

Libertarian Slams GOP Health Bill

Already under attack from a consumer-rights group, a House Republican bill to limit the ability of patients to seek damages for medical malpractice now is coming under fire from the right.

Randy Barnett, a constitutional law scholar and a senior fellow at the libertarian Cato Institute, penned an [op-ed in the *Washington Examiner*](#) this weekend slamming H.R. 5, the "Help Efficient, Accessible, Low-Cost, Timely Healthcare (HEALTH) Act of 2011," as an unconstitutional federal overreach.

A constitutional law professor at Georgetown Law Center, Barnett says that H.R. 5 amounts to a federal government takeover of an issue that has always been decided by the states.

"This bill alters state medical malpractice rules by, for example, placing caps on noneconomic damages," he says. "But tort law — the body of rules by which persons seek damages for injuries to their person and property — have always been regulated by states, not the federal government. Tort law is at the heart of what is called the 'police power' of states. What constitutional authority did the supporters of the bill rely upon to justify interfering with state authority in this way?"

"Constitutional law professors have long cynically ridiculed a 'fair-weather federalism' that is abandoned whenever it is inconvenient to someone's policy preferences," adds Barnett. "If House Republicans ignore their Pledge to America to assess the Constitution themselves, and invade the powers 'reserved to the states' as affirmed by the Tenth Amendment, they will prove my colleagues right."

Barnett argues that H.R. 5 would take away legal rights of injured patients by:

- Imposing a one-size-fits-all \$250,000 cap on non-economic damages that injured patients can seek;
- Extending this cap to health care providers that intentionally harm or kill patients, as well as insurance companies that refuse to pay just claims for medical bills;
- Limiting the right to seek justice when injured by a defective medical device, drug, or abuse suffered in nursing homes.

In addition to Barnett, the American Bar Association, constitutional scholar Rob Natelson of the Independence Institute, and the National Conference of State Legislatures have all cited states' rights and federalism concerns for opposing H.R. 5. Consumer and patient safety groups have also written congressional leadership to speak out against the legislation.

The bill, as supporters readily acknowledge, is modeled after California's state Medical Injury Compensation Reform Act (MICRA) enacted in 1975. MICRA included caps on damages and other limits on what could be collected through lawsuits brought because of

injuries sustained due to medical negligence.

But it was insurance reform, not malpractice liability limits, which held down doctors' malpractice premiums in California, according to [Consumer Watchdog](#), another of the organizations which oppose H.R. 5.