

# QUESTIONABLE MEDICINE—WHY FEDERAL MEDICAL MALPRACTICE REFORM MAY BE UNCONSTITUTIONAL

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## I. INTRODUCTION

“Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.”<sup>1</sup>

On January 16, 2003, President Bush delivered a speech at the University of Scranton in Scranton, Pennsylvania.<sup>2</sup> While standing before a backdrop emblazoned with the words “Access,” “Affordability,” and “Quality,” the President discussed the status of the medical liability system in the United States. His diagnosis: the system is “broken.”<sup>3</sup> The President believes that “junk lawsuits” will continue to plague the American people with skyrocketing medical costs and dwindling access to medical professionals unless the government quickly takes decisive action.<sup>4</sup> According to the President, the cure is simple: “Make the liability system more fair, predictable, and timely.”<sup>5</sup> To bring this about, President Bush advocates enacting federal legislation that would reduce medical malpractice liability insurance premiums by placing caps on the amount of damages awarded in malpractice actions.<sup>6</sup>

President Bush’s criticism of the medical malpractice liability system and his call for its reform are hardly novel. States such as California have

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1. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819).

2. President George W. Bush, Address at the University of Scranton (Jan. 16, 2003), <http://www.whitehouse.gov/news/releases/2003/01/20030116-1.html>.

3. *Id.*

4. *Id.*

5. The White House, Medical Liability: A Framework for Addressing the Medical Liability Crisis: Legal Reform, The High Costs of Lawsuit Abuse, *at* <http://www.whitehouse.gov/infocus/medicalliability> (on file with Arizona Law Review).

6. *Id.*

experimented with medical malpractice reform for decades.<sup>7</sup> Moreover, the states are not alone. Every Congress since 1987 has had critics proposing legislation concerning medical malpractice.<sup>8</sup> To date, however, Congress has failed in its attempts to enact reform at the national level, much to the consternation of those critics.<sup>9</sup> The political winds have shifted, however, and the issue is currently being pursued in the nation's capital with renewed vigor.<sup>10</sup>

In March of 2003, the United States House of Representatives passed the "Help Efficient, Accessible, Low-Cost, Timely Healthcare Act" ("HEALTH Act").<sup>11</sup> The HEALTH Act reflects the same principles laid out by President Bush in the Scranton speech and significantly limits damages awarded for medical malpractice claims.<sup>12</sup> Specifically, the HEALTH Act caps punitive damages<sup>13</sup> and caps all noneconomic damages regardless of the number of parties being sued in a medical malpractice action.<sup>14</sup>

The passage of the HEALTH Act would mark a significant turn in the history and development of United States tort law. Tort law generally, and medical malpractice specifically, have traditionally been matters of state law.<sup>15</sup> Although Congress has previously addressed tort law issues, its focus has been relatively narrow.<sup>16</sup> With an estimated 98,000 deaths or injuries attributed to medical

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7. See, e.g., Medical Injury Compensation Reform Act of 1975 ("MICRA" Act"), CAL. CIV. CODE § 3333.2 (West 2005) (capping noneconomic damages at \$250,000); see also Nat'l Council of State Legislatures, Medical Malpractice Fifty-State Chart, at <http://www.ncsl.org/standcomm/sclaw/tortmedmal.htm> (on file with Arizona Law Review).

8. See Common Sense Medical Malpractice Reform Act of 2001, H.R. 1639, 107th Cong.; Common Sense Medical Malpractice Reform Act of 2000, H.R. 5344, 106th Cong.; Health Care Liability Reform Act, H.R. 1091 of 1997, 105th Cong.; Medical Injury Compensation Reform Act of 1995, H.R. 229, 104th Cong.; Advancement of Health Care Reform Act of 1994, S. 2153, 103d Cong.; Access to Health Care for All Americans Act of 1991, S. 2036, 102d Cong.; Ensuring Access Through Medical Liability Reform Act, S. 2934, 101st Cong. (1990); National Professional Liability Reform Act, H.R. 1955, 100th Cong. (1987).

9. For a representative look at the numerous groups advocating health care liability reform at the federal level, see Health Coalition on Liability and Access, Data and Resources: Testimony, at <http://www.hcla.org>.

10. See Jennifer Loven, *Bush Pushes for Tort Reform, Touts Trade*, ASSOCIATED PRESS, Sept. 20, 2003.

11. Help Efficient, Accessible, Low-Cost, Timely Healthcare Act, H.R. 5, 108th Cong. § 1 (2003). The bill was introduced in its original form by Representative James Greenwood (R-PA) and was co-sponsored by 128 other members of the House.

12. *Id.* § 12 ("This Act shall apply to any health care lawsuit brought in a Federal or State court, or subject to an alternative dispute resolution system, that is initiated on or after the date of the enactment of this Act.").

13. *Id.* § 7(b)(2).

14. *Id.* § 4(b).

15. See Robert L. Rabin, *Federalism and the Tort System*, 50 RUTGERS L. REV. 1, 2-3 (1997).

16. See Perry H. Apfelbaum & Samara T. Ryder, *The Third Wave of Federal Tort Reform: Protecting the Public or Pushing the Constitutional Envelope*, 8 CORNELL J.L. & PUB. POL'Y 591 (1999) (describing, among others, the Atomic Testing Liability Act, Pub. L. No. 101-510, § 3141, 104 Stat. 1486, 1837-38 (1990) (transferred and codified as amended

malpractice each year,<sup>17</sup> the HEALTH Act would affect a much broader range of potential litigants—litigants who have historically sought relief in state courts.

The HEALTH Act raises significant issues of federalism. The federal government does not enjoy the same plenary powers as do the States.<sup>18</sup> Rather, our federal scheme mandates that the national government operate in accord with its enumerated powers.<sup>19</sup> Therefore, any regulatory authority that the national government seeks to exercise must originate from the exclusive source of its power, the Constitution. Because the text of the Constitution does not expressly grant Congress the power to regulate tort law, Congress must find constitutional authority to act under one of its more general provisions, such as the Commerce Clause.<sup>20</sup> The HEALTH Act finds just such a basis.<sup>21</sup> This Note considers whether medical malpractice reform, with the HEALTH Act as its exemplar manifestation, constitutes a lawful exercise of congressional authority under the Commerce Clause. This Note first examines the tort of medical malpractice and the HEALTH Act's proposed reforms in Section II. Section III then examines the legitimacy of the HEALTH Act through the lens of recent Commerce Clause jurisprudence.<sup>22</sup>

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at 50 U.S.C. § 2783), which renewed legislation making the Federal Torts Claim Act the exclusive remedy for any suits against government contractors for any injury related to atomic testing; the National Swine Flu Immunization Program, Pub. L. No. 94-380, 90 Stat. 1113 (1976), which made the United States the sole defendant for any claims arising out of injuries related to the administration of Swine Flu vaccine; and the Y2K Act, Pub. L. No. 106-37, 106 Stat. 185 (1999) (codified at 15 U.S.C. §§ 1601–1617), which capped punitive damages at three times compensatory damages or \$250,000 of organizations with a net worth greater than \$500,000 for damages related to Y2K failures). *See also* the Air Transportation Safety and System Stabilization Act, Pub. L. No. 107-42, 115 Stat. 230 (2001), which limited damages for injuries sustained as a result of an air carrier used for purposes of terrorism.

17. INST. OF MED., TO ERR IS HUMAN: BUILDING A SAFER HEALTH SYSTEM, 26–27 (Linda T. Kohn et al. eds., 2000). “Deaths due to preventable adverse [medical] events exceed the deaths attributable to motor vehicle accidents (43,458), breast cancer (42,297) or AIDS (16,516).” *Id.* at 26.

18. *See, e.g.*, Erwin Chemerinsky, *The Values of Federalism*, 47 FLA. L. REV. 499, 504 (1995) (“By ‘federalism,’ I simply mean the allocation of power between the federal and state governments. More specifically, federalism . . . refers to the extent to which consideration of state government autonomy has been and should be used by the judiciary as a limit on federal power.”).

19. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819).

20. U.S. CONST. art. I, § 8 (“The Congress shall have the power . . . [t]o regulate commerce with foreign nations, and among the several states, and with the Indian tribes.”).

21. HEALTH Act, H.R. 5, 108th Cong. § 2(a)(1) (2003) (“Congress finds that our current civil justice system is adversely affecting patient access to health care services, better patient care, and cost-efficient health care, in that the health care liability system is a costly and ineffective mechanism for resolving claims of health care liability and compensating injured patients, and is a deterrent to the sharing of information among health care professionals which impedes efforts to improve patient safety and quality of care.”). *See also id.* § 2(a)(2) (“Congress finds that the health care system and insurance industries are industries affecting commerce . . .”).

22. Specifically in light of recent Supreme Court rulings construing the Commerce Clause. *See United States v. Morrison*, 529 U.S. 598 (2000); *United States v. Lopez*, 514 U.S. 549 (1995).

This Note does not pass judgment on competing claims regarding the wisdom or necessity of reforming the medical liability system. Rather, this Note analyzes the constitutional authority that Congress may invoke to enact these reforms. This analysis reveals significant doubts about whether the HEALTH Act can survive scrutiny under the Supreme Court's more recent pronouncements defining the scope of congressional power under the Commerce Clause.

## II. MEDICAL MALPRACTICE AND LEGISLATIVE REFORMS

### A. The Tort of Medical Malpractice

A medical malpractice claim is a civil action that sounds in tort.<sup>23</sup> As a tort, it is rooted in the common law and thus governed by rules that have been developed by state courts over considerable time.<sup>24</sup> It is a negligence claim, and as such, a plaintiff must prove duty, breach of duty, harm, and causation.<sup>25</sup> A defendant medical professional may defend a medical malpractice claim by asserting traditional negligence defenses such as contributory fault,<sup>26</sup> avoidable consequences,<sup>27</sup> or patient consent.<sup>28</sup>

While similar to garden-variety negligence claims, medical malpractice claims function somewhat differently in terms of establishing the duty requirement. In an ordinary negligence case, courts hold that most people owe to one another a duty defined by the "reasonable person standard."<sup>29</sup> Under this standard, a plaintiff can prove breach of duty by establishing that the defendant failed to act reasonably under the circumstances to avoid or minimize harm to others.<sup>30</sup> In a medical malpractice suit, however, the law is primarily concerned with whether the medical professional's conduct "conformed to the medical standard or medical custom in the relevant community."<sup>31</sup> Doctors thus owe to patients a duty to act "within the ambit of their professional work [and to] exercise the skill, knowledge, and care normally possessed and exercised by members of their profession . . . in the relevant medical community."<sup>32</sup> A doctor, therefore, does not act negligently as long as he acts in a manner consistent with others in his area of specialization.<sup>33</sup> Under this test, a procedure that would otherwise appear

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23. DAN B. DOBBS, *THE LAW OF TORTS* § 242 (2000).

24. *Id.* § 1.

25. *RESTATEMENT (SECOND) OF TORTS* § 282 (1965).

26. DOBBS, *supra* note 23, § 242.

27. *Id.*

28. *Id.* See also *id.* § 242, at n.3 (citing *Boyle v. Revici*, 961 F.2d 1060 (2d Cir. 1992)).

29. *Id.* § 117.

30. *Id.*

31. *Id.* § 242.

32. *Id.*

33. *Id.* § 244. The rule traditionally has involved one other requirement: the practice in question be judged by the practice common to a particular geographic locality. See *id.* This was problematic in the sense that a very small locality might only have a handful of doctors who would be members of a tightly-knit professional community. *Id.* at n.5. It is highly unlikely that in such a community one of its members would be willing to testify that another member's practices did not conform to their local practice. *Id.*

exceedingly dangerous or unnecessary to a lay person does not constitute negligence, even if unsuccessful, if the medical professional performed that procedure in a manner similar to others in his field.<sup>34</sup>

The medical custom standard presents certain problems given that most jurors are not themselves members of the relevant medical community and probably cannot determine, based on their own experience, whether a doctor's conduct fell below the standard of care. Consequently, expert testimony is necessary to help jurors determine the proper standard or customary practice.<sup>35</sup> This requires a highly fact-intensive inquiry.<sup>36</sup> Additionally, many jurisdictions now require plaintiffs to establish the "national standard of care" in relation to a particular set of circumstances giving rise to a malpractice claim.<sup>37</sup> This departs from the traditional rule requiring only a showing of the local standard.<sup>38</sup> This necessary evidentiary showing appears to discourage plaintiffs and plaintiffs' attorneys from bringing suit without some certainty that the medical professional's conduct clearly deviated from the national norm.<sup>39</sup> With so many built-in impediments to medical malpractice claims, why are so many clamoring for reform?

### ***B. The Controversy over Medical Malpractice Litigation—Claims and Statistics***

Proponents of medical malpractice reform argue that increasingly limited access to doctors and other health care professionals resulting from expenses associated with medical liability insurance provide the necessary justification for the HEALTH Act.<sup>40</sup> Such concerns have garnered much media attention recently.<sup>41</sup>

34. See *id.* § 242 (distinguishing the reasonable person standard from the traditional medical standard of care).

35. *Id.*

36. General assertions by the expert witness that the practitioner in question acted dangerously or negligently will not suffice. See *id.* § 246. Rather, to establish the appropriate medical standard, the expert must establish that a certain diagnosis, course of treatment, or specific procedure did not meet the standards of the relevant medical community. *Id.*

37. See, e.g., *Nalder v. W. Park Hosp.*, 254 F.3d 1168, 1176 (10th Cir. 2001) ("Negligence cannot be excused on the ground that others practice the same kind of negligence.").

38. See Roger N. Braden & Jennifer L. Lawrence, *Medical Malpractice: Understanding the Evolution—Rebuking the Revolution*, 25 N. KY. L. REV. 675, 683 (1998) ("Most courts today have moved away from the locality rule, adopting some form of a national standard.").

39. See DOBBS, *supra* note 23, § 243 ("[Courts] often say that the doctor-defendant is not required to exercise the highest care, . . . that the physician is not liable for a bad result nor for a mistake or error of judgment when he acted in good faith, that medicine is an inexact science, and that the physician is not an insurer of the plaintiff's health nor guarantor of her recovery."). See, e.g., *Bryan v. Burt*, 486 S.E.2d 536, 539 (Va. 1997) ("The mere fact that the physician has failed to effect a cure or that the diagnosis or treatment have been detrimental to the plaintiff's health does not raise a presumption of negligence.").

40. HEALTH Act, H.R. 5, 108th Cong. § 2(a)(2) (2003).

Many reports have sought to chronicle the negative effects that increased costs of medical liability insurance have on medical practitioners and their patients. For example, an article in the September 16, 2002 edition of *TIME Magazine* reported that in many states, high costs of liability insurance have forced hospitals to close entire sections of their facilities and caused some rural communities to lose their only doctors.<sup>42</sup> In an illustrative example, the article refers to recent events at Mercy Hospital in Philadelphia. Apparently, Mercy had to shut the doors to its maternity clinic after its insurance premium jumped from seven million dollars in 2000, to twenty-two million dollars in 2002.<sup>43</sup> In another startling anecdote, a Las Vegas obstetrician had to take a leave of absence to avoid paying an insurance bill totaling \$180,000; the premium the year before was \$50,000.<sup>44</sup>

Many other articles citing similar examples lend support to a perception of “crisis” in the health care industry. For example, *The American Prospect* reported in August of 2003 that the average cost of premiums for obstetricians in the Miami area jumped from \$159,000 in 2002 to \$210,000 in 2003.<sup>45</sup> It also reported that patients in Scranton, Pennsylvania seeking emergency neurosurgery have only a one in three chance of finding a qualified physician, given that the only qualified neurosurgeon in the area spreads his time between three different facilities.<sup>46</sup> Reports such as these are relied upon by proponents of medical malpractice reform to argue that it has become too expensive for many medical workers to stay in business.

With doctors leaving their practices, patient access to much needed care is severely limited. Although most doctors remain in business, many have chosen to leave their high-risk specialty or move to other regions of the country to find lower insurance rates.<sup>47</sup> Those doctors who have continued to practice in their given specialty and chosen locale have complained that insurance industry pressure to limit their practice to a predetermined number of patients has hampered their ability to meet patient demands.<sup>48</sup> For instance, obstetricians insured by American Physicians Corporation save twenty-five percent on their insurance premiums if they agree to deliver fewer than 125 babies per year.<sup>49</sup> While such efforts may effectively reduce doctors’ overall expenses, they have the net effect of reducing patient access because doctors simply see fewer patients.

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41. A search conducted in the LEXIS-NEXIS general news database of all major newspaper articles published between January 1, 2003 and December 31, 2003 for the terms “medical malpractice” and “reform” yielded 209 results.

42. Laura Bradford, *Out of Medicine: As Premiums Soar for Malpractice Insurance, Doctors Get Harder to Find*, *TIME*, Sept. 16, 2002, at A13.

43. *Id.*

44. *Id.*

45. Sasha Polakow-Saransky, *Bad Medicine: Why Bush’s Malpractice Policy Will Only Help Insurers*, *AM. PROSPECT*, July/Aug. 2003, at 59.

46. *Id.*

47. Bradford, *supra* note 42.

48. *Id.*

49. *Id.*

The insurance industry vigorously contends that neither greed nor poor management has led to the dramatic upsurge in costs.<sup>50</sup> Rather, insurers point to medical malpractice lawsuits as the primary culprit.<sup>51</sup> For support, the insurance industry relies on studies such as those recently conducted by the Department of Health and Human Services (“DHHS”). In a report released in July of 2002, the DHHS found the following: the median plaintiff’s jury award in medical negligence claims has jumped by seventy-six percent over the last decade; the average award for an obstetrics claim in 2000 was \$1,000,000, marking an increase from an average of \$700,000 in 1999; fifty-two percent of all jury awards in 1999–2000 resulted in judgments of \$1,000,000 or more. These figures record a considerable increase from the years between 1994–1996, a period in which only thirty-four percent of such awards surpassed \$1,000,000.<sup>52</sup> The industry also points to informal studies concluding that because doctors fear being sued, they increasingly practice “defensive medicine.”<sup>53</sup> This leads doctors to recommend procedures otherwise unnecessary or too expensive to justify their limited diagnostic or therapeutic value.<sup>54</sup> Doctors fear that without taking every

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50. See HEALTH COALITION ON LIABILITY AND ACCESS, CONFRONTING THE MYTHS ON MEDICAL MALPRACTICE REFORM: ARE MEDICAL LIABILITY PREMIUMS TIED TO STOCK MARKET LOSSES? (“The Bottom Line . . . Medical liability premiums are strictly tied to estimates of future paid losses. There is no possible way to raise rates in order to cover losses—whether in the stock market or anywhere.” (emphasis removed)), <http://www.ama-assn.org/ama1/pub/upload/mm/399/mlrmyths.pdf> (on file with Arizona Law Review). See also Michael Romano, *No Definitive Answers; GAO Report Weakens Some Docs’ Arguments*, MOD. HEALTHCARE, Aug. 4, 2003, at 10 (“The [GAO] report confirms that ‘increasing awards’ are to blame for the escalating premiums in some states . . . it also puts to rest two lawyer smokescreens: that insurance company gouging and/or stock market losses have caused the liability crisis.”). *But see* Polakow-Saransky, *supra* note 45, at 59. (“[I]nsurance companies are technically barred from recovering past losses by raising premiums . . . . But insurance companies do regularly raise rates based on projected investment losses.”).

51. See HEALTH COALITION ON LIABILITY AND ACCESS, THE MEDICAL LIABILITY CRISIS: WHY REPEALING MCCARRAN-FERGUSON OR PASSING OTHER INSURANCE LAWS IS NOT THE ANSWER (“The only way to end America’s medical liability crisis is to address the underlying causes that are making insurance either unaffordable or unavailable at any price. That means reining in meritless lawsuits and establishing clear guidelines to curb runaway juries.”), <http://www.hcla.org/factsheets/2003-212-McCarranFerguson.pdf> (on file with Arizona Law Review).

52. OFFICE OF THE ASSISTANCE SEC’Y FOR PLANNING & EVALUATION, U.S. DEP’T OF HEALTH & HUMAN SERVS., CONFRONTING THE NEW HEALTH CARE CRISIS: IMPROVING HEALTH CARE QUALITY AND LOWERING COSTS BY FIXING OUR MEDICAL LIABILITY SYSTEM 9–10 (July 24, 2002).

53. HARRIS INTERACTIVE, COMMON GOOD FEAR OF LITIGATION STUDY: THE IMPACT OF MEDICINE, FINAL REPORT (April 11, 2002).

54. For example, of all physicians queried in the Harris Interactive poll, ninety-one percent responded “yes” to the question: “Based on your experience, have you noticed the fear of malpractice liability causing physicians to order more tests than they would based only on professional judgment of what is medically needed?” *Id.* at 19. The results of the poll also suggest that fear of liability leads to over prescribing of medications, unnecessary referrals to specialists, and an increase in invasive procedures such as biopsies to confirm diagnoses. *Id.*

precautionary measure possible, they will become easy targets for lawsuits.<sup>55</sup> This too increases costs and places a needless drain on already limited resources.

As a result, an alliance of insurance companies and groups representing health care workers has mobilized its considerable political clout to vigorously lobby Congress for a change in the way courts resolve medical malpractice claims.<sup>56</sup> This alliance desires legislation that would provide greater predictability in both the terms and expected outcomes of malpractice litigation.<sup>57</sup> These groups argue that capping damages would provide this desired predictability and would foster an enhanced desire to settle claims outside of court.<sup>58</sup> This plea for help has not fallen on deaf ears.

### C. *The Government Response: The HEALTH Act*

The HEALTH Act alters the medical liability system for the ostensible purpose of reducing health care costs and improving patient access. Along with capping both punitive and noneconomic damages, the HEALTH Act limits joint and several liability,<sup>59</sup> abolishes the collateral source rule,<sup>60</sup> limits lawyers'

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55. Again, the Harris poll suggests that doctors are more concerned now about being sued for malpractice than they were at the beginning of their careers. Eighty-seven percent of doctors polled stated they were more aware of the risks associated with medical malpractice than they were when they first starting to practice. *Id.* at 16. Additionally, seventy-six percent of doctors polled stated a belief that such risks "hurt their ability to provide quality patient care." *Id.* at 15.

56. See, e.g., Letter from the American Medical Association to Representative James Greenwood (R-PA) (Feb. 6, 2003) ("On behalf of the physicians, residents, and medical students of the American Medical Association (AMA), it is my pleasure to give the AMA's enthusiastic support to the HEALTH Act . . . . We are committed to helping you gather a large and strong bipartisan consensus to move this legislation to final passage."), <http://www.ama-assn.org/ama/pub/category/12993.html> (on file with Arizona Law Review).

57. Health Coalition on Liability and Access, *The Facts: The Crisis* (arguing that limits on noneconomic damages would serve to stabilize insurance markets while in addition would provide affordable liability insurance premiums to health care workers), at <http://www.hcla.org> (last visited Mar. 6, 2005).

58. For a good summary of the arguments against this legislation, see H.R. REP. NO. 108-32, pt. 1, at 237-66 (2003). Opponents of this legislation strenuously deny that the proposed reforms will in any way solve the problems that they purport to address. *Id.* They cite studies that show no correlation between health costs and restrictions on liability in states that have enacted similar reforms. *Id.* at 237. They also cite studies that show that five percent of all health care professionals are responsible for fifty-four percent of malpractice committed and that capping damages on all claims would do little to address the serious problems created by a few dangerous practitioners. *Id.* at 238. Also discussed is a Harvard Medical Practice Study from 1990 that concludes most patients who are injured because of negligence do not even file claims, leading to the conclusion that the problem is not with too many suits, but too few. *Id.* at 241.

59. H.R. 5, 108th Cong. § 4(d) (2003). This section eliminates the common law rule that in the event that more than one defendant is found liable, each defendant can be held one hundred percent liable forcing them to seek contribution from the other co-defendants. *Id.* Advocates of eliminating joint and several liability point out the potential inequity for defendants; i.e., if the plaintiff chooses to recover from one defendant because the other is insolvent, the defendant that is claimed against has to pay the entire award despite the fact that he is not solely liable for the injury. See H.R. REP. NO. 108-32, pt. 1, at



contingent fees,<sup>61</sup> creates a federal statute of limitations,<sup>62</sup> allows for the periodic payment of damages,<sup>63</sup> and preempts state law in regard to certain elements of medical malpractice lawsuits.<sup>64</sup> While each provision presents its own unique issues, this Note will highlight only the caps on damages and preemption since these provisions best demonstrate the extent to which the HEALTH Act would affect medical malpractice claims brought in state courts.

### *1. Noneconomic Damages Under the HEALTH Act*

For each injury caused by an act of medical malpractice, the HEALTH Act would limit noneconomic damages to \$250,000 in any health care lawsuit, regardless of the number of defendants involved or the number of claims made.<sup>65</sup> Under the preemption clause, this limitation would not apply to any state that had already enacted some form of statutory caps before the effective date of the HEALTH Act.<sup>66</sup>

Economic damages generally encompass monetary losses that result from injury, such as lost wages and medical expenses.<sup>67</sup> Noneconomic damages, on the other hand, typically compensate pain and suffering.<sup>68</sup> Advocates of capping noneconomic awards claim that a monetary limit gives the system the predictability that it so desperately needs. Opponents claim that a cap imposes an arbitrary bar to fair compensation and that by setting the amount without any provision for adjustment due to inflation, future awards will increasingly fail to represent the true costs of individual suffering.<sup>69</sup>

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45-47. Those who support the joint and several liability rule stress that it is more important for a tortfeasor to pay more than his fair share than for the injured person to not fully recover for his injuries. *Id.* at 258-59.

60. H.R. 5, § 6. This section would abrogate the common law rule that allows a plaintiff to recover damages from a defendant despite the fact that the plaintiff is entitled to recover such damages from a third party. This section then would allow a jury to consider evidence of a collateral source of benefits when determining the amount of damages. *Id.*

61. *Id.* § 5. This section would impose a sliding scale for the amounts that lawyers can recover on a contingency basis. *Id.* Under this scale, a lawyer may be paid forty percent of the first \$50,000 recovered, one-third of the next \$50,000, twenty-five percent of the next \$50,000, and fifteen percent of any additional amount. *Id.*

62. *Id.* § 3. This section states "the time for the commencement of a health care lawsuit shall be 3 years after the date of manifestation of injury or 1 year after the claimant discovers, or through the use of reasonable diligence should have discovered, the injury, whichever occurs first." *Id.*

63. *Id.* § 8. This section allows for any party, after judgment ordering future damages, to request periodic payments if the damages equal or exceed \$50,000. *Id.*

64. *Id.* § 11.

65. *Id.* § 4(b).

66. *Id.* § 12. In addition, the HEALTH Act would not preempt any state cap at all, as long as the state legislature enacted a specific cap on damages. *Id.* § 11(c)(1).

67. See DOBBS, *supra* note 23, § 377.

68. *Id.* § 384.

69. Peter Perlman, *Don't Punish the Injured*, A.B.A. J., May 1, 1986, at 34.

### 2. Punitive Damages and Burdens of Proof Under the HEALTH Act

The HEALTH Act allows for punitive damages according to state law.<sup>70</sup> The HEALTH Act, however, preempts any state burden of proof and expressly requires that a plaintiff prove “by clear and convincing evidence that [the defendant] acted with malicious intent to injure the claimant, or that [the defendant] deliberately failed to avoid unnecessary injury that [the defendant] knew the claimant was substantially certain to suffer.”<sup>71</sup> The HEALTH Act limits the amount of punitive damages to the greater of \$250,000 or two times the amount of economic damage.<sup>72</sup> States that provide greater protection to defendants in medical malpractice suits are unaffected by these provisions.<sup>73</sup>

Advocates of these provisions point to examples of “the most outrageous punitive damages awards” as justification for capping damages in medical malpractice suits.<sup>74</sup> They argue that the awards are “often unfair, arbitrary, and unpredictable.”<sup>75</sup> Opponents argue that punitive damages punish egregious conduct and that such damages “fill the gaps the criminal law leaves open.”<sup>76</sup>

### 3. Preemption Under the HEALTH Act

Under the HEALTH Act, state law would continue to govern medical malpractice claims, but the HEALTH Act would preempt state law with respect to certain elements of a malpractice claim.<sup>77</sup> It would not preempt any state law “that imposes greater [procedural or substantive] protections . . . for health care providers and health care organizations from liability, loss, or damages than those provided by the Act or create a cause of action.”<sup>78</sup> It would also not preempt “any State law that specifies a particular monetary amount of compensatory or punitive damages . . . that may be awarded in a health care lawsuit, regardless of whether such monetary amount is greater or lesser than is provided for under this Act.”<sup>79</sup> This latter section does not address the possibility of a state adopting a cap so high as to effectively not function as a cap at all.

70. H.R. 5, § 7(a).

71. *Id.*

72. *Id.* § 7(b)(2).

73. *Id.* § 11(c)(1).

74. Michael Rustad & Thomas Koenig, *Reconceptualizing Punitive Damages in Medical Malpractice: Targeting Amoral Corporations, Not “Moral Monsters,”* 47 RUTGERS L. REV. 975, 980–81 (1995).

75. *Id.* at 978.

76. Lisa M. Broman, *Punitive Damages: An Appeal for Deterrence*, 61 NEB. L. REV. 651, 680 (1982).

77. H.R. 5, § 11(b).

78. *Id.*

79. *Id.* § 11(c).

### III. THE CONSTITUTIONAL BASIS OF CONGRESSIONAL AUTHORITY TO ENACT MEDICAL MALPRACTICE REFORM

#### A. Congress's Power Under the Commerce Clause

The Framers of the Constitution did not think it wise to grant Congress general police powers.<sup>80</sup> Rather, they believed the business of governing the daily lives of Americans was a matter properly reserved for the States.<sup>81</sup> It was their hope that such a scheme would create an effective obstacle to the accumulation of power in a remote and indifferent national government and was thus adopted “to ensure protection of our fundamental liberties.”<sup>82</sup> The Framers were aware, however, that such a scheme could not function properly if the national government served as nothing more than an impotent sidekick to much more powerful state governments.<sup>83</sup> In order to establish a workable balance, the Framers granted certain enumerated powers to the national government.<sup>84</sup> The Commerce Clause exemplifies this type of power.

The Commerce Clause gives Congress the authority “[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.”<sup>85</sup> At first blush, this Clause seems fairly distinct and unambiguous; Congress has the power to regulate certain commercial activities. But the history of this Clause proves the contrary. What qualifies as commercial activity has been subject to much interpretation. The word “commerce” has meant different things at different times.<sup>86</sup> Over time, the scope of the term has expanded to encompass a

80. During the Constitutional Convention, Edmund Randolph from the Virginia delegation submitted a proposal that would authorize the national legislature to “legislate in all cases to which the separate States are incompetent, or in which the harmony of the United States may be interrupted by exercise of individual legislation.” RONALD ROTUNDA & JOHN NOWAK, *CONSTITUTIONAL LAW* § 3.1 (2000). This proposal for general police powers was dropped in favor of more limited, enumerated powers. *Id.*

81. State power is generally an inherent attribute of its territorial sovereignty. See U.S. CONST. amend. X (“The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.”).

82. *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991).

83. See ROTUNDA & NOWAK, *supra* note 80, § 3.1 (discussing the Framers’ decision to abandon the Articles of Confederation due to the unworkable balance between powerful State governments and a weak national government).

84. See *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 364 (1819) (“But we contend, that the government of the United States must confine themselves, in [exercising its power], to the means which are specifically enumerated in the constitution, or such auxiliary means as are naturally connected with the specific means.”). See also ROTUNDA & NOWAK, *supra* note 80, § 3.2.

85. U.S. CONST. art. I, § 8.

86. Apparently the “scope and extent of the Commerce Clause” did not trouble the Framers during the Constitutional Convention. KENNETH R. THOMAS, *CONG. RESEARCH SERV., FEDERALISM, STATE SOVEREIGNTY AND THE CONSTITUTION: BASIS AND LIMITS OF CONGRESSIONAL POWER* 5 (updated Jan. 2, 2003). Even the anti-Federalists felt that the uniformity in matters of foreign commerce should be an indispensable power of the new national government. *Id.*

wide range of activities and thus has become the source of a considerable amount of national power.<sup>87</sup> This expansion has fundamentally changed the contours of our federal system.

In the early years of the Republic, the Supreme Court broadly interpreted the Commerce Clause.<sup>88</sup> In the first case to construe it, the Supreme Court held that the Commerce Clause gives Congress the "power to regulate; that is, to prescribe the rule by which commerce is to be governed."<sup>89</sup> The Court stated that this power "is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution."<sup>90</sup> However, throughout the eighteenth and nineteenth centuries, the Court did not employ this approach to expand any specific powers of Congress; rather, the Court concentrated on limiting the States' ability to regulate commerce.<sup>91</sup>

Cases that upheld or expanded congressional power clearly dealt with issues of interstate commerce.<sup>92</sup> These cases varied in subject matter and included the regulation of lottery tickets,<sup>93</sup> the transportation of tainted food,<sup>94</sup> and the movement of prostitutes over state lines.<sup>95</sup> During this initial period, Congress was not thought to possess the power to regulate certain ancillary commercial activities such as manufacturing<sup>96</sup> or mining.<sup>97</sup>

The year 1937 proved a watershed in Commerce Clause jurisprudence. That year, the Supreme Court upheld the National Labor Relations Act and found that Congress acted within its Commerce Clause authority when it sought to control labor unrest and the concomitant burdens such unrest placed on interstate

87. See ROTUNDA & NOWAK, *supra* note 80, § 4.1 ("The brevity of [the Commerce Clause] belies the fact that its interpretation has played a significant role in shaping the concepts of federalism and the permissible uses of national power throughout our history.").

88. *Id.* § 4.4.

89. *Gibbons v. Ogden*, 22 U.S. (4 Wheat.) 1, 196 (1824).

90. *Id.*

91. See THOMAS, *supra* note 86, at 6 (citing *Brown v. Maryland*, 25 U.S. 419 (1927)). For instance, the *Brown* Court struck down a state statute requiring importers of foreign goods to purchase a license and subjecting them to penalties. *Brown*, 25 U.S. at 445.

92. See THOMAS, *supra* note 86, at 6.

93. *Id.* (citing *Champion v. Ames*, 188 U.S. 321 (1803)).

94. *Id.* (citing *Hippolite Egg Co. v. United States*, 220 U.S. 45 (1911)).

95. *Id.* (citing *Hoke v. United States*, 227 U.S. 308, 314 (1913)). In distinguishing the powers between the state and federal government in matters of commerce, the Court stated:

There is unquestionably a control in the States over the morals of their citizens, and, it may be admitted, it extends to making prostitution a crime. It is a control, however, which can be exercised only within the jurisdiction of the States, but there is a domain which the States cannot reach and over which Congress alone has power.

*Hoke*, 227 U.S. at 314.

96. THOMAS, *supra* note 86, at 6 (discussing *United States v. E.C. Knight Co.*, 156 U.S. 1 (1895)).

97. *Id.* (discussing *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936)).

commerce.<sup>98</sup> The Court found that intrastate activities that “have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstruction” comprise appropriate subjects of congressional regulation.<sup>99</sup> Given that Congress could now regulate activities occurring within the “stream” of commerce, Congress reached out to a whole new area of activities that merely affected commerce.<sup>100</sup>

The Court’s new test required a reasonable nexus between the regulated activity and its effect on commerce.<sup>101</sup> This reasonableness standard witnessed its most liberal application in the seminal but controversial case of *Wickard v. Filburn*.<sup>102</sup> *Wickard* held that the production of wheat for one’s personal use was an activity sufficiently related to interstate commerce.<sup>103</sup> Relying on economic theory, the Court determined that this small scale and purely intrastate activity could reasonably affect interstate commerce when viewed in the aggregate with other similar activity.<sup>104</sup> The Court deferred to legislative judgment concerning the activity’s economic impact and rejected earlier distinctions between activities having either direct or indirect connections to commerce.<sup>105</sup> Under this reasoning, the Court subsequently upheld a host of legislation regulating intrastate activity with limited and sometimes non-obvious connections to interstate commerce.<sup>106</sup>

After *Wickard*, Commerce Clause standards remained fairly static. Under the Clause, Congress could establish the terms for the interstate transportation of people and products. Additionally, Congress could regulate intrastate activity

98. *Id.* (citing *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937)).

99. *Jones & Laughlin Steel*, 301 U.S. at 37.

100. THOMAS, *supra* note 86, at 6 (citing *United States v. Darby*, 312 U.S. 100 (1941)). As the Court stated in *United States v. Darby*:

The power of Congress over interstate commerce is not confined to the regulation of commerce among the states. It extends to those activities intrastate which so affect interstate commerce . . . as to make regulation of them appropriate means to the attainment of a legitimate end, the exercise of the granted power of Congress to regulate interstate commerce.

*Darby*, 312 U.S. at 118.

101. THOMAS, *supra* note 86, at 6.

102. 317 U.S. 111 (1942).

103. *Id.* at 128–29.

104. *See United States v. Lopez*, 514 U.S. 549, 556 (1995) (“The *Wickard* Court emphasized that although *Filburn*’s own contribution to the demand for wheat may have been trivial by itself, that was not ‘enough to remove him from the scope of federal regulation where, as here, his contribution, taken together with that of many others similarly situated, is far from trivial.’”).

105. *Wickard*, 317 U.S. at 125 (“[E]ven if appellee’s activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce . . .”).

106. *See THOMAS, supra* note 86, at 6, 7 (discussing *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964)); *see also Katzenbach v. McClung*, 379 U.S. 294 (1964) (finding a rational basis for federal regulation prohibiting racial discrimination at *Ollie’s Barbeque*, a local restaurant serving only local clientele, on grounds that it functioned within the “channels of commerce”). These cases are representative of the crucial role that the Commerce Clause played in the enactment of major civil rights legislation.

related to interstate commerce,<sup>107</sup> including trade in “intangibles” such as securities and insurance contracts.<sup>108</sup> In construing legislation enacted pursuant to the Commerce Clause, the Court would strike down a regulation “only if it [was] clear that there [was] no rational basis for a congressional finding that the regulated activity affects interstate commerce, or that there [was] no reasonable connection between the regulatory means selected and the asserted ends.”<sup>109</sup> Under such a permissive standard, the Court did not hold any law rooted in the Commerce Clause unconstitutional for many decades after *Wickard*.<sup>110</sup> This deference came to an abrupt halt in 1995.

## ***B. Limiting the Scope of the Commerce Clause: Modern Commerce Clause Standards***

### *1. Closing the Door Part-Way: United States v. Lopez*

In 1990, Congress passed the “Gun-Free School Zones Act.”<sup>111</sup> This legislation made it a federal crime for “any individual knowingly to possess a firearm at a place the individual knows, or has reasonable cause to believe, is a school zone.”<sup>112</sup> Nowhere in the text of the statute or in its legislative history did the Gun-Free School Zones Act mention exactly what effect possessing a gun within a school zone has on interstate commerce.<sup>113</sup> Despite this shortcoming, the federal government prosecuted a twelfth-grade student from San Antonio, Texas under the statute after he brought a loaded handgun to his high school.<sup>114</sup> The student challenged the statute, arguing that it exceeded Congress’s power to legislate under the Commerce Clause.<sup>115</sup>

In support of its position that the Act was an appropriate exercise of Commerce Clause authority, the government argued that the possession of a firearm within a school zone may result in violent crime.<sup>116</sup> Such crime can affect the national economy by increasing the cost of insurance or by reducing the willingness of people to travel to certain localities perceived as dangerous.<sup>117</sup> The government also argued that guns in and around schools threaten the learning process resulting in a less economically productive citizenry.<sup>118</sup> Based on these

107. ROTUNDA & NOWAK, *supra* note 80, § 4.9.

108. *Id.* (citing *United States v. South-Eastern Underwriters Ass’n*, 322 U.S. 533 (1944)).

109. *Id.* (citing *Hodel v. Indiana*, 452 U.S. 314, 323 (1981)).

110. *Id.*

111. Pub. L. No. 101-647, § 1702, 104 Stat. 4789, 4844–45 (1990) (codified at 18 U.S.C. § 922(q)(1)).

112. *Id.*

113. *United States v. Lopez*, 514 U.S. 549, 562 (1995).

114. *Id.* at 551.

115. *Id.* at 552.

116. *Id.* at 563–64 (citing the government’s brief in support of the Gun-Free School Zones Act).

117. *Id.*

118. *Id.* This is an argument that the dissent found most compelling. *Id.* at 622–23 (Breyer, J., dissenting) (“Why then is it not equally obvious . . . that a widespread, serious,

facts, the government urged the Court to hold that Congress had a rational basis to conclude that guns in school zones substantially affect interstate commerce.

The Court, however, rejected this argument. The majority was troubled by the implications of the government's "cost of crime" argument. They felt that accepting this argument would give Congress the power to regulate not just violent crime, but every activity that could lead to such crime no matter how far removed from interstate commerce it might actually be.<sup>119</sup> The Court also rejected the "national productivity" argument.<sup>120</sup> They believed that this reasoning would grant Congress unbridled authority to regulate any activity related to economic productivity,<sup>121</sup> allowing the federal government to legislate in areas traditionally left to the States.<sup>122</sup> The majority refused to countenance such a result, especially over matters so clearly unrelated to commerce of any kind. To hold otherwise, the Court reasoned, would "pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States."<sup>123</sup> The Court refused to sanction this approach.

Despite *Lopez*, Congress continues to enjoy considerable power under the Commerce Clause. *Lopez* does indicate, however, that the Court will not give Congress carte blanche to regulate anything and everything even vaguely related to commercial enterprise. *Lopez* reaffirmed the Court's past Commerce Clause holdings but carefully limited the circumstances under which Congress could exercise that power. In *Lopez*, the Court defined three distinct areas in which Congress could legitimately exercise Commerce Clause authority. Congress may constitutionally regulate: the use of the channels of interstate commerce;<sup>124</sup> the instrumentalities of interstate commerce even though they may be used only in intrastate activities;<sup>125</sup> and those activities having a substantial relation to interstate commerce.<sup>126</sup>

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and substantial physical threat to teaching and learning *also* substantially threatens the commerce to which that teaching and learning is inextricably tied?" (emphasis in original)).

119. *Id.* at 564; see also Beth Rogers, Note, *Legal Reform—at the Expense of Federalism?: House Bill 956, Common Sense Civil Justice Reform Act and Senate Bill 565, Product Liability Reform Act*, 21 DAYTON L. REV. 513, 537 (1996) (discussing the *Lopez* Court's rejection Congressional justification for Gun Free School Zones Act).

120. *Lopez*, 514 U.S. at 564; see also Rogers, *supra* note 119, at 537 (discussing the *Lopez* Court's rejection of Congressional justification for Gun Free School Zones Act).

121. *Lopez*, 514 U.S. at 565.

122. Such areas might include education. *Id.* at 565 ("[I]f Congress can, pursuant to its Commerce Clause power, regulate activities that adversely affect the learning environment, then . . . it could regulate the educational process directly."). Family law too would not escape the reach of Congress. *Id.* ("Congress could just as easily look at child rearing as 'falling on the commercial side of the line' because [education] provides a 'valuable service—namely, to equip children with the skills they need to survive in life and, more specifically, in the work place.'").

123. *Id.* at 567.

124. *Id.* at 558 (citing earlier case law in support of this proposition).

125. *Id.*

126. *Id.*

The third subject of this Commerce Clause analysis proved fatal to the Gun-Free School Zones Act. First, the Act was criminal in nature and did not relate in any way to commerce.<sup>127</sup> Second, the Act did not contain a “jurisdictional element that would ensure, through case-by-case analysis, that the [regulated activity] in question affects interstate commerce.”<sup>128</sup> Finally, while not necessarily required, the Act was not accompanied by any legislative findings that indicate a connection between the activity and interstate commerce.<sup>129</sup> While the bulk of Commerce Clause jurisprudence is not affected by *Lopez*, that case does cast doubt on Congress’s ability to regulate single-state noneconomic activity.

## 2. Closing the Door Further: United States v. Morrison

In what some trumpeted as one of the most significant pieces of civil rights legislation since the 1960s,<sup>130</sup> Congress passed the Violence Against Women Act in 1994.<sup>131</sup> The law stated that “[a]ll persons within the United States shall have the right to be free from crimes of violence motivated by gender.”<sup>132</sup> Similar to the Gun-Free School Zones Act, Congress enacted this legislation pursuant to its Commerce Clause authority. Unlike the Gun-Free School Zones Act, however, the Violence Against Women Act contained an explicit provision defining it as a “[f]ederal civil rights cause of action” established in accordance with “section 8 of Article I of the Constitution.”<sup>133</sup> It also came replete with congressional findings demonstrating the significant impact that gender-motivated violence has on the national economy.<sup>134</sup>

Antonio Morrison, one of two perpetrators of a rape against a fellow female student at Virginia Polytechnic Institute, was sued by his victim under the Violence Against Women Act. The victim of the rape decided to sue Morrison

127. The statute is also not an essential part “of a larger regulatory scheme” that would be “undercut unless the intrastate activity were regulated.” *Id.* at 561. This affirms the expansive earlier cases such as *Wickard* since the regulation of wheat in general was permissible to prevent Mr. Wickard from growing it for his personal consumption.

128. *Id.*

129. *Id.* at 562–63.

130. See Sally F. Goldfarb, *The Supreme Court, the Violence Against Women Act, and the Use and Abuse of Federalism*, 71 *FORDHAM L. REV.* 57 (2002) (discussing competing characterizations of the Violence Against Women Act as relating to civil rights law).

131. Civil Rights Remedies for Gender-Motivated Violence Act (Violence Against Women Act), 103 Pub. L. No. 103-322, § 40302, 108 Stat. 1941, 1941 (codified at 42 U.S.C. § 13981).

132. *Id.* § 40302(b). Subsection (c) enforces this right in stating: “A person . . . who commits a crime of violence motivated by gender and thus deprives another of the right declared in subsection (b) shall be liable to the party injured [for damages].” *Id.* § 40302(c).

133. *Id.* § 40302(a).

134. See *United States v. Morrison*, 529 U.S. 598, 628–30 (2000) (Souter, J., dissenting) (describing the “mountain of data assembled by Congress” including “four years of hearings which included testimony from physicians and law professors; from survivors of rape and domestic violence; and from representatives of state law enforcement and private business”).



under the Act after the school overturned Morrison's two-semester suspension.<sup>135</sup> Morrison moved to dismiss the case on the ground that it failed to state a claim and argued that the law itself was unconstitutional.<sup>136</sup> The United States District Court of the Western District of Virginia agreed with Morrison's constitutional argument and dismissed the claim, concluding that Congress lacked the authority under the Commerce Clause to enact such legislation.<sup>137</sup> The Fourth Circuit affirmed the District Court's decision.<sup>138</sup>

In deciding *Morrison*, the Supreme Court utilized the three-part Commerce Clause framework elucidated in *Lopez*. The Court reaffirmed that the Commerce Clause is an enumerated power of limited scope.<sup>139</sup> Given that the Violence Against Women Act dealt neither with the channels of commerce nor its instrumentalities, the Court did not address the first two subjects of the *Lopez* analysis.<sup>140</sup> Regarding the third subject, the Court scrutinized the Act exactly as it had the Gun-Free School Zones Act.

The Court rejected the contention that gender-motivated crime qualifies as economic activity.<sup>141</sup> While the majority stopped short of adopting a rule against aggregating the effects of noneconomic activity in order to find a connection to interstate commerce, it stated such a rule would be unnecessary since "our cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature."<sup>142</sup> The Court also found, that similar to *Lopez*, the Violence Against Women Act did not contain a jurisdictional element establishing a sufficient nexus between the federal cause of action and congressional power under the Commerce Clause.<sup>143</sup>

The most significant difference between *Morrison* and *Lopez* was that *Morrison* had reams of data supporting the substantial impact that gender-motivated violence has on the national economy. The Court stated, however, that "[s]imply because Congress may conclude that a particular activity substantially affects interstate commerce does not necessarily make it so."<sup>144</sup> Rather, determining which activities substantially affect interstate commerce to the extent that it falls under the Commerce Clause "is ultimately a judicial rather than a legislative concern and can be settled finally only by . . . [the Supreme] Court."<sup>145</sup> In *Morrison*, the Court found the legislative findings unpersuasive because they relied heavily on a "but-for causal chain from the initial occurrence of violent

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135. Brzonkala v. Va. Polytechnic and State Univ., 935 F. Supp. 779, 781-82 (W.D. Va. 1996).

136. *Id.*

137. *Id.*

138. Brzonkala v. Va. Polytechnic and State Univ., 169 F.3d 820, 889 (4th Cir. 1999).

139. *Morrison*, 529 U.S. at 608.

140. *Id.* at 609.

141. *Id.* at 613.

142. *Id.*

143. In *Lopez*, such a showing could have been made had Congress tied the prohibition of guns in school zones to those guns that had moved in interstate Commerce.

144. *Id.* at 614 (quoting *Lopez*, 514 U.S. at 557, n.2) (internal quotations omitted).

145. *Id.*

crime to every attenuated effect on interstate commerce."<sup>146</sup> Such a broad interpretation raised the specter of a general federal police power. And once again, the Court refused to expand congressional authority to this extent.

### C. *The HEALTH Act in Light of Lopez and Morrison*

What is the fate of the HEALTH Act following the recent refinements of Commerce Clause principles? Must future legislation have an obvious connection to interstate commerce? And does the HEALTH Act have that connection?

Both *Lopez* and *Morrison* are reminders that Congress must do more than "ritualistically" find a connection to interstate commerce.<sup>147</sup> Both decisions clearly indicate a willingness on the part of the Court to constrain Congress to only those areas enumerated in the Constitution.<sup>148</sup> The question then becomes whether the HEALTH Act, with the limits it places on medical malpractice litigation, is a constitutionally permissible exercise of the commerce power post *Lopez* and *Morrison*.

In answering this question, it is helpful to reduce the *Lopez* and *Morrison* analyses to basic principles. These decisions make it plain that Congress continues to enjoy plenary power under the Commerce Clause to regulate the channels of interstate commerce and the instrumentalities of commerce, including any activities, persons, products, or services that move across state lines.<sup>149</sup> Furthermore, the Court will continue to defer to Congress and will employ only rational basis review of regulations concerning single-state *commercial* activities, so long as Congress feels that such activities "substantially affect" interstate commerce.<sup>150</sup> However, the Court will not defer to Congress regarding regulation of single-state *noncommercial* activities regardless of how strongly Congress believes that the activities significantly impact interstate commerce.<sup>151</sup> Instead, the

146. *Id.* at 615.

147. See Glen H. Reynolds & Brannon P. Denning, *Lower Court Readings of Lopez, or What if the Supreme Court Held a Constitutional Revolution and Nobody Came?*, 2000 WISC. L. REV. 369, 379 (referring to this formalistic approach as "Simon Says *Lopez*" whereby a statute will be upheld as long as certain "magic words" are invoked in legislation stemming from Congress's authority under the Commerce Clause).

148. See Steven G. Calbresi, *A Government of Limited and Enumerated Powers: In Defense of United States v. Lopez*, 94 MICH. L. REV. 752, 752 (1995) (characterizing *Lopez* as "a revolutionary and long overdue revival of the doctrine that the federal government is one of limited and enumerated powers").

149. *Morrison*, 529 U.S. at 609; *United States v. Lopez*, 514 U.S. 549 (1995).

150. See *Lopez*, 514 U.S. at 560 ("Where economic activity substantially affects interstate commerce, legislation regulating that activity will be sustained."). See also ROTUNDA & NOWAK, *supra* note 80, § 4.9 (discussing critical elements of Commerce Clause analysis).

151. *Lopez*, 514 U.S. at 551 ("Even *Wickard* which is perhaps the most far reaching example of Commerce Clause authority over intrastate activity, involved economic activity in a way that the possession of a gun in a school zone does not."). See also *Morrison*, 529 U.S. at 611-13 ("*Lopez*'s review of Commerce Clause case law demonstrates that in those cases where we have sustained federal regulation of intrastate activity based upon the activity's substantial effects on interstate commerce, the activity in question has been some sort of economic endeavor. . . . [T]hus far in our Nation's history our cases have

Court will require the government to show that as a class, single-state noncommercial activities have a real and not merely speculative effect on interstate commerce.<sup>152</sup> Even then, the Court may find congressional determinations unpersuasive.<sup>153</sup>

In analyzing a new congressional venture undertaken pursuant to the Commerce Clause, the Court must first determine whether the activity to be regulated is commercial or noncommercial in nature.<sup>154</sup> If the activity proves commercial, the analysis still must continue but does so with a strong presumption towards constitutionality.<sup>155</sup> If the activity proves noncommercial, the presumption evaporates but does not necessarily dictate a finding of unconstitutionality.<sup>156</sup> Regardless of how the regulated activity is ultimately characterized, the Court is still likely to require the presence of a jurisdictional element establishing a sufficient nexus between the activity in question and congressional power under the Commerce Clause.<sup>157</sup> In making this determination, the Court may look to, but may not be swayed by, the statute's legislative history.<sup>158</sup> Even if the Court is satisfied that all of the elements point to a constitutional use of the commerce power, the Court may nevertheless be reluctant to uphold the regulation if it allows the federal government to significantly intrude into an area of the law traditionally controlled by the States.<sup>159</sup> We turn now to an application of this analysis to the HEALTH Act.

### *1. The Tort of Medical Malpractice as Commercial or Noncommercial Activity*

The HEALTH Act baldly asserts that the health care and insurance industries are "industries affecting interstate commerce."<sup>160</sup> Additionally, the HEALTH Act declares that medical malpractice liability litigation impinges on

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upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature."); ROTUNDA & NOWAK, *supra* note 80, § 4.9 (discussing critical elements of Commerce Clause analysis).

152. *Lopez*, 514 U.S. at 557.

153. *See id.* at 557 & n.2.

154. ROTUNDA & NOWAK, *supra* note 80, § 4.9.

155. *Id.*

156. *Id.* ("Federal regulation of single state activities that are not commercial in character will not be upheld unless the federal government can demonstrate to the Court that there is a factual basis for the conclusion that the single state [noncommercial] activities, as a class, have a substantial effect on interstate commerce.").

157. *United States v. Morrison*, 529 U.S. 598, 613 (2000).

158. *See Lopez*, 514 U.S. at 563 (stating that the existence of such findings may "enable us to evaluate the legislative judgment that the activity in question substantially affects interstate commerce, even though no such substantial effect is visible to the naked eye").

159. *See id.* at 577, 580 (Kennedy, J., concurring) ("Were the Federal Government to take over the regulation of entire areas of traditional state concern, areas having nothing to do with the regulation of commercial activities, the boundaries between the spheres of federal and state authority would blur."). *See also Morrison*, 529 U.S. at 615 (stating a fear "that Congress might use the Commerce Clause to completely obliterate the Constitution's distinction between national and local authority").

160. HEALTH Act, H.R. 5, 108th Cong. § 2(a)(2) (2003).

these industries and hence interstate commerce by “contributing to the high costs of health care and premiums for . . . liability insurance purchased by health care system providers.”<sup>161</sup> In establishing the interstate commerce connection between medical malpractice litigation and the insurance and health care industries, the legislative history of the HEALTH Act cites a report from the Congressional Research Service (“CRS”) that supports the constitutionality of federal regulation of torts such as medical malpractice.<sup>162</sup>

The CRS report references 1940s case law which held that the business of insurance constitutes interstate commerce for purposes of the Commerce Clause and convincingly establishes that Congress does indeed have the authority to regulate the insurance and health care industries.<sup>163</sup> The report then cites *Wickard* and other pre-*Lopez* Commerce Clause cases to support the notion that because medical malpractice litigation substantially affects interstate commerce, Congress need only have a rational basis upon which to regulate this area of tort law.<sup>164</sup>

The legislative history of the HEALTH Act, as informed by the CRS report, puts forth a credible argument that health care related litigation substantially affects these industries.<sup>165</sup> But both the CRS report and the legislative history gloss over the fact that the HEALTH Act does not seek to regulate these industries directly, but rather only activities that affect them.<sup>166</sup> The report and the

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161. *Id.*

162. H.R. REP. NO. 108-32, pt. 1, at 37 (2003) (citing HENRY COHEN, CONG. RESEARCH SERV., FEDERAL TORT REFORM LEGISLATION: CONSTITUTIONALITY AND SUMMARIES OF SELECTED STATUTES (updated May 2, 2003)).

163. COHEN, *supra* note 162, at 2 (citing *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944)). It is not at all surprising that the Court in *South-Eastern Underwriters* came to the conclusion that the insurance industry properly falls under congressional commerce authority. In 1941, when the case was decided, the insurance industry in the United States had assets totaling more than thirty-seven billion dollars—an amount roughly equivalent in value to all the farm lands and buildings in the country at that time. *South-Eastern Underwriters*, 322 U.S. at 540. Additionally, the industry’s annual revenue exceeded six billion dollars—more than the average annual revenue of the United States during the same period. *Id.*

164. See COHEN, *supra* note 162, at 2 (“The Supreme Court has held that Congress’s power to regulate interstate commerce includes the power to regulate any activity that ‘exerts a substantial effect on interstate commerce,’ or is within a ‘class of activities . . . within the reach of federal power.’ Furthermore, ‘when Congress has determined that an activity affects interstate commerce, the courts need inquire only whether the finding is rational.’” (emphasis in original) (internal citations omitted)).

165. See H.R. REP. NO. 108-32, pt. 1, at 18–236 (2003).

166. Curiously, the California statute upon which the HEALTH Act is modeled, the so-called “MICRA Act” of 1975, CAL. CIV. CODE § 3333.2 (West 2005), which limits damages in the same manner as the proposed limits in the HEALTH Act, did not control insurance premiums as promised in the years immediately following its passage. See Polakow-Saransky, *supra* note 45, at 59. It was not until 1988, when the voters of California passed Proposition 103 forcing publicly traded insurance companies to reduce their rates by twenty percent, that the medical liability insurance markets in California stabilized. *Id.* The additional element of direct regulation of the insurance industry is absent from the HEALTH Act, which is odd given that it seems to be a necessary component of effective

legislative history ignore altogether the importance the Court has recently placed on the condition that the activity affecting interstate commerce should itself be commercial in nature.<sup>167</sup> Neither the report nor the legislative history establish or even attempt to establish that medical malpractice litigation is in fact a commercial activity. Thus, both of these authorities fail to address the critical question of whether medical malpractice litigation is a commercial activity subject to congressional regulation under the commerce power.

It is true that medical malpractice claims have a commercial dimension. Plaintiffs injured due to health care worker negligence seek compensation for economic harms including lost wages, lost earning potential, out-of-pocket medical expenses, etc.<sup>168</sup> Defendants in medical malpractice suits also have an economic stake in the outcome of such litigation as they may be held liable for substantial jury awards.<sup>169</sup> But these competing economic interests do not necessarily imbue medical malpractice litigation with a decidedly commercial character.

In writing for the majority in *Lopez*, Chief Justice William H. Rehnquist commented that “depending on the level of generality, any activity can be looked upon as commercial.”<sup>170</sup> Therefore, an attempt to determine whether a certain “intrastate activity is commercial or noncommercial in nature may in some cases result in legal uncertainty.”<sup>171</sup> The Court, however, seemed to have little trouble in holding that the possession of guns near schools or gender-motivated violence are not intrinsically commercial activities and that Congress overreached when attempting to regulate them.<sup>172</sup> The Court attributed little significance to the assertion that both activities have a substantial impact on interstate commerce.<sup>173</sup> While the Court relied heavily on the commercial versus noncommercial distinction in deciding both *Lopez* and *Morrison*, it failed to provide any guidelines about how to resolve any uncertainty regarding this distinction. Rather, the Court

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control of insurance rates and that it has already been established that Congress could regulate insurers themselves without running afoul of limitations on the Commerce Power.

167. See *United States v. Morrison*, 529 U.S. 598, 611 (2000).

168. *DOBBS*, *supra* note 23, § 377.

169. *Id.*

170. *United States v. Lopez*, 514 U.S. 549, 567 (1995).

171. *Id.* at 566.

172. See *id.* at 561 (noting that the Gun-Free School Zones Act is “a criminal statute that by its terms has nothing to do with ‘commerce’ or any sort of economic enterprise, however broadly one might define those terms”). See also *Morrison*, 529 U.S. at 613 (“Gender-motivated crimes of violence are not, in any sense of the phrase, economic activity.”).

173. See *Morrison*, 529 U.S. at 615 (noting that while the Violence Against Women Act is supported by congressional findings showing a substantial connection between such violence and interstate commerce, to hold that noneconomic, gender-motivated violence is sufficient to justify regulation under the Commerce Clause would allow Congress to regulate any activity no matter how “attenuated [its] effect on interstate commerce”). The same could be said for the Gun-Free School Zones Act. Such activity might have a real effect on interstate commerce, allowing Congress to reach such criminal acts would open the door to federal regulation of areas traditionally controlled by the States such as family law or education. See *supra* note 122.

seemed to suggest that the judiciary would have the discretion to make any determination and that it would do so on a case-by-case basis.<sup>174</sup>

An example of this approach is found in *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*.<sup>175</sup> In this case, the Court struggled to find the point at which an activity with some commercial elements becomes sufficiently commercial in nature to render it subject to congressional regulation under the Commerce Clause.<sup>176</sup> The *Solid Waste Agency* Court examined whether the Army Corps of Engineers (“the Corps”) could lawfully assert control over abandoned sand pits that had filled with water and become ponds. The Corps justified its claim on the ponds by arguing that they were subject to federal regulation under the Clean Water Act.<sup>177</sup> The Corps argued further that federal control was proper under the Commerce Clause because certain species of migratory birds used the ponds and that “millions of people spend over a billion dollars annually on recreational pursuits related to migratory birds.”<sup>178</sup> Because commercial interests were so clearly implicated, the Corps believed that federal regulation was constitutionally proper.<sup>179</sup>

In evaluating the validity of this argument, the Court looked at the purpose and function of the thing to be regulated, rather than any ancillary commercial effect that it might have.<sup>180</sup> The Court refused to accept the Corps’ argument that the object of regulation was in fact petitioner’s municipal landfill, something that “is plainly commercial in nature.”<sup>181</sup> Instead, the Court determined that abandoned sand pits are not navigable waterways that can be regulated by Congress and that they simply do not exist for commercial purposes.<sup>182</sup>

This purpose and function analysis may yield similar results when applied to medical malpractice litigation. While medical malpractice suits do involve claims for economic harms suffered as a result of negligence, the overall purpose of these suits cannot easily be classified as predominantly commercial.<sup>183</sup> For

174. See *Morrison*, 529 U.S. at 610 (noting that Congress’s commerce power is subject to judicially enforceable outer-limits and that *legal uncertainties* regarding the economic/non-economic distinction should be resolved by the courts). See also Robert A. Schapiro & William W. Buzbee, *Unidimensional Federalism: Power and Perspective in Commerce Clause Adjudication*, 88 CORNELL L. REV. 1199, 1236–43 (2003) (criticizing the Court’s focus on single activities as the touchstone of legislative interpretation for Commerce Clause purposes and questioning the judiciary’s ability to determine, on a case-by-case basis, whether the subject of particular legislation is sufficiently economic in nature).

175. 531 U.S. 159 (2001); see also ROTUNDA & NOWAK, *supra* note 80, § 4.9 (discussing *Solid Waste Agency* as an example of the Court’s emphasis on the commercial/noncommercial nature of the regulated activity).

176. ROTUNDA & NOWAK, *supra* note 80, § 4.9.

177. *Solid Waste Agency*, 531 U.S. at 162–67.

178. *Id.* at 173.

179. *Id.*

180. *Id.*

181. *Id.*

182. *Id.*

183. See Jerry J. Phillips, *Hoist by Own Petard: When a Conservative Commerce Clause Interpretation Meets Conservative Tort Reform*, 64 TENN. L. REV. 647, 662–63

instance, many medical malpractice suits seek recovery for noneconomic harms, such as punitive damages and pain and suffering.<sup>184</sup> Such recovery is consistent with two of the primary goals of tort law, deterrence and compensation, neither of which reflects a commercial purpose.<sup>185</sup>

Deterrence, usually in the form of punitive damages, is not a commercial goal.<sup>186</sup> To the extent that compensation is economic in nature, one could say that it serves a commercial purpose. However, it also serves the noneconomic function of correcting a wrong committed against an innocent party.<sup>187</sup> Regardless of how compensation is characterized, the HEALTH Act does not even seek to regulate it.<sup>188</sup> Rather, the HEALTH Act's limitations fall almost exclusively on noneconomic recovery in the form of pain and suffering and punitive damages.<sup>189</sup> In light of this emphasis, it is difficult to treat the HEALTH Act as legislation properly confined to the regulation of commercial activity permissible under the Commerce Clause. In terms of its constitutionality then, the HEALTH Act may very well fail on this account.

## 2. *The Necessary Jurisdictional Element as Discussed in Both Lopez and Morrison*

In deciding *Lopez*, the Court was concerned that the Gun-Free School Zones Act "contained no express jurisdictional element which might limit its reach to a discrete set of firearm possessions that additionally have an explicit connection with or effect on interstate commerce."<sup>190</sup> Such an element is an important factor in assisting courts in determining whether laws are enacted as part of congressional regulation of interstate commerce.<sup>191</sup> In both *Lopez* and *Morrison*, the Court admonished Congress not to take its Commerce Clause authority for granted<sup>192</sup> and reminded Congress that aggregation of certain activities in the style of *Wickard* is generally appropriate only insofar as the underlying activity is commercial.<sup>193</sup> When an activity is not obviously commercial, attempts at

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(1997) (suggesting that products liability and other torts such as medical malpractice are not in essence economic issues).

184. DOBBS, *supra* note 23, § 377. *See also id.* § 381.

185. *See Phillips, supra* note 183, at 662.

186. *Id.*

187. *Id.*

188. *See HEALTH Act*, H.R. 5, 108th Cong. § 4(a) (2003) ("In any health care lawsuit, the full amount of a claimant's economic loss may be fully recovered without limitation.").

189. *Id.* § 4(b).

190. *United States v. Lopez*, 514 U.S. 549, 562 (1995).

191. *United States v. Morrison*, 529 U.S. 598, 611–12 (2000).

192. *See Morrison*, 529 U.S. at 615 (pointedly noting that to accept the government's argument would allow "Congress to regulate any crime as long as the nationwide aggregated impact of that crime has substantial effects on employment, production, transit, or consumption"); *Lopez*, 514 U.S. at 557 ("[E]ven [our] modern-era precedents which have expanded congressional power under the Commerce Clause confirm that this power is subject to outer limits.").

193. *See Morrison*, 529 U.S. at 613 ("While we need not adopt a categorical rule against aggregating the effects of any noneconomic activity in order to decide these cases,

congressional regulation become suspect.<sup>194</sup> Thus, in order for a statute allegedly grounded on the commerce power to survive constitutional scrutiny, the Court requires that the statute demonstrate an identifiable and convincing nexus between the regulated activity and interstate commerce.<sup>195</sup> A jurisdictional element limiting a statute's reach to only those instances in which interstate commerce is truly involved would help place that statute on constitutionally firm ground.

The HEALTH Act has no jurisdictional element as contemplated in *Lopez* and *Morrison*. As the dissenting view in the legislative history points out, the HEALTH Act makes a "flat and unsubstantiated assertion that all of the activities it regulates affect interstate commerce."<sup>196</sup> Like the gun at issue in *Lopez*, not all medical malpractice litigation necessarily affects interstate commerce.<sup>197</sup> While many malpractice insurance companies do business in several states, most medical malpractice claims arise and are settled entirely within a given jurisdiction and thus have limited "extraterritorial impacts."<sup>198</sup> In fact, most premiums for medical malpractice insurance are set according to the malpractice experience of a particular region within a state.<sup>199</sup> This calls into question the assertion that medical malpractice litigation has significant "spill-over" effects and thus makes the need for a specific jurisdictional element that much more important.<sup>200</sup>

This is not to say that such an element is absolutely necessary. If the Court determines that medical malpractice litigation is in itself a commercial activity, the lack of the jurisdictional element may not be so critical.<sup>201</sup> However, if the Court cannot be convinced, the absence of a jurisdictional element in the HEALTH Act could prove an insurmountable constitutional hurdle.

### *3. The Effect of the HEALTH Act on an Area of Law Traditionally Controlled by the States*

"Were the Federal Government to take over the regulation of entire areas of traditional state concern, areas having nothing to do with the regulation of commercial activities, the boundaries between the spheres of federal and state authority would blur . . . ."<sup>202</sup> So wrote Justice Kennedy in *Lopez*. His statement underscores one of the major themes of recent Commerce Clause jurisprudence:

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thus far in our Nation's history our cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature."

194. *Lopez*, 514 U.S. at 561 (noting that the Gun-Free School Zones Act was "a criminal statute that by its terms has nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might define those terms").

195. *Id.* at 580 (Kennedy, J., concurring); see also *Morrison*, 529 U.S. at 611-12.

196. H.R. REP. NO. 108-32, pt. 1, at 253 (2003).

197. See Gary T. Schwartz, *Considering the Proper Federal Role in American Tort Law*, 38 ARIZ. L. REV. 917, 922 (1996).

198. *Id.*

199. *Id.*

200. *Id.*

201. See *United States v. Lopez*, 514 U.S. 549, 560 (1995) ("Where economic activity substantially affects interstate commerce, legislation regulating that activity will be sustained.").

202. *Lopez*, 514 U.S. at 577 (Kennedy, J., concurring).



the balance of power between federal and state governments is upset when Congress injudiciously employs its commerce power to intrude into areas of traditional state concern.<sup>203</sup> Such intrusions require intervention by the Court to help restore this balance and to protect traditional notions of federalism and a government restricted to enumerated powers.<sup>204</sup> Both *Lopez* and *Morrison* make plain the Court's keen interest in doing just that.

The HEALTH Act violates general principles of federalism for two reasons. First, tort law developed in the common law of the States and has been recognized as a state prerogative for over two hundred years.<sup>205</sup> To allow Congress to federalize certain elements of state medical malpractice torts would foreclose the States from "experimenting and exercising their own judgment in an area to which States lay claim by right of history and expertise."<sup>206</sup> Second, the HEALTH Act prevents state courts from being the final arbiters of state tort law.<sup>207</sup> While it is well established that state courts must enforce federal rights as well as federal procedures in claims arising from federal rights of action, it is not clear that Congress possesses the authority to prescribe procedures that state courts must use to enforce state rights of action.<sup>208</sup> These two issues may be of enough significance that the Court would be unwilling to uphold the HEALTH Act, as it would have too great a "tendency to . . . displace state regulation in areas of traditional state concern . . . ."<sup>209</sup>

As to the issue of state prerogatives, the Court in *Morrison* recognized that the Commerce Clause makes distinctions between activities that are national in scope and those that are local.<sup>210</sup> The Court stated further that local activities are more likely to fall outside the acceptable reach of the commerce power.<sup>211</sup> At least one scholar makes a reasonable argument that medical malpractice litigation is mainly a local matter.<sup>212</sup> Although the business of insurance is national in scope, the litigation system in which it plays a role is not. Doctors are licensed by the state in which they practice, and they may only practice legally within the states in

203. Reynolds & Denning, *supra* note 147, *passim*.

204. *Lopez*, 514 U.S. at 581 (Kennedy, J., concurring) (stating, in regard to federal regulations that intrude into areas of state concern: "In these circumstances, we have a particular duty to ensure that the federal-state balance is not destroyed").

205. Schwartz, *supra* note 197, at 918–19.

206. *Lopez*, 514 U.S. at 583 (Kennedy, J., concurring).

207. H.R. REP. NO. 108-32, pt. 1, at 253 (2003).

208. See Anthony J. Bellia, Jr., *Federal Regulation of State Court Procedures*, 110 YALE L.J. 947 (2001).

209. *Lopez*, 514 U.S. at 583 (Kennedy, J., concurring). Professor Nim Razook agrees that the HEALTH Act may fail the Court's current Commerce Clause analysis. See Nim Razook, *A National Medical Malpractice Reform Act (and Why the Supreme Court May Prefer to Avoid It)*, 28 SETON HALL LEGIS. J. 99, 121–23 (2003) ("While a national product liability law would seem to comport with the Court's Commerce Clause jurisprudence, the same may not be true for other tort issues, including those surrounding medical malpractice. Acts of medical malpractice are often local, in that physicians operate in and are license [sic] by a single state in which the patient also resides.").

210. *United States v. Morrison*, 529, U.S. 598, 617–18 (2000).

211. *Id.* at 618.

212. Schwartz, *supra* note 197, at 922.

which they are licensed.<sup>213</sup> The average doctor usually sees patients who are residents of that same state and any conflicts that may arise between the doctor and patient are usually resolved in state court.<sup>214</sup> If a settlement is reached, the defendant may be paid by an insurance company that has been formed and operates exclusively in a particular state.<sup>215</sup> These factors all tend to support the argument that medical malpractice is more local than national in character and should remain within the province of state law free from federal interference.

The more compelling federalism argument, however, is in the effect that the HEALTH Act would have on the judiciary of each individual state. The Supreme Court has previously held that Congress may not “commandeer” state legislatures or their executive branches.<sup>216</sup> By imposing a new burden of proof, the Congress is in effect “commandeering” state courts. Why then, should Congress be able to do so?

In the past, the Court has determined that Congress does have some power to intrude into the workings of state courts.<sup>217</sup> As the Court explained in *New York v. United States*, Congress can pass laws and require that they be enforceable in state courts.<sup>218</sup> This power emanates from the Supremacy Clause of the Constitution and its provision that federal law “shall be the supreme Law of the Land” enforceable in every state and territory within the United States.<sup>219</sup>

This rationale, however, may only allow Congress to compel state courts to enforce federal substantive law or federal procedures that arise out of a federal right of action. Several commentators argue that the Supremacy Clause does not permit Congress to prescribe procedural law arising out of state rights of action such as those found in state defined tort law.<sup>220</sup> To permit otherwise would intrude upon a fundamental instrument of state sovereignty, the effect of which would offend the Court’s more protective stance towards state’s rights and judicial prerogatives as enunciated in *Lopez* and *Morrison*.<sup>221</sup> Insofar as the HEALTH Act imposes procedural limitations on state courts in such matters as the required burden of proof, the HEALTH Act may unduly impinge upon the sovereignty of the States and their judiciaries.

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213. *Id.*

214. *Id.*

215. *Id.*

216. *Printz v. United States*, 521 U.S. 898 (1997) (holding that Congress has no authority to compel state executives to enforce a federal regulatory program); *New York v. United States*, 505 U.S. 144 (1992) (holding that Congress has no authority to compel state legislators to enact a federal program). *See also* Bellia, *supra* note 208, at 957.

217. *New York v. United States*, 505 U.S. at 178.

218. *Id.*

219. *Id.*

220. *See, e.g.*, Bellia, *supra* note 208; H. Jefferson Power & Benjamin J. Priester, *Convenient Shorthand: The Supreme Court and the Language of State Sovereignty*, 71 U. COLO. L. REV. 645 (2000) (exploring the various contexts in which the Supreme Court has used concepts of state sovereignty to strike down federal legislation).

221. *See* Bellia, *supra* note 208.

## IV. CONCLUSION

As stated in its legislative history, the HEALTH Act and the limitations it places on medical malpractice suits brought in state courts is justified as a permissible exercise of Congress's power under the Commerce Clause.<sup>222</sup> Recent Supreme Court cases, however, have significantly altered Commerce Clause jurisprudence and have limited congressional authority under this Clause to items that move in interstate commerce or to commercial activities that "substantially affect" interstate commerce.<sup>223</sup> If Congress attempts to regulate noncommercial activities, the regulation should be limited to only those elements of that activity that have a demonstrable connection to interstate commerce.<sup>224</sup> Even if a regulation of noncommercial intrastate activity is so limited, the Court may still refuse to uphold it if it unnecessarily intrudes upon an area of traditional state concern.<sup>225</sup>

The HEALTH Act may not survive constitutional scrutiny because it appears to fail the Court's refined view of what constitutes proper congressional use of the commerce power. First, the purely intrastate tort of medical malpractice may not qualify as a commercial activity. As a noncommercial activity, any presumption of constitutionality surrounding congressional regulation evaporates.<sup>226</sup> Also, the HEALTH Act does not contain a jurisdictional element that would limit its reach to only those portions of medical malpractice litigation that have an actual and identifiable impact on interstate commerce.<sup>227</sup> Finally, given that tort law has been a traditional concern of the States, the Court may regard the HEALTH Act as an unacceptable assertion of federal power over state prerogatives and thus find that it offends the balance of power prescribed by our system of federalism as mandated by the Constitution.<sup>228</sup>

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222. H.R. REP. NO. 108-32, pt. 1.

223. *United States v. Morrison*, 529 U.S. 598, 610-11, (2000); *United States v. Lopez*, 514 U.S. 549, 558-59 (1995).

224. *Morrison*, 529 U.S. at 612; *Lopez*, 514 U.S. at 558-59.

225. *Morrison*, 529 U.S. at 615-16; *Lopez*, 514 U.S. at 583 (Kennedy, J., concurring).

226. *See supra* Section III.C.1.

227. *See supra* Section III.C.2.

228. *See supra* Section III.C.3.

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