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HEALTH COURTS ARE UNCONSTITUTIONAL

There are substantial constitutional problems with state and federal proposals that eliminate or severely restrict the right to civil jury trial for victims of medical malpractice. See, Amy Widman and Francine A. Hochberg, “Federal Administrative Health Courts Are Unconstitutional: A Reply to Elliott, Narayan, and Nasmith,” 33(4) *Journal of Health Politics, Policy and Law* 799 (2008); Amy Widman, “Why Health Courts are Unconstitutional,” 27 *Pace L. Rev.* 55 (Fall 2006).

Almost every state constitution guarantees the right to trial by jury in civil cases and the right to access the court system for redress; health courts require that patients give up these rights without any reasonable substitute.

- Health courts are not “no-fault” systems, where compensation for an injury is automatic and the victim does not have to prove fault. Instead, health courts require that injured patients prove that an injury or death was “avoidable” before they can receive compensation. This standard is much like negligence. Courts have held that it is only a fair trade for claimants to give up their right to jury if in turn they no longer have to prove fault, unlike the health court model. *New York Central Railroad Co. v. White*, 37 S. Ct. 247 (1917), cited in Amy Widman, “Why Health Courts are Unconstitutional,” 27 *Pace L. Rev.* 55 (Fall 2006).
- Courts have struck down far less intrusive measures, like caps, in many states on many different grounds, including infringing on the right to jury trial, the right to recourse, and equal protection especially when the laws under scrutiny are not responsive to an actual problem, but rather serve only to disadvantage some population unreasonably. Amy Widman, “Why Health Courts are Unconstitutional,” 27 *Pace L. Rev.* 55 (Fall 2006)

Congress cannot infringe on state medical malpractice laws by requiring health courts or otherwise restricting patients’ rights.

- Medical malpractice is not a separate body of law; it is part and parcel of ordinary tort law (common law) that has been enshrined in state law since the beginning of our civil justice system. There is no such thing as federal medical malpractice law.
- The Commerce Clause of the Constitution is clear: Congress only has the authority to interfere with state law in this fashion when there is interstate commerce. Neither medical injuries nor medical malpractice litigation constitutes economic activity. Both are primarily *intrastate* activities. Amy Widman and Francine A. Hochberg, “Federal Administrative Health Courts Are Unconstitutional: A Reply to Elliott, Narayan, and Nasmith,” above, citing *United States v. Lopez*, 514 U.S. 549 (1995), *United States v. Morrison*, 529 U.S. 598 (2000).
- Other provisions of the U.S. Constitution would be violated, including the Seventh Amendment right to trial by jury; separation of powers and the spending clause. Amy Widman and Francine A. Hochberg, “Federal Administrative Health Courts Are Unconstitutional: A Reply to Elliott, Narayan, and Nasmith,” 33(4) *Journal of Health Politics, Policy and Law* 799 (2008).