The fact that certain tort reforms have been found to violate State constitutions is important when considering whether and how to implement malpractice tort reform at the Federal level. A number of the reforms examined in this report have been challenged in State courts, and in some cases they have been overturned or repealed (see app. A). OTA has not undertaken an extensive review of these cases; however, caps on damages and pretrial screening panels appear to have been particularly vulnerable to successful constitutional challenges (138). The following provides a brief discussion of the Federal and State constitutional harriers to tort reform.

## Federal Constitutional Review

Medical malpractice tort reform legislation is typically challenged under the equal protection and due process clauses of the Fifth amendment and the right to jury trial guaranteed by the Seventh amendment of the U.S. Constitution. Very few Federal courts have overturned malpractice tort reform and it is highly unlikely the Supreme Court would overturn federal malpractice tort reform because the lowest level of scrutiny is applied in reviewing the constitutionality of tort reform statutes ( 1 38).

The due process and equal protection clauses act to protect individuals and groups of individuals from being unfairly singled out and discriminated against by a legislative action. Analysis of economic legislation, such as tort reform, under the due process clause only examines whether the legislature has been arbitrary or irrational in achieving its legislative purpose (Duke Power Company v. Carolina Environmental Study Group, Inc. 438 U.S. 59 ( 1978)). The **equal** protection clause requires that a law apply equally to all persons within a class and that differing treatment be based on differences that have a reasonable tendency to further the objectives of the statute. Malpractice tort reforms are challenged under equal protection because they treat people injured by medical malpractice differently than people injured by other tortious conduct: they single out certain plaintiffs in medical malpractice and limit their damages (e. g., caps on damages), or defendants in other tort actions are treated differently than defendants in medical malpractice (105).

The determinative factor in constitutional review of a statute is the level of scrutiny applied by the court. When evaluating tort reform under the due process clause the Supreme Court applies the lowest level of scrutiny -- the "rational basis test" -- which only requires that the statute have a rational relationship to a legitimate legislative objective. Under this standard, a reform will be held constitutional provided the legislature had a reasonable basis for passing the statute, even if in retrospect their assumptions about the effect of the reform prove to be incorrect. The court does not judge whether the statute was "wise or desirable, " and "misguided laws" can also be held constitutional (James v. Strange, 407 U.S. 128 (1972)). For example, if a tort reform is passed because the legislature believes it is necessary to lower health care costs or avoid an insurance crisis, the reform will be upheld if it is at least debatable that such a crisis could exist and that the reform could help abate it (138).

The Supreme Court also uses minimal scrutiny in examining tort reform under the equal protection clause.[1] This low level of scrutiny almost guarantees that a reform will be held constitutional. Again, the statute will not declared unconstitutional unless "the classification rests on grounds wholly irrelevant to the achievement of the State's objective" (McGowan v. Maryland, 366 U.S. 420 (1%1)). The court will uphold the statute even though the legislative determination may be disputed: debated or even opposed by strong contrary arguments (Vance v. Bradley, 440 U.S. 93 (1979)).

The Seventh amendment guarantees a person the right to jury trial for all suits in which the amount of the controversy exceeds $20 and the legal claim is of a type that could have been tried at common law, which includes certain tort actions (138). Pretrial screening panels are one reform that is often challenged under the Seventh amendment. The Federal courts have uniformly rejected these challenges, holding that delays produced by administrative remedies that must be completed before proceeding to trial do not deprive a plaintiff of their right to trial (138). In addition, the admissibility of the panel's decision does not deprive the plaintiff of the right to jury trial since the decision is not dispositive, but merely additional evidence (138).

## State Constitutional Review

Most State constitutions contain equal protection and due process clauses that are either identical or very similar to the those found in the U.S. Constitution. In addition, State constitutions guarantee a right to trial in the State court (138). However, when interpreting their own constitutions, the State courts are not bound by the Federal standards for review (138). It is for this reason that tort reforms have been held unconstitutional under the equal protection and due process clauses of State constitutions. In most cases, the statute is overturned on equal protection grounds because the State court uses a stricter scrutiny standard than the Federal courts.

A number of State courts have applied a heightened scrutiny and overturned malpractice reform.[2] As one court explained, State courts are generally much less deferential than Federal courts to economic legislation that singles out one group of individuals or rights, especially when that legislation infringes on the right to trial (Condemarin v. University Hospital. University of Utah 775 P.2d 348 (Utah 1989)). A number of courts that have applied an "intermediate level of scrutiny"[3] to malpractice reform have found the provisions unconstitutional on equal protection and in a few cases on due process grounds.[4] At least two courts have even applied the strictest level of scrutiny, holding that the right to a judicial remedy for medical malpractice is a fundamental right.[5]

State courts have overturned reforms because under intermediate scrutiny the court evaluates the assumptions made by the legislature in passing the legislation. A number of courts have found these assumptions lacking. For example, in Arenson v. Olson the court struck down a cap on damages that was intended to reduce malpractice insurance premiums, noting evidence from another State that malpractice insurance rates were not related to claims involving large damages. The court concluded that either the legislature was misinformed or the situation had changed dramatically (Arenson v. Olson. 270 N.W.2d 125 (N.D. 1978)). In Kenyon v. Hammer, the court found no evidence supporting the legislature's assertion that elimination of the discovery rule for the statute of limitations was necessary in order to reduce either malpractice premiums or the cost of medical care (Kenyon v. Hammer, 688 P.2d 961 (Az. 1984)), In Hoem v. State of Wyoming, the court wrote that, in reviewing malpractice tort reforms, courts should take a more "skeptical attitude toward the evidence presented by the medical profession and the insurance industry and toward the conclusion reached by the State legislature" that a crisis exists (Hoem v. State of Wyoming, the University of Wyoming, 756 P.2d 780 (Wyo. 1988)).

Some reforms have been found to violate State constitutional provisions guaranteeing the right to trial or the State's broader guarantee of access to the courts.[6] In addition, some State constitutions have specific provisions guaranteeing rights to tort plaintiffs. For example, State constitutions in Arizona, Pennsylvania, and Montana

specifically limit the legislature's right to restrict damages recoverable in tort actions (138).

Not all challenges to medical malpractice reforms have been successful. Some State courts have rejected arguments for heightened scrutiny and have upheld malpractice reforms.[7] Some of these more recent cases involve reforms that apply to all torts, not just medical malpractice. These "generic" reforms may be better able to withstand a challenge on equal protection grounds **(14).** Moreover, while cases overturning caps on damages have received significant attention, most reforms in the States have survived, either by judicial decision upholding the reform or from lack of a judicial challenge ( 14). Indeed, both California and Indiana courts upheld very comprehensive reform packages, both of which included caps on damages.[8] In addition, recent decisions indicate that some State courts are less likely to subject tort reform legislation to heightened scrutiny (15).

## Alternative Dispute Resolution, No-Fault, and State Constitutions

While a number of States have been willing to enact reforms that change the rules that apply in civil trials, few States have embraced broader procedural reforms that would remove malpractice disputes from the civil judicial system. This may be due in part to the fact that it is difficult to make alternative dispute resolution (ADR) procedures binding and mandatory without running afoul of constitutional protections such as the right to trial, equal protection, access to courts, and due process (47). Nonjudicial schemes could be set up as alternatives to the tort system, analogous to the workers' compensation programs. However, to pass constitutional muster, the reform must provide a benefit that offsets the plaintiff's loss of the right to a judicial proceeding (156). Several States have already begun to employ a "quid pro quo" reasoning in evaluating tort reform under the due process clause (138) (Fein v. Permanence Medical Group, 474 U.S. 892 (1985) (White, dissent)).

To date. the only no-fault reforms that have been implemented are the Virginia and Florida birth-injury, no-fault programs. The constitutionality of these statutes with respect to nonparticipating physicians has been upheld in both States; however, the constitutionality of removing those cases from the judicial process has not yet been specifically challenged.9

## Federal Malpractice Reform and State Constitutional Challenges

Tort reform initiated at the Federal level could face a challenge under State constitutions depending on how the Federal government would choose to implement such reforms. If Federal monies were tied to the requirement that certain reforms be implemented, challenges would almost certainly be brought in State courts and may be brought in Federal courts as well.[10] As discussed above, tort reforms are likely to withstand Federal challenge, but may not withstand all State challenges. This implementation approach could give rise to the awkward situation in which a State court has declared a particular type of reform unconstitutional, thereby making it difficult for the State to qualify for the federal funds. This is a policy issue that would need to be addressed if the federal government chose to encourage States to adopt specific reforms. The alternative, passing Federal medical malpractice reforms, may be equally sensitive from a States' rights perspective.

## Footnotes for Appendix B

[1]Higher levels of scrutiny are reserved for statutes that discriminate against people on the basis of race, alienage, national origin, sex, and illegitimacy, or which impinge upon fundamental rights, such as privacy, voting, or the right to interstate travel (117).

[2]At least one court overturned caps on noneconomic damages using the lowest level of scrutiny. In Morris v. Savoy the Ohio Supreme Court found no evidence demonstrating a rational connection between limiting awards and reducing malpractice insurance rates (Morris v. Savoy (576 N.E.2d 765 (Ohio 1991)).

[3]Under intermediate scrutiny, the statute will be upheld if it is determined the State's interest is "important" and the means adopted to serve that interest has a fair and substantial relationship to the object of the legislation (Kenyon v. Hammer, 688 P.2d 961 (Ariz. 1984)). Strict scrutiny requires that the statute serves a compelling State interest and is necessary to achieve the legislative objective (Kenyon v, Hammer, 688 P.2d 961 (Ariz. 1984)). Very few statutes can withstand [his level of scrutiny (138).

[4]Farley v. Engleken, 740 P.2d 1058 (Kan. 1987); Arenson v. Olson, 270 N.W.2d 125 (N.D. 1978); Brannigan v. Usitalo 587 A.2d 1232 (N.H. 1991); Carson v. Maurer 424 A.2d 825 (N.H. 1980); Condemarin v. University Hospital, University of Utah, 775 P.2d 348 (Utah 1989); Jones v. State Board of Medicine, 555 P.2d 399 (Idaho 1976) *cert. denied* 431 U.S. 914 (1977). The courtin Jones did not overrule the statute, but instead remanded the case with instructions to the court to scrutinize the cap in light of the heightened standard of review. The court on remand found the limitation unconstitutional (Jones v. State Board of Medicine, Nos. 55527 and 55586 (4th Dis. Idaho, Nov. 3. 1980) *as cited in (105).*

[5]White v. State, 661 P.2d 1272 (Mont. 1983) (applying "strict scrutiny" to damage cap) *overturned* Meech v. Hillhaven West. Inc., 776 P.2d 488 (Mont. 1989) (held that strict scrutiny did not apply when reviewing the constitutionality of a limit on damages in personal injury suits); Kenyon v. Hammer, 688 P.2d 961 (Ariz. 1984) (overturning statute of limitation).

[6]*See e.g.,* Smith v. Dept. of Insurance, 507 So.2d **1080** (Fla. 1987) (overturning cap on damages); State ex. rel. Cardinal Glennon Memorial Hosp. for Children v. Gaertner, 583 S.W.2d 107 (Mo. 1979) (overturning pretrial screening panel); Mattes v. Thompson, 421 A.2d 190 (Pa. 1980) (overturning pretrial screening panel); Sofie v. Fibreboard Corp., 771 P.2d 711 (Wash. 1989) (overturning cap on damages).

[7]State ex. rel. Strykowski v. Wilkie, 261 N.W.2d 434 (Wis. 1978) (upholding patient compensation fund, including periodic payments for future damages); Fein v. Permanence Medical Group, 695 P.2d 665 (Cal. 1985) (upholding California's package of tort reforms); Johnson v. Saint Vincent Hospital Inc., 404 N.E.2d 585 (Ind. 1980) (upholding $500,000 total cap on damages); Samsel v. Wheeler Transportation Serv.. Inc., 789 P.2d 541 (Kan. 1990) (upholding $250,000 cap on noneconomic damages for all personal injuries); Etheridge v. Medical Center Hosp., 376 S.E.2d 525 (Vir. 1989) (cap on total damages constitutional); Murphy v. Edmonds, 601 A.2d 102 (Ct. App. Md. 1992) (cap on noneconomic damages of $350,000 constitutional); Adams v. The Children's Hospital, 832 S.W.2d 898 (Me. 1992) cert. *denied 113* S. Ct. **511 (1992)** (upholding $430,000 cap on noneconomic damages, periodic payment provision and modified joint and several liability); Murphy v. Edmonds 601 A.2d 102 (Md. 1992) (upholding $350,000 cap on noneconomic damages applicable to all persona] injury cases including malpractice); Scholz v. Metropolitan Pathologists, P. C., 851 P.2d 901 (Colo. 1993) *reh'g. denied* Scholz v. Metropolitan Pathologists, P. C., 1993 Colo. Lexis 502 (Colo. June 7, 1993) (upholding $1 million cap on damages in medical malpractice of which no more than $250,000" could be attributable to pain and suffering); Prendergast v. Nelson, 256 N.W.2d 657 (Neb. 1977).

[8]Fein v. permanence Medical Group, 696 P.2d 665 (Cal. 1985) *appeal dismissed* 474 U.S. 892 (1985); Johnson v. St. Vincent Hospital, Inc. 404 N.E.2d 585 (Ind. 1980).

[9]In reviewing the constitutionality of the statute, the Virginia Supreme Court applied the least stringent review standard (King v. Virginia Birth-Related Neurological Injury Compensation Program, 410 S.E.2d 656 (Va. 1991)). Therefore, the statute is likely to withstand a challenge by plaintiffs as well. The review in the Florida court was somewhat more limited, focusing more specifically on the financing mechanism provision (James F. Cov v, Florida Birth-Related Neurological Injury Compensation Plan, 595 So.2d 943 (Fla. 1992) *cert. denied* McGibonv v. Florida Birth-Related Neurological Injury Compensation Plan, 113 S. Ct. 194 (1992)). Currently several cases brought by plaintiffs challenging the constitutionality of the Florida program arc pending in State courts (37).

[10]The Supreme Court has held that Congress may attach conditions to the receipt of Federal funds provided that the conditions are intended to serve general public purposes, arc unambiguous, arc related to a Federal interest in a national project or program, and are not barred by other Federal constitutional provisions (South Dakota v. Dole, 484 U.S. 203 (1987)).