citing its lengthy findings in the statute) on whether this was a valid exercise of the police power to eradicate a perceived social evil.³⁰² Also, it helped that there was a saving clause for those who were injured near the end of the statutory period.³⁰³ *Baughner* was the Supreme Court of Alabama's last significant statement on this issue.

For purposes of the med-mal administrative compensation scheme, it would be prudent to assume that both the vested-rights approach and the common-law rights approach are still the law. The vested-rights approach should be easy to satisfy: the Alabama bill explicitly provides that it operates only prospectively.³⁰⁴ As for the common-law rights approach, some cases have been deferential to the legislature's judgment—but not all, so the legislature ought to include detailed findings in the law justifying why it's necessary for the state to use its police power to remedy the perceived social evil of common-law medical malpractice litigation. However, some sections—like the statute of repose,³⁰⁵ the departure from the collateral-source rule,³⁰⁶ and the maximum contribution and payout amounts³⁰⁷—might pose some problems in the event that the court chooses to treat the legislature's judgment with less deference and scrutinizes the relationship between the perceived social evil and the legislature's exercise of its police power.

³⁰⁰ See, e.g., *United Cos. Lending Corp. v. Autrey*, 723 So. 2d 617 (Ala. 1998); *McCullar v. Universal Underwriters Life Ins.*, 687 So. 2d 156 (Ala. 1996) (plurality opinion); *Morris v. Merritt Oil Co.*, 686 So. 2d 1139 (Ala. 1996).

³⁰¹ 791 So. 2d 932 (Ala. 2000).

³⁰² *Id.* at 934–37.

³⁰³ *Id.* at 937.

³⁰⁴ S. 413, 2016 Leg., Reg. Sess. § 12(a) (Ala. 2016).

³⁰⁵ *Id.* § 5(e); see also *supra* text accompanying notes 283, 301–03 (discussing treatment of statutes of repose and relevance of savings clauses for people injured near the end of the statutory period).

³⁰⁶ Ala. S. 413 § 6(f); see also Hubbard, *supra* note 1, at 485–88; *infra* note 396 (discussing back-and-forth on collateral-source rule in Alabama cases under equal protection).

³⁰⁷ Ala. S. 413 § 8; see also *supra* text accompanying notes 118–19, 124; *infra* text accompanying notes 387–96 (discussing Alabama case law on caps under jury trial and equal protection).

V. DUE PROCESS AND EQUAL PROTECTION

Finally, any statute can be challenged under concepts of due process and equal protection. Under the Federal Constitution, fiddling with the tort system is an example of economic regulation, which is analyzed under the very deferential rational basis test.³⁰⁸ And the same is true in Georgia, Florida, and Alabama, although one can occasionally find courts being unexpectedly strict, applying “rational basis with bite.”³⁰⁹ Courts often don’t clearly distinguish between due process and equal protection—there generally isn’t much need to do so since both doctrines have the same rational basis standard—which is why it makes sense to consider the doctrines together here. The equal protection law is in a state of confusion in Alabama, where there doesn’t even seem to be any consensus as to whether equal protection exists under the state constitution at all.

A. *The Federal Clauses*

The Supreme Court considered the constitutionality of the New York workers’ compensation law under the Due Process and Equal Protection Clauses in *New York Central Railroad v. White*.³¹⁰ The challengers argued

- (a) that the employer’s property is taken without due process of law, because he is subjected to a liability for compensation without regard to any neglect or default on his part or on the part of any other person for whom he is responsible, and in spite of the fact that the injury may be solely attributable to the fault of the employee;
- (b) that the employee’s rights are interfered with, in that he is prevented from having compensation for injuries arising from the employer’s fault commensurate with the damages actually sustained, and is limited to the measure of compensation prescribed by the act; and
- (c) that both employer and employee are deprived of their liberty to acquire property by being prevented from making such

³⁰⁸ See, e.g., *Ry. Express Agency v. New York*, 336 U.S. 106, 110 (1949) (upholding, under the Equal Protection Clause, “classification[s] that ha[ve] relation to the purpose for which [they are] made”); *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379, 391 (1937) (stating that “regulation which is reasonable in relation to its subject and is adopted in the interests of the community is due process”).

³⁰⁹ See, e.g., Gayle Lynn Pettinga, Note, *Rational Basis with Bite: Intermediate Scrutiny by Any Other Name*, 62 IND. L.J. 779 (1987); cf. Duff, *supra* note 26, at 177–84 (discussing state equal protection theories); Maron, *supra* note 31, at 125–35 (discussing due process and equal protection under Mississippi con law).

³¹⁰ 243 U.S. 188 (1917).

agreement as they choose respecting the terms of the employment.³¹¹

The Supreme Court rejected these claims:

No person has a vested interest in any rule of law entitling him to insist that it shall remain unchanged for his benefit. The common law bases the employer's liability for injuries to the employee upon the ground of negligence; but negligence is merely the disregard of some duty imposed by law; and the nature and extent of the duty may be modified by legislation, with corresponding change in the test of negligence. Indeed, liability may be imposed for the consequences of a failure to comply with a statutory duty, irrespective of negligence in the ordinary sense³¹²

"It may be added, by way of reminder, that the entire matter of liability for death caused by wrongful act . . . is a modern statutory innovation, in which the [s]tates differ as to who may sue, for whose benefit, and the measure of damages."³¹³

The Court found it unnecessary to decide whether "a [s]tate might, without violence to the constitutional guaranty of 'due process of law,' suddenly set aside all common-law rules respecting liability as between employer and employee, without providing a reasonably just substitute."³¹⁴ In light of employers' and employees' substantial reliance interests in the current state of the law, "it perhaps may be doubted whether the [s]tate could abolish all rights of action, on the one hand, or all defenses on the other, without setting up something adequate in their stead"—although this is of course dictum.³¹⁵ Instead, the Court observed that the New York act embodied a quid pro quo: Employees recovered less money, but they recovered in more cases, and more quickly and certainly.³¹⁶ Employers, for their part, lost defenses, but acquired greater certainty in damages.³¹⁷

³¹¹ *Id.* at 196–97 (paragraph breaks added).

³¹² *Id.* at 198 (citations omitted) (first citing *Munn v. Illinois*, 94 U.S. 113, 134 (1876); then citing *Hurtado v. California*, 110 U.S. 516, 532 (1884); then citing *Martin v. Pittsburg & Lake Erie R.R.*, 203 U.S. 284, 294 (1906); then citing *Mondou v. N.Y., New Haven, & Hartford R.R. (Second Employers' Liability Cases)*, 223 U.S. 1, 50 (1912); and then citing *Chi. & Alton R.R. v. Tranbarger*, 238 U.S. 67, 76 (1915)).

³¹³ *Id.* at 200.

³¹⁴ *Id.* at 201.

³¹⁵ *Id.*

³¹⁶ *See id.*; *see also* Ford & Abernathy, *supra* note 24, at 51.

³¹⁷ *See White*, 243 U.S. at 201; Zomberg, *supra* note 178, at 829, 851–52; *see also supra* text accompanying notes 24–28.

The Court went on to conclude, based on the details, that the “new arrangement” was not “arbitrary and unreasonable, from the standpoint of natural justice”³¹⁸:

This, of course, is not to say that any scale of compensation, however insignificant on the one hand or onerous on the other, would be supportable. In this case, no criticism is made on the ground that the compensation prescribed by the statute in question is unreasonable in amount, either in general or in the particular case. Any question of that kind may be met when it arises.³¹⁹

The Court also held that, although the statute abridged freedom of contract, this was acceptable because—having to do with loss of life and limb in hazardous occupations—it was “a reasonable exercise of the police power of the [s]tate.”³²⁰ It further held that the procedural provisions of the statute, including the denial of a jury, comported with due process.³²¹

The equal protection argument was that farm laborers and domestic servants were improperly excluded, but this discrimination was upheld as nonarbitrary, “since it reasonably may be considered that the risks inherent in these occupations are exceptionally patent, simple, and familiar.”³²²

The reasoning in *White* would probably apply to a med-mal administrative compensation scheme as well. States are allowed to modify their common law; under this system, injured patients give up their right to sue in a common-law court but obtain some compensation in a greater set of cases, doctors gain predictability, and hopefully litigation costs will be lower. Admittedly, this scheme deals with medical injuries generally and not just hazardous employment as in *White*, but the *White* court would probably still consider this a reasonable exercise of the police power.³²³

³¹⁸ *White*, 243 U.S. at 202; *see also id.* at 203 (“It is plain that, on grounds of natural justice, it is not unreasonable . . .”).

³¹⁹ *Id.* at 205–06.

³²⁰ *Id.* at 206.

³²¹ *Id.* at 207–08 (first citing *Walker v. Sauvinet*, 92 U.S. 90 (1875); then citing *Frank v. Magnum*, 237 U.S. 309, 340 (1915)).

³²² *Id.* at 208 (citing *Mo., Kan., & Tex. Ry. v. Cade*, 233 U.S. 642, 650 (1914)).

³²³ *See also Silver v. Silver*, 280 U.S. 117, 122–24 (1929) (upholding a Connecticut statute preventing guests in a car from recovering for the owner’s or operator’s negligence against due process and equal protection challenges); *Ariz. Employers’ Liab. Cases*, 250 U.S. 400, 420–31 (1919) (upholding an Arizona statute providing for no-fault employer liability in workplace injuries against due process and equal protection challenges).

Moreover, all this assumes that a med-mal administrative system would be judged on same terms as the New York statute evaluated in *White*. But *White* was decided a century ago, and modern doctrine is much more deferential to the legislature than it was in 1917. *White* applied due process doctrine from the *Lochner* era, which (since the New Deal) is no longer good law.³²⁴ Under modern doctrine, all that's required to uphold the system against a due process challenge is the traditional rational basis test that is standard in the analysis of economic regulation.³²⁵ And a rational basis is easy to find here: a rational legislature could have thought that the medical malpractice system was dysfunctional and that an administrative system would work better.³²⁶ It's doubtful that a *quid pro quo* is required³²⁷—although this is an issue that the Supreme Court hasn't definitely resolved,³²⁸ so showing that the law does provide some sort of substitute can't hurt.³²⁹

So far we've been talking about *substantive* due process, but as a matter of *procedural* due process the matter is clearer yet: even assuming that a right to sue is a species of "property" and therefore can't be eliminated without due

³²⁴ See *Planned Parenthood v. Casey*, 505 U.S. 833, 861–62 (1992) (discussing the demise of the *Lochner* line of cases beginning in 1937).

³²⁵ See *Duke Power Co. v. Carolina Envtl. Study Grp., Inc.*, 438 U.S. 59, 82–84 (1978) (rejecting the suggestion, in a case about liability limitations for nuclear power plants, that "the traditional presumption of constitutionality generally accorded economic regulations" be replaced by a heightened standard); Duff, *supra* note 26, at 133 ("[I]t might be argued that workers' compensation laws are tantamount to 'ordinary' common law rules, modifiable at will by a rational legislature."); *id.* at 136 ("If none of *White* remains viable, it may be a short road to judicial authorization of any legislative reduction of personal injury remedies . . .").

³²⁶ Cf. Zomberg, *supra* note 178, at 829 (discussing the Kansas Supreme Court's upholding of workers' compensation amendments as satisfying the rational basis standard); *id.* at 838 (noting that the due process analysis in Kansas is a two-part test that resembles Florida's *Kluger* access to courts doctrine); *id.* at 842 (explaining that the first part of the Kansas two-part test, which resembles federal rational basis, also resembles the Kansas rational basis test under equal protection); *id.* at 845–47 (discussing the Kansas Supreme Court's rejection, under the rational basis test, of the equal protection argument against the workers' compensation amendments).

³²⁷ See *Duke Power*, 438 U.S. at 88 ("[I]t is not at all clear that the Due Process Clause in fact requires that a legislatively enacted compensation scheme either duplicate the recovery at common law or provide a reasonable substitute remedy."); *id.* at 88 n.32 ("[S]tatutes limiting liability are relatively commonplace and have consistently been enforced by the courts." (citing cases)).

³²⁸ See *Fein v. Permanente Med. Grp.*, 474 U.S. 892, 894–95 (1985) (White, J., dissenting) ("Whether due process requires a legislatively enacted compensation scheme to be a *quid pro quo* for the common-law or state-law remedy it replaces, and if so, how adequate it must be, thus appears to be an issue unresolved by this Court, and one which is dividing the appellate and highest courts of several [s]tates."); Duff, *supra* note 26, at 187–89.

³²⁹ See *Duke Power*, 438 U.S. at 88–93 (not reaching the question of whether a "reasonably just substitute" for displaced tort remedies is necessary because the statute at issue did provide a substitute).

process of law, “the legislative determination provides all the process that is due.”³³⁰

On the equal protection claim, whether someone is a doctor or patient isn’t a suspect classification, and the right to have a traditional common-law cause of action has never been held to be a “fundamental right.” Therefore, here, too, merely rational basis is required. Any equal protection objection to the limitation of the administrative scheme to med-mal cases is insubstantial.

B. Georgia Due Process and Equal Protection

In Georgia, arguments based on the state’s due process and equal protection clauses³³¹ were raised in the context of the employer immunity in the workers’ compensation act and rejected in *Georgia Department of Human Resources v. Joseph Campbell Co.*³³² The *Joseph Campbell* opinion didn’t contain any reasoning, but it did cite *Henderson v. Hercules, Inc.*³³³ and *Williams v. Byrd*.³³⁴ *Henderson* didn’t even purport to rely on the due process or equal protection clauses.³³⁵ *Williams* rejected the constitutional challenge to the extinguishment of an employee’s action for negligence against a fellow employee.³³⁶

Neither opinion contained much reasoning. *Williams* simply stated that the statute “is not unconstitutional for any reason alleged by appellants. No case to the contrary has been cited or found.”³³⁷ Nonetheless, *Joseph Campbell* and *Williams* together upheld many key provisions of the workers’ compensation act against due process and equal protection challenges. This strongly suggests that a med-mal administrative scheme would fare similarly.³³⁸ This is true

³³⁰ *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 433 (1982); *Bi-Metallic Inv. Co. v. State Bd. of Equalization*, 239 U.S. 441, 445–46 (1915).

³³¹ See GA. CONST. art. I, § 1, para. I (“No person shall be deprived of life, liberty, or property except by due process of law.”); *id.* para. II (“No person shall be denied the equal protection of the laws.”).

³³² 411 S.E.2d 871, 873 (Ga. 1992).

³³³ 324 S.E.2d 453 (Ga. 1985).

³³⁴ 247 S.E.2d 874 (Ga. 1978).

³³⁵ 324 S.E.2d at 454 (analyzing the statute under GA. CONST. art. I, § 1, para. XXIV (1976) (“All property of the wife at the time of her marriage, and all property given to, inherited or acquired by her, shall remain her separate property, and not be liable for the debts of her husband.”)).

³³⁶ 247 S.E.2d at 875.

³³⁷ *Id.* (citation omitted) (citing 2A ARTHUR LARSON, THE LAW OF WORKMEN’S COMPENSATION § 72.20 (1976)).

³³⁸ Cf. *Mack Trucks, Inc. v. Conkle*, 436 S.E.2d 635, 637–39 (Ga. 1993) (rejecting an equal protection challenge to a statute diverting 75% of punitive damages awards in products liability cases to the state); *id.* at 640 (rejecting a due process challenge to the same statute); *Teasley v. Mathis*, 255 S.E.2d 57, 58 (Ga. 1979) (rejecting a due process and equal protection challenge to the provision of the Georgia Motor Vehicle Accident

regardless of how medical malpractice claims were treated when the constitution was adopted, which is relevant for the jury trial right but not for due process or equal protection.³³⁹

C. Florida Due Process and Equal Protection

To survive a state due process challenge³⁴⁰ (which, like equal protection, functions similarly to its federal counterpart),³⁴¹ the statute must “bear[] a reasonable relation to a permissible legislative objective and [not be] discriminatory, arbitrary or oppressive.”³⁴² The *Lasky v. State Farm Insurance* court found that lessening court congestion, reducing insurance premiums, and increasing the likelihood of compensation for victims, as well as fixing complaints about the tort system’s slowness, inefficiency, and inequalities of recovery, were permissible legislative objectives.³⁴³ The court’s discussion of whether the statute was reasonably related to these objectives was fairly deferential.³⁴⁴

The court likewise upheld the partial abrogation of joint and several liability in *Smith v. Department of Insurance* because there was a rational basis for the abrogation as well as for the exceptions.³⁴⁵ In fact, due process review is so deferential that it would be tedious to discuss all the cases upholding

Reparation Act barring recovery of exemplary damages by accident victims without serious injuries); *Cannon v. Ga. Farm Bureau Mut. Ins.*, 241 S.E.2d 238, 240–41 (Ga. 1978) (rejecting a due process and equal protection challenge to the provision of the Georgia Motor Vehicle Accident Reparation Act limiting survivor benefits to certain types of people); *Williams v. Kennedy*, 240 S.E.2d 51, 53 (Ga. 1977) (rejecting a due process and equal protection challenge to the provision of the Georgia Motor Vehicle Accident Reparation Act barring recovery of noneconomic damages by accident victims without serious injuries); *Andrew v. State*, 233 S.E.2d 209 (Ga. 1977) (rejecting a due process challenge to the mandatory insurance provision of the Georgia Motor Vehicle Accident Reparation Act).

³³⁹ However, occasionally Georgia courts have applied equal protection fairly stringently, for instance in the case of statutes of repose. *See, e.g., Shessel v. Stroup*, 316 S.E.2d 155 (Ga. 1984) (striking down a medical statute of repose on equal protection grounds); *Clark v. Singer*, 298 S.E.2d 484 (Ga. 1983) (same). For the distinction between statutes of limitations and statutes of repose, see *infra* text accompanying notes 283, 301–03.

³⁴⁰ *See* FLA. CONST. art. I, § 9 (“No person shall be deprived of life, liberty or property without due process of law, or be twice put in jeopardy for the same offense, or be compelled in any criminal matter to be a witness against oneself.”).

³⁴¹ *See, e.g., Sasso v. Ram Prop. Mgmt.*, 431 So. 2d 204, 212 (Fla. Dist. Ct. App. 1983) (citing *Schreiner v. McKenzie Tank Lines & Risk Mgmt. Servs., Inc.*, 408 So. 2d 711, 716 (Fla. Dist. Ct. App. 1982), *aff’d*, 432 So. 2d 567 (Fla. 1983)).

³⁴² *Lasky v. State Farm Ins.*, 296 So. 2d 9, 15 (Fla. 1974) (first citing *Harrell v. Schleman*, 36 So. 2d 431 (Fla. 1948); then citing *Adams v. Am. Agric. Chem. Co.*, 82 So. 850 (Fla. 1919)).

³⁴³ *Id.* at 16.

³⁴⁴ *See id.* at 16–17.

³⁴⁵ 507 So. 2d 1080, 1091 (Fla. 1987).

various statutes under due process.³⁴⁶ What's more interesting is the cases in which courts have said due process was violated.³⁴⁷

In *Aldana v. Holub*, a statute imposing strict and mandatory time limits in medical mediation proceedings was held to violate due process because litigants could be deprived of valuable legal rights simply due to unavoidable delays in the legal system.³⁴⁸

In *Psychiatric Associates v. Siegel*, the Florida Supreme Court considered the validity of statutes requiring “a plaintiff bringing an action against someone who participated in a medical review board process to post a bond sufficient to cover the defendant’s costs and attorney’s fees.”³⁴⁹ We’ve seen this case before³⁵⁰: the statutes were struck down under *Kluger* prong two because they burdened access to courts and it hadn’t been shown that there was no other alternative.³⁵¹ But the court also held that these statutes violated due process because, in trying to discourage frivolous claims by doctors against medical review boards, they disproportionately affected poor claimants who couldn’t afford the bond.³⁵²

³⁴⁶ In the workers’ comp context, see *Newton v. McCotter Motors, Inc.*, 475 So. 2d 230, 231 (Fla. 1985); *Scholastic Sys., Inc. v. LeLoup*, 307 So. 2d 166, 170 (Fla. 1974); *Lundy v. Four Seasons Ocean Grand Palm Beach*, 932 So. 2d 506, 510 (Fla. Dist. Ct. App. 2006), *disapproved on other grounds by Murray v. Mariner Health*, 994 So. 2d 1051, 1061 (Fla. 2008); *Rucker v. City of Ocala*, 684 So. 2d 836, 840–42 (Fla. Dist. Ct. App. 1996); *Strohm v. Hertz Corp./Hertz Claim Mgmt.*, 685 So. 2d 37, 39–40 (Fla. Dist. Ct. App. 1996); *Bradley v. Hurricane Rest.*, 670 So. 2d 162, 165 (Fla. Dist. Ct. App. 1996); *Burdick v. Bob’s Space Racers*, 659 So. 2d 351, 352 (Fla. Dist. Ct. App. 1995); *Montgomery Ward v. Lovell*, 652 So. 2d 509, 512 (Fla. Dist. Ct. App. 1995); *Rodriguez v. Prestress Decking Corp.*, 611 So. 2d 59, 60 (Fla. Dist. Ct. App. 1992); *Whitely v. U.S. Fid. & Guar. Co.*, 454 So. 2d 63, 65 (Fla. Dist. Ct. App. 1984); *Carr v. Cent. Fla. Aluminum Prods., Inc.*, 402 So. 2d 565, 568 (Fla. Dist. Ct. App. 1981); see also *Castellanos v. Next Door Co./Amerisure Ins.*, 124 So. 3d 392, 394 (Fla. Dist. Ct. App. 2013), *quashed by* 192 So. 3d 431 (Fla. 2016); *Kauffman v. Cmty. Inclusions, Inc./Guarantee Ins.*, 57 So. 3d 919, 920–21 (Fla. Dist. Ct. App. 2011); *Campbell v. Aramark & Speciality Risk Servs.*, 933 So. 2d 1255, 1256 (Fla. Dist. Ct. App. 2006), *disapproved on other grounds by Murray v. Mariner Health*, 994 So. 2d 1051, 1062 (Fla. 2008). In related contexts, see *Chrysler Corp. v. Pitsirelos*, 721 So. 2d 710, 713–14 (Fla. 1998) (holding that mandatory arbitration under lemon law with the possibility of de novo court review satisfies access to courts; the continuing damages provision also satisfies access to courts because damages are meant to compensate consumer); *Florida Patient’s Comp. Fund v. Rowe*, 472 So. 2d 1145, 1148–49 (Fla. 1985) (upholding loser-pays for med-mal).

³⁴⁷ Of course, every due process case turns on its own facts, and the cases are highly varied, so it’s hard to say anything for sure, but I haven’t been able to find a case ruling against something similar to the proposed med-mal administrative system on due process grounds.

³⁴⁸ 381 So. 2d 231 (Fla. 1980).

³⁴⁹ 610 So. 2d 419, 421 (Fla. 1992).

³⁵⁰ See *supra* text accompanying notes 222–26.

³⁵¹ *Siegel*, 610 So. 2d at 424–25.

³⁵² *Id.* at 425–26.

In *Nationwide Mutual Fire Insurance v. Pinnacle Medical, Inc.*, the court considered the validity of an attorney's-fee-shifting statute.³⁵³ Under the statute, if an insured sued an insurer to enforce his insurance contract, he wasn't liable for the insurer's attorney's fees if he lost—but if a medical provider that had been assigned the insured's claim did the same, it *was* liable for the insurer's attorney's fees.³⁵⁴ The court held that:

This distinction does nothing to further the prompt payment of benefits or to discourage insurers' denial of valid claims. The effect of the attorney-fee provision . . . is to further delay insureds from receiving medical benefits by encouraging medical providers to require payment from insureds at the time the services are rendered rather than risk having to collect through arbitration. Thus, the prevailing party attorney-fee provision . . . arbitrarily distinguishes between medical providers and insureds, violating medical providers' due process rights³⁵⁵

The med-mal administrative system doesn't resemble these cases much; moreover, the workers' comp program, its closest analogue, has successfully sustained due process attacks.

Now let's consider the equal protection clause.³⁵⁶ To survive a state equal protection challenge, a "statutory classification[] must be reasonable and nonarbitrary, and all persons in the same class must be treated alike. When the difference between those included in a class and those excluded from it bears a substantial relationship to the legislative purpose, the classification does not deny equal protection."³⁵⁷

This is also a deferential standard. A plurality opinion of the Florida Supreme Court was recently *nondeferential* in examining the legislative findings supporting a cap on noneconomic damages, essentially disbelieving the legislature on the existence of the supposed medical insurance crisis

³⁵³ 753 So. 2d 55 (Fla. 2000).

³⁵⁴ *Id.* at 57.

³⁵⁵ *Id.* at 59.

³⁵⁶ See FLA. CONST. art. I, § 2 ("All natural persons . . . are equal before the law and have inalienable rights . . .").

³⁵⁷ *Lasky v. State Farm Ins.*, 296 So. 2d 9, 18 (Fla. 1974) (citations omitted) (first citing *Silver Blue Lake Apartments, Inc. v. Silver Blue Lake Home Owners Ass'n*, 225 So. 2d 557 (Fla. Dist. Ct. App. 1969); then citing *Daniels v. O'Connor*, 243 So. 2d 144 (Fla. 1971)); see *id.* at 19 (citing *Silver Blue Lake Apartments*, 225 So. 2d 557 and *Daniels*, 243 So. 2d 144); *Estate of McCall v. United States*, 134 So. 3d 894, 901 (Fla. 2014) (plurality opinion) (stating that a cap on noneconomic damages is evaluated under the rational basis test).

supporting the cap.³⁵⁸ But that plurality opinion represents the views of only two out of seven justices: Justices Lewis and Labarga.³⁵⁹

Thus, in *Mizrahi v. North Miami Medical Center, Ltd.*, the court considered whether the Wrongful Death Act—which for the first time authorized the recovery of nonpecuniary damages for wrongful death by *adult* children—could, consistent with equal protection, make an exception to this new rule when the wrongful death was caused by med-mal.³⁶⁰ The court concluded that this legislative choice was rational (and therefore consistent with equal protection) because it bore “a rational relationship to the legitimate state interests of limiting increases in medical insurance costs.”³⁶¹

As with due process, most cases uphold the classifications;³⁶² let’s look at cases where they’ve been struck down.

³⁵⁸ See *McCall*, 134 So. 3d at 905–12 (plurality opinion) (reexamining the factual bases of the statute); see also *supra* text accompanying note 235.

³⁵⁹ Compare *id.*, with *id.* at 921–22 (Pariente, J., concurring in the result) (disapproving of this reexamination), and *id.* at 931–32 (Polston, C.J., dissenting).

³⁶⁰ 761 So. 2d 1040 (Fla. 2000).

³⁶¹ *Id.* at 1042 (internal quotation marks omitted) (quoting *Stewart v. Price*, 718 So. 2d 205, 210 (Fla. Dist. Ct. App. 1998)).

³⁶² In the workers’ comp context, see *Newton v. McCotter Motors, Inc.*, 475 So. 2d 230, 231 (Fla. 1985); *Sasso v. Ram Prop. Mgmt.*, 452 So. 2d 932, 934 & n.3 (Fla. 1984); *Acton v. Fort Lauderdale Hosp.*, 440 So. 2d 1282, 1284 (Fla. 1983); *Lundy v. Four Seasons Ocean Grand Palm Beach*, 932 So. 2d 506, 510 (Fla. Dist. Ct. App. 2006), *disapproved on other grounds by* *Murray v. Mariner Health*, 994 So. 2d 1051, 1062 (Fla. 2008); *Bradley v. Hurricane Rest.*, 670 So. 2d 162, 165 (Fla. Dist. Ct. App. 1996); *Strohm v. Hertz Corp./Hertz Claim Mgmt.*, 685 So. 2d 37, 39–40 (Fla. Dist. Ct. App. 1996); *Rodriguez v. Prestress Decking Corp.*, 611 So. 2d 59 (Fla. Dist. Ct. App. 1992); *Whitely v. U.S. Fid. & Guar. Co.*, 454 So. 2d 63, 65 (Fla. Dist. Ct. App. 1984); *Morrow v. Amcon Concrete, Inc.*, 433 So. 2d 1230, 1232 (Fla. Dist. Ct. App. 1983); *Radney v. Edwards*, 424 So. 2d 956, 957 (Fla. Dist. Ct. App. 1983); *Noel v. M. Ecker & Co.*, 422 So. 2d 1062, 1063 (Fla. Dist. Ct. App. 1982); see also *Castellanos v. Next Door Co./Amerisure Ins.*, 124 So. 3d 392 (Fla. Dist. Ct. App. 2013), *quashed by* 192 So. 3d 431, 449 (Fla. 2016); *Kauffman v. Cmty. Inclusions, Inc./Guarantee Ins.*, 57 So. 3d 919, 920–21 (Fla. Dist. Ct. App. 2011); *Campbell v. Aramark & Speciality Risk Servs.*, 933 So. 2d 1255, 1256 (Fla. Dist. Ct. App. 2006), *disapproved on other grounds by* *Murray v. Mariner Health*, 994 So. 2d 1051, 1062 (Fla. 2008). In related contexts, see *Samples v. Fla. Birth-Related Neurological Injury Comp. Ass’n*, 114 So. 3d 912, 917 (Fla. 2013) (upholding the Florida Birth-Related Neurological Injury Compensation Plan against a claim that a parental award should have been \$100,000 per parent as opposed to per claim); *Smith v. Dep’t of Ins.*, 507 So. 2d 1080, 1090 (Fla. 1987) (upholding a partial abrogation of joint and several liability); *Fla. Patient’s Comp. Fund v. Von Stetina*, 474 So. 2d 783, 789 (Fla. 1985) (upholding the legislature’s power to create a nonprofit fund to provide medical insurance and be responsible for portions of awards in excess of \$100,000 per year, up to a maximum of \$100,000 per year, and holding that this didn’t implicate any suspect classification and was rational); *Fla. Patient’s Comp. Fund v. Rowe*, 472 So. 2d 1145, 1149 (Fla. 1985) (upholding loser-pays for med-mal); see also *Gluesenkamp v. State*, 391 So. 2d 192, 199–200 (Fla. 1980) (distinguishing between passenger vehicles and other vehicles for the purposes of granting officials access for inspection is a rational distinction).

Consider *Lasky v. State Farm Insurance*, which upheld an auto accident liability and insurance statute—and which we've already seen in connection with both the jury trial right and the access to court right.³⁶³ There, the court examined the classifications surrounding the pain and suffering thresholds: pain and suffering damages were unavailable unless there was at least \$1,000 in medical benefits, a permanent injury or death occurred, or certain listed injuries (such as fractures of weight-bearing bones or compound fractures) were present.³⁶⁴ The court upheld the basic \$1,000 threshold and the permanent-injury-or-death threshold.³⁶⁵ But it struck down the weight-bearing or compound-fracture threshold since, for cases in which medical costs are below \$1,000 and there's no death or permanent injury, it makes no sense to allow pain and suffering damages for an injury to the weight-bearing bones in one's little toe but to deny them for a skull injury.³⁶⁶

A few aspects of the workers' comp statute have been struck down under equal protection, but these weren't in the core of workers' comp. In *Sunspan Engineering & Construction Co. v. Spring-Lock Scaffolding Co.*, the court considered employers' immunity from suit.³⁶⁷ Sure, employers are immune from suit by their employees because their employees have workers' comp to fall back on. But what if the employee also sues a third-party tortfeasor, and the third-party tortfeasor wants to sue the employer, arguing that the employer is partly or entirely liable? The court held that the employer's immunity didn't apply in these cases; denying third-party tortfeasors the right to sue the employer was arbitrary and violated equal protection.³⁶⁸ (Clearly, this has no applicability to the immunity of the employer from employee suits.)³⁶⁹

When a statute is ambiguous, and when one possible interpretation would be possibly unconstitutional, these constitutional concerns sometimes lead courts to choose the interpretation that doesn't raise constitutional problems.³⁷⁰

³⁶³ 296 So. 2d 9 (Fla. 1974); *see also supra* text accompanying notes 103–06, 202–05.

³⁶⁴ *Lasky*, 296 So. 2d at 20.

³⁶⁵ *Id.*

³⁶⁶ *Id.* at 20–21.

³⁶⁷ 310 So. 2d 4, 8 (Fla. 1975); *see supra* notes 186, 216.

³⁶⁸ *Sunspan*, 310 So. 2d at 8.

³⁶⁹ *See also* *De Ayala v. Fla. Farm Bureau Cas. Ins.*, 543 So. 2d 204, 207–08 (Fla. 1989) (striking down a workers' comp provision because of discriminatory treatment of nonresident alien dependents). For other cases finding equal protection violations but in contexts not closely related to med-mal or administrative tribunals, *see, for example, Rollins v. State*, 354 So. 2d 61 (Fla. 1978).

³⁷⁰ *See, e.g.,* JOHN F. MANNING & MATTHEW C. STEPHENSON, LEGISLATION AND REGULATION: CASES AND MATERIALS 331–53 (3d ed. 2017) (discussing the constitutional avoidance canon).

So courts have sometimes used constitutional concerns to guide their statutory interpretation rather than strike a statute down.³⁷¹

Quite recently, in *Estate of McCall v. United States*, a majority of the Florida Supreme Court (five justices of seven) held that, in the case of a clearly *per-incident* cap on noneconomic damages in a wrongful death case arising from med-mal, the *per-incident* limitation was “arbitrary and unrelated to a true state interest.”³⁷²

But just the year before *McCall*, in *Samples v. Florida Birth-Related Neurological Injury Compensation Ass’n*—discussed above, in the access-to-courts section³⁷³—the court wrote that while this was a concern under a fault-based system, it was no longer problematic under a no-fault system like the one at issue there, the Birth-Related Neurological Injury Compensation Plan.³⁷⁴ The *McCall* court specifically noted that the fault–no-fault distinction was crucial, and that *Samples* remained good law: the traditional fault-based negligence action and the statutorily created no-fault scheme “are, quite simply, completely different and distinct”; the result under *Samples* didn’t “control, or even inform,” the outcome in *McCall*.³⁷⁵

In the case of the med-mal administrative system, the distinction that one might want to challenge under equal protection would seem to be the one between medical-malpractice injuries (which go to the administrative system) and injuries arising outside of medical malpractice (which stay in the tort system). But it seems clear that this is a rational distinction that can be supported by findings specific to medical malpractice. The court seems unlikely to apply heightened scrutiny to the policy considerations underlying the statute, since the discussion in *McCall* only represented the views of two justices. As for various details of the compensation scheme that might be challenged as irrational: to be on the safe side and fall on the more generous side of the distinction between fault-based and no-fault systems, it would help

³⁷¹ See *St. Mary’s Hosp., Inc. v. Phillippe*, 769 So. 2d 961, 971 (Fla. 2000), *superseded by statute*, FLA. STAT. ANN. § 766.207 (West 2003), *as recognized in* *Lifemark Hosps. v. Afonso*, 4 So. 3d 764 (Fla. Dist. Ct. App. 2009); *Carter v. Sparkman*, 335 So. 2d 802 (Fla. 1976); *Trindade v. Abbey Rd. Beef ’N Booze*, 443 So. 2d 1007, 1012 (Fla. Dist. Ct. App. 1983).

³⁷² 134 So. 3d 894, 901 (Fla. 2014) (plurality opinion); *see also id.* at 919–20 (Pariente, J., concurring in result); Duff, *supra* note 26, at 182–84.

³⁷³ See *supra* text accompanying notes 213–14.

³⁷⁴ 114 So. 3d 912, 919 (Fla. 2013).

³⁷⁵ *McCall*, 134 So. 3d at 904 (plurality opinion); *see also id.* at 921–22 (Pariente, J., concurring in result) (explaining that the disagreement with the plurality opinion related only to its second-guessing of the legislature’s faculty findings).

for the standard of liability under the administrative system to be as distant from a fault-based system as possible.³⁷⁶

D. Alabama Due Process and Equal Protection

The Alabama Constitution doesn't have a due process clause or equal protection clause in the same way that the U.S. Constitution does. There is a due process clause, but it's by its terms limited to criminal cases: "That in all criminal prosecutions, the accused . . . shall not . . . be deprived of life, liberty, or property, except by due process of law . . ." ³⁷⁷ The right-to-a-remedy clause provides that "every person, for any injury done him, . . . shall have a remedy by due process of law," ³⁷⁸ but that clause has already been analyzed above.

And there's no equal protection clause at all—not surprising, since one of the explicit goals of the 1901 constitution was to establish white supremacy.³⁷⁹ Still, the Supreme Court of Alabama has often stated that equal protection guarantees can be inferred from article I, sections 1, 6, and 22.³⁸⁰ Article I, section 1 is a general declaration that "all men are equally free and independent";³⁸¹ section 6 contains a bunch of criminal-defendant protections including the due process clause noted above;³⁸² and section 22 is a clause prohibiting ex post facto laws, "irrevocable or exclusive grants of special privileges or immunities," and the like.³⁸³

So even though it's hard to find exact equivalents to the Due Process and Equal Protection Clauses in the Alabama Constitution, *usually* Alabama courts talk as though due process and equal protection function more or less the same way under the Alabama Constitution as under the U.S. Constitution. *Usually*, government action under due process or equal protection is judged under the

³⁷⁶ As discussed above, *see* text accompanying *supra* note 237, when courts are nondeferential, they might be inclined to eventually find that a crisis that once justified a particular system is now past. So the recitation of legislative findings should include concerns that go beyond a particular temporary crisis.

³⁷⁷ ALA. CONST. art. I, § 6.

³⁷⁸ *Id.* art. I, § 13.

³⁷⁹ *See Ex parte Melof*, 735 So. 2d 1172, 1202 (Ala. 1999) (Cook, J., concurring in the result, dissenting from the rationale) (citing the 1901 constitutional convention proceedings).

³⁸⁰ *See id.* at 1183–86 (majority opinion).

³⁸¹ ALA. CONST. art. I, § 1.

³⁸² *Id.* § 6.

³⁸³ *Id.* § 22.

rational basis standard.³⁸⁴ *Usually*, the only exceptions—when any higher level of review is applied—have been when fundamental rights or suspect classifications are involved.³⁸⁵ Heightened scrutiny is thus *usually* unlikely for “tort reform” measures. But note the “*usually*”: there are notable exceptions, which are discussed below.

For a long time, this described the state of the doctrine in Alabama.³⁸⁶ Then, in 1991, came *Moore v. Mobile Infirmary Ass’n*.³⁸⁷ The statute at issue in *Moore* limited noneconomic damages (including punitive damages) to \$400,000.³⁸⁸ The equal protection analysis sounds superficially like the rational basis analysis, but it’s really “rational basis with bite,” in which a court analyzes the rationality of a policy more strictly and without deference to the legislature.

The legislature, said the court, can’t “create classifications ‘to prevent evils of a remote or highly problematical character. Nor may its exercise be justified when the restraint imposed upon the exercise of a private right is disproportionate to the amount of evil that will be corrected.’”³⁸⁹ The statute was irrational and thus violated equal protection: it classified victims based on the severity of their injury (those least injured would fall under the cap and would be unaffected, while those with large injuries would be bound by the cap), and it also treats the most egregious health-care injurers best (because those who don’t act so badly as to merit punitive damages get less benefit from the cap).³⁹⁰

³⁸⁴ See, e.g., John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2446 (2003) (calling “the rational basis test . . . the default position for judicial review of routine social and economic legislation under the Due Process and Equal Protection Clauses”).

³⁸⁵ See, e.g., Amy Coney Barrett, *Suspension and Delegation*, 99 CORNELL L. REV. 251, 318 (2014) (“In [the context of due process and equal protection review], certain types of laws—namely those restricting fundamental rights or employing suspect classifications—merit heightened scrutiny because of the particular constitutional guarantees they implicate.”).

³⁸⁶ See, e.g., *Ex parte Adkins*, 600 So. 2d 1067 (Ala. 1992); *Reed v. Brunson*, 527 So. 2d 102 (Ala. 1988); *Home Indem. Co. v. Anders*, 459 So. 2d 836 (Ala. 1984); *Bowlin Horn v. Citizens Hosp.*, 425 So. 2d 1065 (Ala. 1982); *Reese v. Rankin Fite Mem’l Hosp.*, 403 So. 2d 158 (Ala. 1981); *Tyson v. Johns-Manville Sales Corp.*, 399 So. 2d 263 (Ala. 1981); *Thompson v. Wiik, Reimer & Sweet*, 391 So. 2d 1016 (Ala. 1980); *Mayo v. Rousselle Corp.*, 375 So. 2d 449 (Ala. 1979); *Slagle v. Parker*, 370 So. 2d 947 (Ala. 1979); *Slagle v. Reynolds Metals Co.*, 344 So. 2d 1216 (Ala. 1977); *Sellers v. Edwards*, 265 So. 2d 438 (Ala. 1972); *Pickett v. Matthews*, 192 So. 261 (Ala. 1939); *Martin’s Executrix v. Martin*, 25 Ala. 201 (1854).

³⁸⁷ 592 So. 2d 156 (Ala. 1991).

³⁸⁸ See *id.* at 157–58.

³⁸⁹ *Id.* at 166 (quoting *City of Russellville v. Vulcan Materials Co.*, 382 So. 2d 525, 527 (Ala. 1980)).

³⁹⁰ *Id.* at 166–67.

The legislature had included extensive findings in the statute itself—citing a Government Accountability Office study and other sources to buttress a claim that there was a health providers' insurance crisis because of high tort costs.³⁹¹ But the court questioned those findings, stating that the correlation between a damages cap and the reduction of health-care costs was, “at best, indirect and remote,” while the burden imposed on injured individuals was “direct and concrete. The hardship falls most heavily on those who are most severely maltreated and, thus, most deserving of relief.”³⁹²

Moore seemed to herald a new age of strict review under equal protection (which might be problematic for S.B. 413's maximum contribution and payout amounts).³⁹³ Moreover, the court stressed that it didn't need to commit itself to one of the formal tiers of traditional federal equal protection scrutiny (rational basis, intermediate scrutiny, strict scrutiny) because it was applying the state equal protection doctrine instead, and the state doctrine could be stricter than the federal one.³⁹⁴ The trend continued in *Smith v. Schulte*³⁹⁵ and *Ray v. Anesthesia Associates*.³⁹⁶

But in 1999 came *Ex parte Melof*.³⁹⁷ The statute there exempted certain retired state employees from income tax on their state retirement benefits.³⁹⁸ The court upheld this against an equal protection challenge.³⁹⁹ Justice Houston

³⁹¹ *Id.* at 167–68.

³⁹² *Id.* at 168–69.

³⁹³ S. 413, 2016 Leg., Reg. Sess. § 8 (Ala. 2016).

³⁹⁴ *Moore*, 592 So. 2d at 170. Recall that this stricter state equal protection doctrine is without any actual support in the text of the state constitution. *See supra* text accompanying note 379.

³⁹⁵ 671 So. 2d 1334 (Ala. 1995) (striking down a statute capping the amounts recoverable in tort actions against medical providers), *abrogated by Ex parte Apicella*, 809 So. 2d 865, 874 (Ala. 2001).

³⁹⁶ 674 So. 2d 525 (Ala. 1995) (striking down a damages cap). In *American Legion Post No. 57 v. Leahey*, 681 So. 2d 1337, 1338 (Ala. 1996), the court analyzed a statute allowing the defendant to introduce evidence that the plaintiff received payments for medical expenses from a collateral source (i.e., abrogating the “collateral source rule”). The court held that this statute abridged due process and equal protection. *Id.* at 1346–47. Because the statute treats the plaintiff and defendant differently, the jury might assume that the plaintiff has more funds (since the defendant could now introduce evidence that he had received funds from a collateral source). *See id.* at 1346. Alternatively, a wealthy plaintiff who's self-insured wouldn't be able to show any collateral funds at all. But it violates equal protection to treat someone differently based on how much money he has. *Id.* The statute also treats medical tortfeasors better than others, and malpractice victims with insurance differently than others. *Id.* Moreover, since the statute gives the jury no guidance on how to consider the evidence on funds from a collateral source, it invites arbitrary and unfair decisions in violation of due process. *See id.* at 1347. But the court overruled *American Legion* soon afterward, in *Marsh v. Green*, 782 So. 2d 223, 233 (Ala. 2000). This may have implications for S.B. 413's abrogation of the collateral source rule. Ala. S. 413, § 6(f).

³⁹⁷ 735 So. 2d 1172 (Ala. 1999).

³⁹⁸ *Id.* at 1173.

³⁹⁹ *Id.* at 1186.

wrote the opinion, in which he also wrote—as he had been writing in dissents for years—that there was no state equal protection clause.⁴⁰⁰

Justice Houston wrote for himself, and the other justices wrote separately. Some believed there was a separate state equal protection doctrine;⁴⁰¹ others believed there was a state equal protection doctrine but it had exactly the same content as the Federal Equal Protection Clause.⁴⁰² There was certainly no majority for Justice Houston's strong view, and not all the justices were super clear about their beliefs. In *Hutchins v. DCH Regional Medical Center*, the court analyzed a statute providing that the jury in a med-mal case must be instructed on the “substantial evidence” rule.⁴⁰³ The court said it was still an open question whether there was a separate state equal protection doctrine, but that it didn't matter because (deferring to legislative judgment) the statute was rational under either view.⁴⁰⁴

But various appellate courts have treated *Melof* as having held that there's no state equal protection doctrine.⁴⁰⁵ The infamous (twice-elected and twice-removed) Chief Justice Roy Moore (probably no relation to Barbara Moore of *Moore v. Mobile Infirmary Ass'n*) even enters the scene here, endorsing that view of *Melof* in his separate opinion in *Ex parte James*.⁴⁰⁶ And very recently, in *Duran v. Buckner*, an appellate court said that the effect of *Melof* has been questioned, but that in any event, any state equal protection analysis is no different than the federal equal protection analysis.⁴⁰⁷

The result is that there remains uncertainty about due process and equal protection in Alabama. Probably a statute would be analyzed under the rational

⁴⁰⁰ *Id.* Obviously, the Federal Equal Protection Clause applies in every state. But denying that there is a state equal protection doctrine implies that there can be no stricter state version, such as the version that the court applied in *Moore*.

⁴⁰¹ *Id.* at 1205 (Cook, J., concurring in the result, dissenting from the rationale); *id.* at 1205 (Johnstone, J., dissenting).

⁴⁰² *Id.* at 1188 (Maddox, J., concurring).

⁴⁰³ 770 So. 2d 49 (Ala. 2000).

⁴⁰⁴ *Id.* at 59; *see also* Marsh v. Green, 782 So. 2d 223, 236 n.3 (Ala. 2000) (Cook, J., concurring in part and dissenting in part) (noting that “no fewer than 5 of the 8 [j]ustices participating in that decision expressed either their disagreement with, or no opinion” as to Justice Houston's opinion in *Melof*); *Oblander v. USAA Cas. Ins.*, 792 So. 2d 1103 (Ala. Civ. App. 2000) (saying the issue is disputed).

⁴⁰⁵ *See* Squires v. City of Saraland, 960 So. 2d 666 (Ala. Civ. App. 2007); *M.E.T. v. M.F.*, 892 So. 2d 393 (Ala. Civ. App. 2003); *Tomlin v. State*, 909 So. 2d 213 (Ala. Crim. App. 2002), *rev'd on other grounds*, 909 So. 2d 283; *M.V.S. v. V.M.D.*, 776 So. 2d 142 (Ala. Civ. App. 1999).

⁴⁰⁶ 836 So. 2d 813, 842 (Ala. 2002) (per curiam) (Moore, C.J., concurring in the result in part and dissenting in part).

⁴⁰⁷ 157 So. 3d 956 (Ala. Civ. App. 2014).

basis test and upheld without much fuss, but due process and equal protection can always be used more strictly if some justices feel like doing so.

Just to be on the safe side, one might presume that the nondeferential approach of *Moore*, *Schulte*, and *Ray* still holds and that the statute should contain detailed findings documenting the extent of the problem and the closeness of the relationship between the statutory scheme and the solution to the problem.⁴⁰⁸

CONCLUSION

It's already been well-known that tort law interacts with state constitutional law since so many tort reforms have been struck down on state constitutional grounds. That alone is good reason to be familiar with state con-law doctrines.

What's less commonly appreciated is that state administrative law interacts with tort and con law as well—because while many kinds of tort reform have been struck down, the administrative, workers'-comp-like system for medical malpractice claims may have a better chance of being upheld.

Of course, from a legal realist perspective, perhaps anti-tort-reform justices will strike down any significant tort reform, and more radical reforms will simply be struck down more decisively; while pro-tort-reform justices will defer to the legislature and uphold legislative reforms. I can't rule this out. But this Article has proceeded on the premise, justified or not, that doctrine is meaningful.

This hasn't been a fifty-state survey, but it has focused on three states, in a similar area of the country, where there has been substantial (and often successful) con-law litigation challenging tort reform, and where med-mal administrative compensation schemes have actually been introduced legislatively. I've discussed three of the main doctrines that courts have used in evaluating tort reforms—jury trial rights, access-to-courts rights, and due process/equal protection rights—and compared them to the federal doctrines where analogues exist. What emerges is that state courts have a hundred-year-long history of discussing constitutional challenges to tort reforms, dating all the way back to the adoption of workers' comp laws. This is a rich source of

⁴⁰⁸ As mentioned above, *see supra* text accompanying notes 125, 283, 301–03, 305–07, 393, 396, three sections—the statute of repose of section 5(c), the collateral-source offset of section 6(f), and the maximum contribution and payout amounts of section 8—might call for greater findings (if they are to be included at all). S. 413, 2016 Leg., Reg. Sess. (Ala. 2016). Whatever findings strengthen the case under section 13 of the constitution should also strengthen the case under due process/equal protection.

case law, which ought to be studied and taught even beyond its immediate applicability in debates over this specific tort reform.