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Conflicts Between Kentucky's New Tort Reform and the Jural Rights Doctrine

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NOTES

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Christopher N. Jacovitch

TABLE OF CONTENTS

INTRODUCTION ........................................................................................................... 124
I. KENTUCKY’S NEW TORT REFORM ..................................................................... 126
   A. Senate Bill 4: Malpractice Review Panels ...................................................... 129
   B. Proposals During the 2018 General Assembly ............................................... 130
      i. Senate Bill 20 .................................................................................................. 131
      ii. Senate Bill 2 ................................................................................................. 132
II. THE JURAL RIGHTS DOCTRINE ........................................................................ 132
   A. Foundations of the Doctrine ........................................................................... 134
   B. Subsequent Cases and Doctrinal Development: The Jural Rights Doctrine Enjoys an Expansionist Era ................................................................. 137
   C. First Serious Questions Raised Regarding the Validity of the Jural Rights Doctrine ........................................................................................................... 139
   D. Courts Take Notice of the Doctrine’s Critics: A Period of Contraction .......... 141
III. NAVIGATING THE JURAL RIGHTS DOCTRINE IN THE CONTEXT OF THE NEW TORT REFORM: A MINEFIELD FOR LITIGANTS AND LEGISLATORS AND WHAT COURTS SHOULD DO TO ADDRESS IT .............................................. 141
   A. Current Litigation Regarding Senate Bill 4 .................................................... 141
   B. The Kentucky Supreme Court Should Use Current Litigation to Reaffirm the Jural Rights Doctrine and Refine the Scope of Permissible Legislation ........................................................................................................... 143
   C. Rejecting a Constitutional Amendment .......................................................... 145
      i. A Brief Review of Kentucky’s Constitutional Amendment Procedure .......... 145
      ii. Why Kentucky Should Not Amend Its Constitution .................................... 146
CONCLUSION ............................................................................................................. 147

1 J.D. Candidate 2019, University of Kentucky College of Law. The author would like to thank his wife, Dina Klimkina, for her endless patience and support during the process of writing this Note. The author would also like to thank the Staff Editors, Articles Editors, Production Editors, and Editor-in-Chief of the Kentucky Law Journal, whose invaluable assistance and advice greatly improved the quality of this Note. Litigation that may substantially impact the analysis and conclusions of this Note is currently pending before the Kentucky Supreme Court. The author plans to provide an update on Kentucky Law Journal Online following the Supreme Court’s decision in that case.
INTRODUCTION

In November 2016, the Republican Party won a majority in the Kentucky House of Representatives, and with it, control of the entire state government for the first time in ninety-five years. The newly emboldened majority laid out an ambitious legislative agenda, setting tort reform as one of its foremost goals. During the legislative session of 2017, State Senator Ralph Alvarado proposed a bill that required medical malpractice plaintiffs to bring their claims before a panel of doctors. The panel of doctors would review the complaint and evidence submitted by the parties, and then determine if the defendant healthcare provider acted negligently with regard to the plaintiff. According to legislators the bill would reduce the incidence of frivolous medical malpractice claims because experts would have the opportunity to review a plaintiff's claim prior to filing. The bill, modeled after an Indiana law, passed on partisan lines, and a state agency began its implementation in July 2017. 

But this proposal, like others before it, faces a significant obstacle in the Kentucky Constitution: the judicially created jural rights doctrine. Within days of the malpractice review panels going live, malpractice plaintiffs filed a complaint, arguing that the panel legislation was unconstitutional, relying on the jural rights doctrine among other things. VERIFIED COMPLAINT FOR DECLARATION OF RIGHTS AND FOR INJUNCTIVE RELIEF AT 22-26, CLAYCOMB V. COMMONWEALTH OF KENTUCKY, NO. 17-CI-708 (FRANKLIN CIR. CT. JUNE 29, 2017); SEE ALSO, RONNIE ELLIS, LAWMAKERS GO BACK TO WORK TUESDAY, DAILY INDEP. (FEB. 6, 2017), HTTP://WWW.DAILYNDEPENDENT.COM/NEWS/LAWMAKERS-GO-BACK-TO-WORK-TUESDAY/ARTICLE_5DADC7AA-ECAD-11E6-AE51-13756011506D.HTML [HTTPS://PERMA.CC/3GJ3-GYZ9].

2 Jack Brammer & Linda Blackford, Republicans Take the Kentucky House After 95 Years of Democratic Control, LEXINGTON HERALD-LEADER (Nov. 9, 2016, 1:02 AM), HTTP://WWW.KENTUCKY.COM/NEWS/GOVERNMENT/ARTICLE113464563.HTML [HTTPS://PERMA.CC/4DXZ-F4F4].
4 S.B. 4, 2017 GEN. ASSEMBLY, REG. SSS. (KY. 2017); SEE ALSO, RONNIE ELLIS, LAWMAKERS GO BACK TO WORK TUESDAY, DAILY INDEP. (FEB. 6, 2017), HTTP://WWW.DAILYINDEPENDENT.COM/NEWS/LAWMAKERS-GO-BACK-TO-WORK-TUESDAY/ARTICLE_5DADC7AA-ECAD-11E6-AE51-13756011506D.HTML [HTTPS://PERMA.CC/3GJ3-GYZ9].
Kentucky’s New Tort Reform

Constitution that prevents the elimination or alteration of a plaintiff’s ability to sue for certain causes of action and receive compensation for injuries. The Kentucky Supreme Court has relied on the doctrine to strike down previous attempts at tort reform as unconstitutional. But, recent Kentucky Supreme Court opinions have cast serious doubts on the continued viability of the jural rights doctrine, and a federal judge went as far as to say that the Kentucky Supreme Court’s recent opinions rendered the doctrine “no longer viable.” Although the Kentucky Supreme Court has not expressly overruled the doctrine, the doubts expressed by the Court, coupled with the legislative agenda of the new majority, have given questions surrounding the doctrine renewed saliency.

The passage of the malpractice review panel law will give the Kentucky Supreme Court an opportunity to once again consider the propriety of the jural rights doctrine. In October 2017, following a legal challenge brought by a malpractice plaintiff, a Kentucky Circuit Court issued a permanent injunction against the law, finding it unconstitutional on the grounds that it violated the jural rights doctrine. The Commonwealth appealed the decision thereafter, and in November 2017, the Kentucky Court of Appeals issued a stay of the lower court’s injunction. Utilizing Kentucky’s expedited appellate procedures, the Kentucky Supreme Court agreed to take up the case in December 2017, with oral arguments set to occur in 2018. In response to the perceived hostility of the judiciary towards tort reform proposals, state legislators proposed an amendment to the Kentucky Constitution during the 2018 legislative session that would eliminate or severely curtail the jural rights doctrine.

Legislators also proposed further legislation that would have placed greater barriers on the ability of malpractice plaintiffs to bring suit in Kentucky.
Although both of these proposals ultimately failed to be signed into law, they demonstrate the Kentucky General Assembly’s continued push for tort reform.

According to advocates, tort reform often works best as a comprehensive package, containing several different pieces of legislation. If legislators cannot find a work-around to avoid conflict with the jural rights doctrine, passing a tort reform package will likely prove impossible, leaving an ineffective patchwork of legislation that was able to meet constitutional muster. This note will argue that clarification on the continuing validity of the jural rights doctrine by the Kentucky Supreme Court is needed, and that the Court should reaffirm the doctrine, but somewhat limit its future application.

Part I discusses the aggressive new push for tort reform by the Kentucky legislature. Section I.A. focuses on the recently passed malpractice review panel legislation. Section I.B. discusses subsequent tort reform proposals, including a potential constitutional amendment. Part II provides a detailed description of the development of the jural rights doctrine. Section II.A discusses the origins of the doctrine and the constitutional text that forms its basis. Section II.B reviews the early application of the doctrine and the expansionist interpretation given to it by courts. Section II.C focuses on some academic criticisms of the doctrine. Section II.D discusses the current state of uncertainty surrounding the continued viability of the doctrine. Part III discusses potential solutions to resolve the inevitable conflict between an aggressive legislature seeking reform and a judiciary that has created uncertainty in the law. Section III.A discusses current litigation surrounding tort reform proposals and suggests a resolution to the case that might satisfy both sides. Section III.B argues that in order to resolve the uncertain state of the law the Kentucky Supreme Court should reaffirm the jural rights doctrine but justify its necessity in light of its critics’ concerns. Finally, Section III.C, briefly discusses and criticizes arguments that the Kentucky Constitution should be amended to alter those provisions that underlie the jural rights doctrine.

I. KENTUCKY’S NEW TORT REFORM

Since taking control of the legislature, Kentucky Republicans have sought to enact several tort reform proposals. A bill establishing malpractice review panels

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22 Gregory, supra note 21.
was the first major tort reform proposal passed in Kentucky under newly minted Republican control. During the 2018 legislative session Kentucky legislators have become more aggressive, proposing additional legislation and a Constitutional amendment that would effectively eliminate the jural rights doctrine.

A. Senate Bill 4: Malpractice Review Panels

Upon taking control of both chambers of the state legislature, Kentucky Republicans set about implementing an ambitious agenda. This included serious efforts to rein in a civil tort system that legislators believed left courts overburdened with frivolous lawsuits. Legislators argued that tort reform was necessary because Kentucky’s plaintiff-friendly environment had resulted in higher malpractice insurance premiums, and caused doctors to practice so-called defensive medicine. During the 2017 legislative session, Republican senators proposed and the General Assembly passed Senate Bill 4, establishing medical review panels in Kentucky.

The legislation was modeled after similar legislation passed in other states. The medical review panel system applies only to tort cases brought where there is an allegation of medical malpractice. Instead of the normal court filing process that would occur to initiate a lawsuit, a plaintiff must file a draft complaint to the Kentucky Cabinet for Health and Family Services. The Cabinet then convenes a malpractice review panel by randomly selecting three doctors, who review the case, and an attorney who oversees the process. The parties are required to submit evidence to the panel within certain time periods, and may depose witnesses at the discretion of the panel. The panel then reviews the evidence and issues an opinion. Notably, the panel is only allowed to select from one of three options for each defendant: (1) That the defendant’s acts did not violate a duty of care; (2) That the defendant’s acts violated the duty of care, but that the violation did not cause the plaintiff’s injuries; or (3) That the defendant’s acts violated the duty of care and did cause the plaintiff’s injuries. The opinion of the medical review panel can then be submitted into evidence, at the discretion of a trial court, if the plaintiff chooses

23 Schickel, supra note 6.
24 See sources cited supra note 20.
25 Pfeifer, supra note 7.
28 See sources cited supra note 7.
30 Id. § 216C.040; id. § 216C.010 (West 2017).
31 Id. § 216C.060.
32 Id. § 216C.160.
33 Id. § 216C.180(2).
34 Id. § 216C.180(2)(c).
35 Id. § 216C.180(2)(b).
36 Id. § 216C.180(2)(a).
to initiate a lawsuit. The bill does not allocate funds to pay for the costs associated with the panel system, instead it shifts those costs to the litigants; interestingly, the winning party is required to pay the fees incurred by the review panel process.

Critically, the Bill contains several provisions seemingly designed to avoid potential Constitutional issues and address problems that had plagued similar systems implemented in other states. First, the bill does not require that the review panel process be exhausted before a plaintiff may file their lawsuit in court. Rather, it allows a case to be brought in a regular court if the panel has not issued a ruling within nine months of the proposed complaint being filed. This provision is designed to avoid delay issues that have plagued the panel systems in other states, where some instances of backlog have caused panel review to take several years. Additionally, the final opinion of the medical review panel is merely advisory, meaning it has no binding legal effect and does not bar the plaintiff from filing their lawsuit if the board gives an adverse opinion.

While proponents insist that implementing medical review panels will reduce perceived problems in the medical malpractice area, the bill has received harsh criticism on several grounds. For one, evidence from other states seems to suggest that the medical review panel system may, in fact, increase the number of malpractice cases filed. Under the malpractice system that existed prior to the passage of the malpractice review panel law, it was already quite costly and difficult to find a plaintiff's attorney willing to take medical malpractice cases due to the high upfront costs incurred in obtaining expert medical opinions to support a case. Because Kentucky law requires most medical malpractice claims to be supported by expert

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37 Id. § 216C.200(1).
38 Id. § 216C.220(4).
39 Id. § 216C.020(1)(b).
41 See KY. REV. STAT. ANN. § 216C.200(2) (West 2017).
42 Legislation that totally cut off access to the court in this way would certainly be struck down even under the most lenient review. See Opinion and Order at 25, Claycomb v. Commonwealth of Kentucky, No. 17-Cl-708 (Franklin Cir. Ct. Oct. 30, 2017).
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testimony, few frivolous cases could reach stages of litigation where medical providers could face significant liability. The natural barriers that existed as part of the litigation process may in fact be undermined by the new bill. In effect the current law would reduce barriers by allowing plaintiffs to rely on the board to provide a much cheaper medical expert opinion, that the plaintiff could later use in court to meet the requirements of Kentucky medical malpractice law. It is certainly possible that the medical review panels will be flooded by the kinds of cases that plaintiff’s attorneys would not normally accept because of the small or negative margins that would result once those cases reached judgment.

Another flaw with the malpractice review panel system is that there is virtually no way to ensure doctor compliance. The panels would pay doctors only $350 for the entirety of their work on a medical review panel, a paltry sum compared to the expert fees normally charged to private litigants. Other states implementing medical review panels have seen their systems suffer serious delays and eventual collapse because they had no way to ensure that doctors would participate. Despite these concerns the General Assembly approved the panel program, and potential plaintiffs were required to file with panels starting in June of 2017. But within days of coming online a plaintiff sued the Commonwealth in state court arguing that the malpractice review panel system was unconstitutional.

B. Proposals During the 2018 General Assembly

Consistent with their proclaimed goal of continuing to propose tort reform legislation, Kentucky legislators introduced several bills during the 2018 legislative session that, if passed, would have added further burdens to potential medical malpractice litigants

i. Senate Bill 20

Senate Bill 20, also introduced by Republican State Senator Ralph Alvarado, contained several different amendments to Kentucky statutes. The bill required

47 Amy Lynn Sorrel, Litigation Screening Panels on Trial, Cunningham Group (Aug. 4, 2009), https://www.cunninghamgroups.com/litigation-screening-panels-on-trial/[https://perma.cc/854A-2HWQ] (quoting a Nevada doctor describing that state’s panel system as “breaking down” because doctors “wouldn’t show up, and you’d end up cancelling and creating huge delays.”).
49 Verified Complaint for Declaration of Rights and for Injunctive Relief at 6, Claycomb v. Commonwealth of Kentucky, No. 17-CI-708 (Franklin Cir. Ct. June 29, 2017); see also infra Section III.B.
plaintiffs to submit an affidavit of merit from a medical expert attesting to the validity of their claim before they could bring a claim in court, if their malpractice panel had not completely adjudicated their claim. The bill effectively tried to amend the malpractice review panel law in that it no longer would have allowed a plaintiff to merely wait until their proposed complaint had been pending before the panel for nine months to file suit in court. Thus, the bill meant that a potential plaintiff must either have had their claim completely adjudicated by a panel or wait nine months without adjudication and receive an affidavit of merit. This proposal would clearly increase the burden on plaintiffs in having their case heard in court, and would seemingly eliminate one of those provisions in Senate Bill 4 that was included so that the law could pass constitutional muster. The reasons for this proposal, though, are obvious: it was designed to eliminate a loophole in the malpractice review panel system by requiring every potential plaintiff to have their claim prescreened prior to filing in court. This proposal demonstrates the more aggressive approach that legislators have begun to adopt in restricting malpractice plaintiff's access to courts.

Additionally, the bill contained other amendments to Kentucky statutes, including a cap on the percentage of damages that plaintiff's attorneys could receive as a contingency fee. This proposal seemed designed to discourage plaintiff's attorney from taking malpractice cases, especially those with a higher risk of no-recovery. The bill also contained an amendment to the Kentucky Rules of Evidence that would make inadmissible, as an admission of liability, any "statement, writing, or action that expresses sympathy, compassion, commiseration... made to [an] individual or the individual's family." This bill ultimately died in the Kentucky House after narrowly passing in the Senate.

ii. Senate Bill 2

Republican legislators also proposed a bill that would have allowed citizens of Kentucky to vote on a proposed amendment to the Kentucky Constitution to effectively eliminate barriers to additional tort reform proposals. Senate Bill 2 allowed a proposal to be placed on the November 2018 ballot that would amend

54 See discussion supra Section I.0.
55 See infra Part II.0.
57 Id. § 5.
Section 54 of the Kentucky Constitution—a crucial part of the jural rights doctrine—to read:

The General Assembly shall have power to: (1) Limit the amount to be recovered for injuries resulting in death; (2) Limit the amount to be recovered for injuries to person or property; and (3) Provide for a uniform statute of limitations or statutes of repose, or both, for any civil action for injuries resulting in death or for injuries to person or property.\(^{61}\)

According to the Kentucky Constitution, a proposed constitutional amendment must be approved by three-fifths of the members of each chamber of the legislature.\(^{62}\) The proposed amendment would then be placed on the ballot during the next election of members of the House of Representatives.\(^{63}\) Elections for the Kentucky House of Representatives are held on even years, meaning that if the constitutional amendment was approved by the legislature during the 2018 session, Kentucky voters would have had an opportunity to vote for or against it during the November 2018 election.\(^{64}\) A simple majority of voters is ultimately required for constitutional amendments to pass.\(^{65}\)

The proposed change to Section 54 of the Kentucky Constitution would have radically reoriented power over the ability to limit tort claims from the judiciary to the legislature. The initial proposal apparently went too far for some as it was amended during the legislative process.\(^{66}\) The newest version of the proposed amendment applied only to “noneconomic damages” as opposed to allowing for limits on all damages.\(^{67}\) This revision would have presumably allowed the legislature to place damage caps on things such as pain and suffering, a type of tort reform proposal that has been enacted in many states. This amendment would have had dire consequences for the jural rights doctrine, as it is currently understood, and probably would have resulted in a wave of new tort reform legislation.

Like Senate Bill 20, Senate Bill 2 failed to muster the requisite votes for passage, failing to receive a vote in either the House or Senate.\(^{68}\)

\(^{60}\) See infra Section II.0.

\(^{61}\) S.B. 2, 2018 Gen. Assemb., Reg. Sess. § 1 (Ky. 2018) (as introduced in Senate, Jan 2, 2018). The Section currently reads: “The General Assembly shall have no power to limit the amount to be recovered for injuries resulting in death, or for injuries to person or property.” KY. CONST. § 54. The proposed amendment is consistent with Senator Alvarado’s claim that he would seek to replace “shall not” with “shall.” See Barton, supra note 18.

\(^{62}\) KY. CONST. § 256.

\(^{63}\) Id.

\(^{64}\) KY. CONST. § 30; KY. CONST. § 256. Additionally, Section 256 requires that the bill be passed in the legislature ninety days prior to the November election. KY. CONST. § 256.

\(^{65}\) KY. CONST. § 256.


\(^{67}\) Id.

\(^{68}\) See KY. LEGISLATIVE RESEARCH COMM’N, Legislative Record Online: Senate Bill 2, KY. LEGISLATURE, http://www.lrc.ky.gov/record/18RS/sb2.htm [https://perma.cc/DYY5-JQUU].
II. THE JURAL RIGHTS DOCTRINE

Now that Kentucky legislators have begun a new push for tort reform, litigants have turned to the jural rights doctrine for protection. The jural rights doctrine has a long history in Kentucky and is fairly unique among the states regarding the strictness of its protections for plaintiffs’ causes of action. Following its announcement by the Kentucky Supreme Court the doctrine saw several decades of expansion and growth, but in recent years scholars and courts alike have cast doubts on its foundations. The doctrine is now in a state of flux, leaving both legislators and litigants with little guidance.

A. Foundations of the Doctrine

The Seventh Amendment of the United States Constitution preserves the right to a jury trial in common law civil suits. The Seventh Amendment is the only federal constitutional amendment that addresses the civil trial system. Many states, believing that additional protections of the civil jury trial system were necessary, enshrined the inviolability of the right to a civil jury trial in their state constitutions. Kentucky was one such state and, in 1891, the state ratified a new constitution that contained a number of sections protecting citizens’ rights to recovery in a civil jury trial. Kentucky’s jural rights doctrine is founded upon judicial interpretation of three sections of the Kentucky Constitution that address civil jury trials: Sections 14, 54, and 241. Section 14 of the Kentucky Constitution guarantees access to the courts for those who suffer injury: All courts shall be open, and every person for an injury done him in his lands, goods, person or reputation, shall have remedy by due course of law, and right and justice administered without sale, denial or delay.

Section 54, arguably the section most restrictive of legislative power, discusses limitations on the legislature’s ability to curtail recovery in tort actions: The General Assembly shall have no power to limit the amount to be recovered for injuries resulting in death, or for injuries to person or property.

Section 241 discusses the ability for a deceased’s estate to recover in cases where another has caused that person’s death. The section reads as follows:

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69 See discussion infra Section III.A.
70 See discussion infra Sections II.A., II.B.
71 See discussion infra Section II.C
72 See discussion infra Section II.D.
73 U.S. CONST. amend. VII.
74 U.S. CONST. amends. I–XXVII.
75 See, e.g., N.D. CONST. art. 1, § 13; Or. CONST. art. 1, § 17.
77 Id.
78 KY. CONST. § 14.
79 KY. CONST. § 54.
80 KY. CONST. § 241.
Whenever the death of a person shall result from an injury inflicted by negligence or wrongful act, then, in every such case, damages may be recovered for such death, from the corporations and persons so causing the same. Until otherwise provided by law, the action to recover such damages shall in all cases be prosecuted by the personal representative of the deceased person. The General Assembly may provide how the recovery shall go and to whom belong; and until such provision is made, the same shall form part of the personal estate of the deceased person.81

The Kentucky Supreme Court's announced the jural rights doctrine in 1932, in the case of *Ludwig v. Johnson.*82 The case involved a fairly typical automobile accident tort case, where Ludwig, a passenger, sued the operator of a vehicle, Johnson, for injuries resulting from negligent driving.83 The defendant raised, in defense against the negligence action, a Kentucky "guest statute" that prevented recovery by passengers against the driver of an automobile when they had not paid the driver and the driver's conduct was merely negligent or reckless, rather than intentional.84 In relevant part the statute read:

No person transported by the owner or operator of a motor vehicle, as his guest, without payment for such transportation shall have a cause of action for damages against such owner or operator for any injuries received, death, or any loss sustained, in case of accident, unless such accident shall have resulted from an intentional act on the part of said owner or operator.85

On appeal the plaintiff argued that the statute violated his rights under the Kentucky Constitution to recover damages for his injuries.86

In analyzing the plaintiff's claim, the Kentucky Supreme Court first turned to Section 241, which enshrined wrongful death actions in the Kentucky Constitution.87 The court considered this section—despite the underlying case not involving a wrongful death claim—and found that the portion of the guest statute that prevented death actions violated Section 241.88 The court next turned to the plaintiff's contention that the law violated Section 54 of the Kentucky Constitution, considering past precedent regarding the limits that the section placed on legislative power.89 The court concluded that the "intention of the framers of the Constitution was to inhibit the Legislature from abolishing rights of action for damages for death or injuries caused by negligence."90

81 Id.
82 49 S.W.2d 347, 351 (Ky. 1932).
83 Id. at 348.
84 Id.
85 Id.
86 Id.
87 Id. at 349.
88 Id.
89 Id. at 349–50.
90 Id. at 350.
Finally, the court considered the plaintiff’s argument that the guest statute violated Section 14 of the Kentucky Constitution. The court reviewed cases from other jurisdictions in which courts had considered the constitutionality of guest statutes, finding that many states had found such laws valid. Nevertheless, the court concluded that Section 14, in combination with the other Sections, would render the guest statute unconstitutional.

The court concluded as follows:

The statute under consideration violates the spirit of our Constitution as well as its letter as found in sections 14, 54, and 241. It was the manifest purpose of the framers of that instrument to preserve and perpetuate the common-law right of a citizen injured by the negligent act of another to sue to recover damages for his injury. The imperative mandate of section 14 is that every person, for an injury done him in his person, shall have remedy by due course of law. . . . The Constitution guarantees to him his right to a day in court for the purpose of establishing the alleged wrong perpetrated on him and recovery of his resultant damages. We conclude that chapter 85 of the Acts of the General Assembly of 1930 is unconstitutional and void.

In summarizing the doctrine, the court focused on the historical role of the common law and its belief that Section 14, 54, and 241 worked in tandem to preserve common law rights that existed at the time of the ratification of the Kentucky Constitution.

B. Subsequent Cases and Doctrinal Development: The Jural Rights Doctrine Enjoys an Expansionist Era

Following the Kentucky Supreme Court’s announcement of the jural rights doctrine, the court began to apply it in other cases involving legislative restriction on causes of action sounding in tort. In 1959 the Kentucky Supreme Court decided Happy v. Erwin, in which the plaintiff sought recovery for damages caused by a collision between his vehicle and a city-owned firetruck. The plaintiff sued the municipal governments that owned the firetruck and the individual that operated the truck. The court found that sovereign immunity principles prohibited the suit against the municipalities, and then addressed whether a state law that limited the liability of an operator of the firetruck would prevent suit against the individual defendant.

Ultimately, the court concluded that the law insulating a public employee from liability was unconstitutional, and that the distinction between suit

91 Id. at 350–51.
92 Id.
93 Id. at 351.
94 Id. (emphasis added).
95 Id.
96 Happy v. Erwin, 330 S.W.2d 412, 413 (Ky. 1959), abrogated by Caneyville Volunteer Fire Dep’t v. Green’s Motorcycle Salvage, Inc., 286 S.W.3d 790, 811 (Ky. 2009).
97 Id.
98 Id.
against a "private" versus a "public" defendant was irrelevant.\textsuperscript{99} The language of Happy indicates an understanding of the jural rights doctrine consistent with, and even greater than, the broad approach taken by the court in Ludwig.\textsuperscript{100} The court's conclusion in Happy that the jural rights doctrine prevented the legislature from limiting the liability of public employees would later be abrogated in Caneyville Volunteer Fire Dep't v. Green's Motorcycle Salvage Inc.,\textsuperscript{101} a case discussed below.\textsuperscript{102} In Kentucky Utilities Co. v. Jackson County Rural Electric Cooperative Corp., the Kentucky Supreme Court considered the difficult interaction between its strict adherence to the jural rights doctrine and a provision of the Kentucky Workmen's Compensation Act that appeared to eliminate the ability to recover for indemnity.\textsuperscript{103} The court reviewed the history of indemnity actions and found that they existed as part of the common law during the enactment of the 1891 Constitution.\textsuperscript{104} The court then construed the provision of the Workmen's Compensation Act so that it did not prevent indemnity actions and thus did not violate the injured worker's jural rights.\textsuperscript{105} The decisions of the courts in Happy and Kentucky Utilities exemplify an approach that considered the jural rights doctrine as preserving common law causes of action that existed at the time of the ratification of the 1891 Constitution.

A series of three cases, all involving statutes of repose that affected claims for negligent construction against homebuilders, would be emblematic of the expansionist approach Kentucky courts took towards the jural rights doctrine in the decades following its establishment. First, in Saylor v. Hall,\textsuperscript{106} the Kentucky Supreme Court considered whether two statutes that required claims against a homebuilder to be brought within five years of completion of a home were constitutional as applied to a case in which the homebuilder had completed the work prior to the enactment of the statutes.\textsuperscript{107} The court recognized that many other states had passed similar legislation and only one such law had been struck down by the highest court of its state.\textsuperscript{108} But, relying on the unique power of the jural rights doctrine in Kentucky, and based on its review of the historical record, the court found the laws unconstitutional as applied to the plaintiffs in the case because they:

[D]estroy[ed], pro tanto, a common-law right of action for negligence that proximately causes personal injury or death, which existed at the times the statutes were enacted. The statutory expressions as they relate

\textsuperscript{99} \textit{Id.} at 414 ("The Constitution preserved the rights of injured parties against those persons who had wronged them. The fact that a person is a public officer or employee does not change the nature of the personal wrong nor circumscribe the personal right.").

\textsuperscript{100} \textit{Id.} ("We believe that opinion [in Ludwig] was sound and is conclusive of the question before us.").

\textsuperscript{101} 286 S.W.3d at 811.

\textsuperscript{102} See discussion \textit{infra} Section II.0.


\textsuperscript{104} \textit{Id.} at 790.

\textsuperscript{105} \textit{Id.} at 790–91.


\textsuperscript{107} \textit{Id.} at 221 ("The defendant points out that substantially similar statutes have been adopted in 31 other states, and have been held valid by each state court of last resort that has considered them except in one instance.").
to actions based on negligence perform an abortion on the right of action, not in the first trimester, but before conception.\(^{108}\)

In concluding its opinion, the court stated that the laws "would violate the spirit and language of Sections 14, 54, and 241 of the Constitution of Kentucky when read together."\(^{109}\)

Second, in *Carney v. Moody*, the Kentucky Supreme Court drew back slightly, limiting *Saylor* by applying it only to those situations where the construction occurred prior to the passage of the statute of repose.\(^{110}\) The court refused to rely on *Saylor* because that case had only considered whether the cause of action existed prior the passage of the statute of repose instead of considering whether a cause of action against a homebuilder brought by a third-party was in existence at the time the 1891 Kentucky Constitution was passed.\(^{111}\) Because the court found that there was no common law cause of action available to a third-party purchaser against a homebuilder at that time, it refused to apply the jural rights doctrine to the case.\(^{112}\) This decision represents a more originalist approach to questions surrounding the jural rights doctrine, treating it as one that merely preserves common law causes of action.

Only ten years later, the Kentucky Supreme Court would revisit the issue addressed in *Carney*, in *Perkins v. Northeastern Log Homes*.\(^{113}\) Here, the court took a more radical approach, and with it placed the jural rights doctrine at the most expansive point in its history. In the case, the court again considered a statute of repose for negligent construction, but struck down the law, and overruled *Carney*.\(^{114}\) In doing so, the court issued a striking statement regarding their approach: "the Kentucky Constitution must be applied to fundamental jural rights as presently accepted in society, not frozen in time to the year 1891."\(^{115}\) This represented a significant departure from the reasoning of the court in *Carney*, with its focus on the history of the common law in Kentucky,\(^{116}\) but can perhaps be justified. The understanding of the court in *Perkins* is consistent with the court in *Ludwig v. Johnson*, which emphasized both the spirit of the jural rights amendments and the history of the common law.\(^{117}\) Under the logic of *Ludwig v. Johnson*, the court’s opinion may actually have been correct, as there was obviously no common law cause of action available to a passenger of a vehicle negligently operated by the driver at the time of the 1891 Constitution\(^{118}\)—although a simple battery claim may have sufficed. Either way, the opinion exemplified a “living Constitution” approach

\(^{108}\) Id. at 224.

\(^{109}\) Id. at 225 (emphasis added).

\(^{110}\) Carney v. Moody, 646 S.W.2d 40, 40 (Ky. 1982), overruled by Perkins v. Northeastern Log Homes, 808 S.W.2d 809 (Ky. 1991).

\(^{111}\) Id. at 41.

\(^{112}\) Id.

\(^{113}\) 808 S.W.2d 809 (Ky. 1991).

\(^{114}\) Id. at 817.

\(^{115}\) Id.

\(^{116}\) See Carney, 646 S.W.2d at 41.

\(^{117}\) See Ludwig v. Johnson, 49 S.W.2d 347, 351 (Ky. 1932).

\(^{118}\) Id. at 348.
to the jural rights doctrine, and in that way expanded its reach significantly. The court concluded by stating:

Recognizing that a majority of the states have upheld the construction industry's statute of repose against attack on constitutional grounds, our obligation is to comply with the letter and spirit of the Kentucky Constitution. If that places us in a statistical minority, we can only commiserate with the citizens of other states who do not enjoy similar protection.119

Together these cases represent a muddled approach to interpretation of the jural rights doctrine, but with a trend towards a more expansionist reading. Some decisions exemplify an originalist approach with the court focused on the history of the common law cause of action at issue and its existence at the time of the 1891 Constitution.120 On the other end of the spectrum, some decisions focused on the purpose or spirit of the jural rights sections to invalidate laws restricting causes of action that did not exist in 1891.121 The court’s approach during this period would soon draw more intense scrutiny and criticism.122

C. First Serious Questions Raised Regarding the Validity of the Jural Rights Doctrine

The court’s rulings regarding the jural rights doctrine discussed above, exemplify an expansive early approach, but one that would not last. Beginning in the early 1990’s, criticisms of the doctrine became more pronounced, with Professor Thomas P. Lewis’s article, Jural Rights Under Kentucky’s Constitution: Realities Grounded in Myth, serving as the catalyst for increased scrutiny.123 Attacks on the jural rights doctrine essentially flow from two distinct points. First, the criticisms expressed in Professor Lewis’ article, stem from a belief that the jural rights doctrine is an ahistorical legal fiction that is unsupported by the intent of the framers of the Kentucky Constitution.124 The other main criticism of the doctrine relies on an argument that it offends separation of powers because the judiciary, through interpretation, has improperly usurped and restricted legislative power over public policy concerning torts.125 These points often interweave in criticisms of the doctrine.

119 Perkins, 808 at 818.
120 See, e.g., Carney, 646 S.W.2d at 41; Ky. Utils. Co. v. Jackson Cty Rural Elect. Co-op., 438 S.W.2d 788 (Ky. 1968).
121 See, e.g., Perkins, 808 S.W.2d at 817–18; Saylor v. Hall 497 S.W.2d 218 (Ky. 1973); Happy v. Erwin, 330 S.W.2d 412 (Ky. 1959); Ludwig v. Johnson, 49 S.W.2d 347 (Ky. 1932).
122 The cases discussed in this section are certainly not an exhaustive account of the history of jural rights jurisprudence in Kentucky, but rather, are meant to exemplify the approach that the court took in developing the doctrine. For a more exhaustive account, see Lewis, supra note 76, which is discussed in the next section.
123 Lewis, supra note 76.
124 Id. at 955, 964.
In Professor Lewis' seminal work discussing the jural rights doctrine in Kentucky, he stated that his purpose was "to show that these constitutional provisions do not mean what they have been assumed to mean." \(^{126}\) Professor Lewis attacked the judiciary's belief that it could constitutionalize common law developments, essentially making them untouchable by the legislature. \(^{127}\) His analysis turned to each of the three constitutional amendments that make up the "tripod legs" of the jural rights doctrine. \(^{128}\) Regarding Section 14 of the Kentucky Constitution, Professor Lewis traced its roots to the Magna Carta and discussed how it had been carried through from the original 1792 Kentucky Constitution. \(^{129}\) According to him, Section 14 was designed only to ensure that courts administered justice in an even handed and transparent way, and nothing more. \(^{130}\) According to Professor Lewis, the debates that occurred during the convention that resulted in the adoption of the 1891 Constitution contained no reference to a more expansive understanding of Section 14, such as that identified by the Kentucky Supreme Court in *Ludwig v. Johnson*. \(^{131}\)

Turning to Section 54 of the Kentucky Constitution, Professor Lewis again argued for a more limited interpretation of the Section than that used by the courts in their application of the jural rights doctrine. \(^{132}\) In his reading of Section 54, it would prevent only legislation imposing monetary limitations on damages awarded by a jury for common law torts. \(^{133}\) The purpose of the Section was—like many others contained in the 1891 Constitution—to limit the influence of railroad companies on the legislative process, as they had, in several states, successfully advocated for laws that would limit their liability to accident victims. \(^{134}\) The provision, according to Professor Lewis, was designed to restrict the power of the General Assembly, but only in a specific and limited way. \(^{135}\) Section 241 was similarly designed with the purpose of constitutionalizing protections for causes of action that railroads had sought to undermine legislatively. \(^{136}\) Considering the sections that make up the jural rights doctrine together Professor Lewis stated that he "found no evidence that suggests [the sections] were ever conceived as some sort of package." \(^{137}\) Professor Lewis's attack on the jural rights doctrine is deeply rooted in the history of the

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126 Lewis, *supra* note 76, at 963.
127 *Id.* at 963–64.
128 *Id.* at 964.
129 *Id.* at 964–67.
130 *Id.* at 966–67.
131 See *id.* at 955–56, 967–68.
132 *Id.* at 969–69.
133 *Id.*
134 *Id.*
135 For support Professor Lewis relies on a statement made by a delegate regarding Section 54, who stated:

> The Legislature has, perhaps, in some cases, put a limit upon the amount to be recovered for damages by railroad accidents to persons resulting in death or in injury to persons or property. This section forbids the General Assembly from putting any limit upon the amount to be recovered, leaving it to the jury.

*Id.* at 968.
136 *Id.* at 970–72
137 *Id.* at 972.
Kentucky’s New Tort Reform

Kentucky Constitution itself and the intent of those who wrote the document. Professor Lewis did comment on the separation of powers issues raised by the jural rights doctrine, finding fault with the idea that “the judiciary should be the final repository of policy making power,” but delved no further on this point. Following Lewis’ piece, other authors would comment on the place of the doctrine in Kentucky law. One author discussed the separation of powers issue more fully and argued for courts to take a “more restrained approach” to the doctrine.

D. Courts Take Notice of the Doctrine’s Critics: A Period of Contraction

The Kentucky Supreme Court began to take notice of the criticisms of the doctrine, and the case of Williams v. Wilson provided the court a fresh opportunity to clarify its position. In 1988, the Kentucky state legislature passed a series of tort reform measures, including a statute that altered the requisite requirement to prove gross negligence—and thus receive punitive damages—from an objective to a subjective standard. Lower courts had found the law unconstitutional because it “effectively destroyed the common law right of action for punitive damages.” The court addressed the defendant’s attack on the foundations of the jural rights doctrine, inspired in large part by Lewis’s article. In its opinion, the court, perhaps understanding the newfound tenuousness of its prior arguments in favor of the doctrine, relied extensively on stare decisis and the historical underpinnings of the doctrine in upholding it. For example, the court stated:

As the foregoing authorities demonstrate, to the exclusion of any reasonable opinion to the contrary, the doctrine of jural rights is deeply ingrained in Kentucky law and to abandon it now would amount to an extraordinary change. Principles of predictability counsel against such major shifts in the law.

Chief Justice Stephens “reluctantly concur[ed] with the majority opinion.” The Chief Justice stated that only a strong desire for consistency in the law motivated him to uphold the jural rights doctrine, and he desired further debate on its continuing validity. The case garnered a fiery dissent that attacked the very foundation of the doctrine. Relying on the Lewis article, the dissent argued that the courts had essentially usurped the legislative power to amend the common law through their interpretation of the jural rights sections of the Kentucky Constitution. The dissent

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138 Id. at 975.
139 Id. at 975.
140 McIntyre, supra note 125, at 741, 759.
141 Williams v. Wilson, 972 S.W.2d 260, 261 (Ky. 1998).
142 Id. at 261.
143 Id.
144 Id. at 265.
145 Id. at 265–69.
146 Id. at 267.
147 Id. at 269 (Stephens, C.J., concurring).
148 Id.
149 Id. at 272 (Cooper, J., dissenting).
150 Id.
further argued that there is "not one word" in the debates surrounding the enactment of the 1891 Constitution indicating that the framers believed the common law could not be amended by the legislature.\textsuperscript{150} The dissent also argued that the jural rights doctrine presented significant separation of powers issues and issues of institutional competence because it prevented the legislature from forming public policy.\textsuperscript{151} Despite upholding the doctrine, the opinions in \textit{Williams} injected significant uncertainty into the law.

In the 2009 case, \textit{Caneyville Volunteer Fire Department v. Green's Motorcycle Salvage, Inc.}, a majority of the Supreme Court continued to recognize the jural rights doctrine, but limited the expansive scope of the doctrine recognized in \textit{Happy}.\textsuperscript{152} \textit{Caneyville} involved a statute, like that in \textit{Happy}, which would have conferred sovereign immunity on municipal fire fighters.\textsuperscript{153} Although \textit{Happy} seemed to stand for the proposition that the jural rights doctrine prevented the legislature from conferring immunity in a way that would limit a common law cause of action, the court rejected that approach, finding that the law was acceptable because it did not grant absolute immunity.\textsuperscript{154} The opinion focused extensively on the history of sovereign immunity in Kentucky, with the court finding that "during the passage of 1891 Constitution, sovereign immunity for municipal fighters had, in fact, been recognized by Kentucky courts."\textsuperscript{155} Writing in concurrence, Chief Justice Minton argued that the court had failed to articulate counter arguments to the points raised in the Lewis article, and that it was his belief that the doctrine should be abandoned entirely.\textsuperscript{156}

The force of Justice Minton's concurrence in \textit{Caneyville} and Justice Cooper's dissent in \textit{Williams} demonstrate the current uncertainty surrounding the jural rights doctrine. The doctrine's status is now so muddled that a federal district court sitting in diversity recently stated that "it appears the jural rights doctrine is no longer viable."\textsuperscript{157} Although this statement is dictum and almost certainly technically incorrect—because no majority of the Kentucky Supreme Court has ever fully rejected the doctrine—it reflects the shifting attitude of the Kentucky Supreme Court regarding jural rights.

In sum, the current position of the jural rights doctrine seems to be as follows: There is a vocal minority of Kentucky Supreme Court justices who believe that the doctrine should be completely abandoned.\textsuperscript{158} Additionally, a small majority of justices accept the doctrine because of its historical pedigree but believe that its foundation is weak.\textsuperscript{159} Lastly, almost none of the justices on the Kentucky Supreme Court have issued a compelling opinion in support of the doctrine in recent years. As

\textsuperscript{150} Id.
\textsuperscript{151} Id. at 275.
\textsuperscript{152} Caneyville Volunteer Fire Dep't v. Green's Motorcycle Salvage Inc., 286 S.W.3d 790, 806, 811 (Ky. 2009).
\textsuperscript{153} Id. at 795–96.
\textsuperscript{154} Id. at 806.
\textsuperscript{155} Id. at 804–05.
\textsuperscript{156} Id. at 815–16 (Minton, C.J., concurring).
\textsuperscript{158} See supra notes 148–55, 156 and accompanying text.
\textsuperscript{159} See supra notes 146–51 and accompanying text.
will be discussed below, the new push towards tort reform by Kentucky lawmakers will almost certainly provide the court an opportunity to reevaluate its approach to the jural rights doctrine.

III. NAVIGATING THE JURAL RIGHTS DOCTRINE IN THE CONTEXT OF THE NEW TORT REFORM: A MINEFIELD FOR LITIGANTS AND LEGISLATORS AND WHAT COURTS SHOULD DO TO ADDRESS IT

As the above has demonstrated, the uncertainty surrounding the jural rights doctrine and the renewed push for tort reform in the General Assembly, place the legislature and the judiciary on a collision course. During its 2018 term the Kentucky Supreme Court will have an opportunity to revisit the doctrine, an opportunity that it should embrace. The court should rule that the malpractice review panel law is constitutional under even an expansive reading of the jural rights doctrine because it does not actually eliminate or severely restrict recovery for a common law cause of action. The court should use the case to better explain the doctrine, justifying its approach by relying on the intent of those responsible for creating the 1891 Constitution. The General Assembly should attempt to live within the confines of the doctrine; a constitutional amendment would be inadvisable and should be rejected by voters if it reaches the ballot.

A. Current Litigation Regarding Senate Bill 4

Litigation regarding the constitutionality of the law establishing malpractice review panels is currently making its way through the Kentucky court system. Days after the panel system became active, a plaintiff sued the state government in Franklin County Circuit Court, alleging that the law was unconstitutional and arguing for a permanent injunction against its implementation. In the complaint, the plaintiff alleged that the law violated several constitutional provisions, including Sections 14, 54, and 241. The plaintiff argued that the malpractice review panel substantially limited her ability to seek relief in the courts for her injuries, thus making it unconstitutional under the jural rights doctrine. The plaintiff further relied on the fact that malpractice cases had existed at the time of the enactment of the 1891 Constitution, and that because the jural rights doctrine preserves common law causes of action, the malpractice review panel law impossibly restricted access to the court. Potentially anticipating the originalist arguments previously raised in the Lewis article and in prior judicial opinions, the plaintiff's complaint

162 Id. at 22–26.
163 Id.
164 Id. at 25–26.
referenced debate during the passage of the 1891 Constitution discussing the
importance of open courts.\textsuperscript{165}

The trial court accepted the plaintiff's arguments, ruling the malpractice review
panel law unconstitutional on several grounds.\textsuperscript{166} In its opinion the trial court found,
regarding the parties jural rights arguments, that the panel system, while not
eliminating a common law right, "imposes an expensive and unnecessary obstacle to
seeking one's constitutionally guaranteed 'remedy by due course of law.'\textsuperscript{167} The
court focused on the difficult and time consuming procedural barriers that the law
imposed, finding that the process would take at least "several months to complete."\textsuperscript{168}
Additionally, the court focused on the costs associated with the malpractice review
panel system, finding that indigent plaintiffs may have their access limited by filing
fees, and that the system would impose significant costs on a winning party—estimating these costs to be as much as $3050.\textsuperscript{169} The potential delays and
costs led the trial court to find that the burdens placed on litigants by malpractice
review panels violated their jural rights.\textsuperscript{170} Interestingly, the court raised, on its own,
potential impartiality issues that might arise because of the review panel system.\textsuperscript{171}
Specifically, the court suggested that panel members might be biased or have the
appearance of bias against indigent plaintiffs because those plaintiffs would be
unable to pay for the panel's services.\textsuperscript{172} The court concluded by stating:

The effect of the medical review panel process is not the reduction of
frivolous negligence claims, but rather, the erection of barriers to the court
system. These barriers prevent the filing of claims, meritorious or not, by
imposing significant delays and costs . . . . Accordingly the [medical
review panel] Act violates the open courts and jural rights doctrines.\textsuperscript{173}

Following the trial court's decision, the state government appealed, seeking and
winning a stay on the injunction in the Kentucky Court of Appeals.\textsuperscript{174} The parties
sought immediate review of the trial court's decision with the Supreme Court, which
the Supreme Court subsequently granted.\textsuperscript{175} Given that the trial court ruled the
malpractice review panel law unconstitutional on other grounds,\textsuperscript{176} the Supreme

\textsuperscript{165} Id. at 24.
\textsuperscript{167} Id. at 22.
\textsuperscript{168} Id. at 22–23.
\textsuperscript{169} Id. at 23; see also supra note 38 and accompanying text.
\textsuperscript{170} Id. at 24.
\textsuperscript{171} Id. at 23 n.6.
\textsuperscript{172} Id.
\textsuperscript{173} Id. at 25.
\textsuperscript{174} Order Granting Emergency Relief at 1–2, 8, Commonwealth of Kentucky v. Claycomb, No.
\textsuperscript{175} Tom Latek, \textit{KY Supreme Court Takes on Medical Review Panel Case}, KY. TODAY
[https://perma.cc/3XLZ-7S7E].
\textsuperscript{176} Opinion & Order at 26–27, Claycomb v. Commonwealth, No. 17-CI-708 (Franklin Cir. Ct. Oct.
30, 2017).
Court may avoid the jural rights issue entirely, but that would likely be a mistake given the current state of uncertainty that now exists.

Regarding this case, the Kentucky Supreme Court should find that the Circuit Court went too far in its application of the jural rights doctrine, expanding it beyond permissible limits. While the panel system certainly puts some barriers on a plaintiff’s ability to have their case heard in court, they are not so severe that the law should be struck down. In fact, only under the most expansive understanding of the jural rights doctrine, could a law, that essentially only requires a waiting period before a cause of action can be filed, be viewed as an unconstitutional abrogation of a cause of action. The court should reemphasize the views of the drafters of the Kentucky Constitution and the court in Ludwig, who wished to prevent a wholesale destruction of the ability to sue for an injury.\textsuperscript{177} The types of impermissible limitations on causes of action to which the doctrine should be applied are those that virtually eliminate a cause of action entirely or those that place a restriction on the amount that can be recovered by plaintiffs. The malpractice review panel law does not contain any such provisions, and although it may be inadvisable from a policy standpoint, it should not be found unconstitutional. The Kentucky Supreme Court should reject the burden theory of the trial court and allow the legislature to experiment with this kind of tort reform. Given the significant legislative power that tort reform advocates now wield, and their insistence that the malpractice review panel merely marks a first step in their process, the Supreme Court will likely continue to face questions regarding the jural rights doctrine unless it provides further guidance.

B. The Kentucky Supreme Court Should Use Current Litigation to Reaffirm the Jural Rights Doctrine and Refine the Scope of Permissible Legislation

What’s seemingly most needed now is for the Court to lift the haze that surrounds the jural rights doctrine. Others have argued for clarification previously,\textsuperscript{178} but if anything, the law has become more uncertain over time. The expansive approach that the Kentucky Supreme Court took at the height of the doctrine’s application is likely no longer possible, especially given the expected emphasis the General Assembly will place on tort reform in the coming years. A compromise position is clearly in order. The Kentucky Supreme Court should use the opportunity that it is now presented with to reaffirm the jural rights doctrine in some contexts, with a specific eye towards the history of the doctrine and the intent of the Constitutional framers. The justices should not uphold the doctrine by merely relying on stare decisis because it would fail to address the critics’ arguments and thus leave the state of the law uncertain.

\textsuperscript{177} The Commonwealth, in its brief to the Supreme Court made just such an argument, suggesting that the jural rights doctrine, if the Court were to continue relying on it, should only apply where the legislature attempted to eliminate a cause of action. See Brief of Appellant The Commonwealth of Kentucky at 26, Commonwealth v. Claycomb, 2017-SC-000614 (Ky. Jan. 08, 2018). But the Commonwealth’s position is incorrect because it fails to recognize those cases where the Supreme Court has struck down limitations on causes of actions that do not totally eliminate rights.

\textsuperscript{178} See McIntyre, supra note 125, at 720.
Professor Lewis’ arguments, which form the basis for much of the opposition to the doctrine, are not entirely persuasive and the Court should move beyond his framework. Regarding Section 14 of the doctrine, Professor Lewis is certainly correct in his position that the provision was merely adopted to provide for the fair administration of justice in Kentucky Courts. But his history of Sections 54 and 241, should counsel towards a preservation of the jural rights doctrine, rather than its abolition. Those sections were adopted specifically because of the influence of special interest groups over the legislature. As Lewis discussed, railroads had, in the period preceding the 1891 Constitution, used their power to place severe limits on plaintiffs’ ability to recover against them. The purpose of Sections 54 and 241 was thus to remove from the legislature the ability to alter or amend the common law, and thus defeat the influence of special interests. Is this really that different from the position that we find ourselves in today? The new tort reform proposed by lawmakers in Frankfort is likely in response to pressure from special interest groups, who have sought and will continue to seek limitations on their liability to those that they injure. Several healthcare special interest groups have filed amicus curiae briefs in the Kentucky Supreme Court supporting the malpractice review panel law. If the purpose of the sections was to prevent special interests from limiting rights of recovery, why should it matter that healthcare rather than railroad companies are now exerting significant influence over the legislative process? Despite the handwringing of critics about the “spirit” and “purpose” language used by the Kentucky Supreme Court in its jural rights jurisprudence, it does appear that the framers of those sections did have a specific purpose in mind, one that can only be achieved if courts continue to apply the doctrine to strike down special

179 Lewis, supra note 76, at 966–67.
180 Id. at 968–72.
181 Id. at 968.
182 Id.
183 Id. at 969–71.
184 For example, according to a website that tracks campaign contributions, as of October 2018, State Senator Ralph Alvarado, one of the main proponents of the new tort reform agenda, has received $197,997 in campaign contributions for his 2018 campaign in the category of “Health,” including over $10,000 from the Kentucky Medical Association and $4,500 from both the Kentucky Hospital Association and the Kentucky Association of Healthcare Facilities. Health Contributions to Ralph Alvarado, FOLLOW THE MONEY, https://www.followthemoney.org/show-me?id=1&c-t-eid=6656298&d-ccg-8# [https://perma.cc/D5FL-6X7C].
186 See, e.g., Lewis, supra note 76, at 964, 984.
interest legislation that burdens potential plaintiffs. This same logic applies to arguments that the jural rights doctrine represents a usurpation of legislative power by the judiciary. According to the history discussed in Professor Lewis’ article, the framers clearly intended to put the ability to make certain changes to common law causes of action outside the domain of the legislature. Because the provision is codified in the Kentucky Constitution, this should not be viewed as a violation of the separation of powers, but rather, an intended division of authority within the constitutional structure. In sum, the Court should recognize that Section 14 does not truly work to preserve jural rights but explain that Sections 54 and 241 work in combination to restrict the legislature from passing onerous special interest legislation restricting the tort liability of industry.

Under this framework, which renews focus on the intent of Sections 54 and 241, legislation eliminating causes of action or establishing damage caps on recovery should remain unconstitutional. This is consistent with both the text and the purpose of the jural rights sections. But the court should not entirely prevent the legislature from making minor changes to the procedures through which plaintiffs recover. The malpractice review panel law is an example of the kind of law that the Court should leave untouched, as its burdens are minimal. Because a plaintiff would only be slightly delayed in their recovery by the new law—the plaintiff must wait nine months to file in a court after submitting their complaint to a panel—the malpractice cause of action is not tampered with to such an extent that it is effectively destroyed. But if the legislature were to approve something like Senate Bill 20, which would require an opinion from a panel or an affidavit from a medical professional before a cause of action could be filed, the Court should strike that law down as it would essentially eliminate the ability to recover for those plaintiffs who could not afford to bring their case before a panel and could not receive an affidavit in support.

C. Rejecting a Constitutional Amendment

Following the circuit court decision striking down Senate Bill 4, Republican legislators suggested a constitutional amendment to curtail the jural rights doctrine.

i. A Brief Review of Kentucky’s Constitutional Amendment Procedure

Kentucky’s Constitution contains two sections that lay out the procedure by which the document may be amended. The Constitution states explicitly that it can be amended in two ways, as stated in Section 256 and Section 258, and as described by the Kentucky Supreme Court in *Gatewood v. Mathews*:

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187 See id. at 968–69.
188 KY. CONST. § 54.
189 KY. REV. STAT. ANN. § 216C.020 (West 2017).
191 See discussion supra Section II.B.2.
192 KY. CONST. § 256; KY. CONST. § 258.
193 Id.
Section 258 authorizes the General Assembly to enact a law at two successive sessions providing for taking the sense of the people as to the necessity and expediency of calling a convention for the purpose of revising the Constitution. Section 256 provides for the proposal of amendments to the Constitution by the General Assembly. 194

The method most often utilized is that under Section 256. 195 Under that method the General Assembly passes an act that would allow for the proposed constitutional amendment to be placed on the ballot. 196 In order to reach the ballot, the act must receive a three-fifths majority in each chamber of the General Assembly. 197 A simple majority of voters is then required to approve the amendment. 198 One recent implementation of the amendment procedure discussed in Section 256 occurred in 2004 when marriage was defined as valid only between one man and one woman. 199 In the case of that amendment, the Kentucky legislature passed an act that allowed the citizens of the Commonwealth to vote on a proposed amendment. 200 Information was distributed to voters regarding the amendment, and during the regular election of November 2004, citizens of the Commonwealth voted on the proposed amendment. 201 The amendment passed with overwhelming support and was enshrined in the Kentucky Constitution. 202

ii. Why Kentucky Should Not Amend Its Constitution

Although, the proposed constitutional amendment contained in Senate Bill 2 failed to garner the support of legislators, 203 it should be viewed as a serious threat

194 Gatewood v. Mathews, 403 S.W.2d 716, 718 (1966). Oddly in Gatewood, the court found that Section 256 and 258 did not represent the only means of amending the Kentucky Constitution. See id. at 717–18.
195 See generally Ryland Barton, Lawmakers Propose a Kentucky Constitutional Convention, WFPL (Sep. 27, 2017), https://wfpl.org/lawmaker-proposes-calling-a-kentucky-constitutional-convention/ [https://perma.cc/2RBX-X382] (discussing how an amendment to the Kentucky Constitution can currently be proposed and potential changes to this process that some lawmakers would like to see implemented).
196 KY. CONST. § 256.
197 Id.
198 Id.
199 KY. CONST. § 233A (“Only a marriage between one man and one woman shall be valid or recognized as a marriage in Kentucky. A legal status identical or substantially similar to that of marriage for unmarried individuals shall not be valid or recognized.”); see also KY. LEGISLATIVE RESEARCH COMM’N, PROPOSED MARRIAGE AMENDMENT (2004), http://lrc.ky.gov/lrcpubs/2004_const_amendment_1.pdf [https://perma.cc/M6G3-TH5] [hereinafter MARRIAGE AMENDMENT PAMPHLET].
200 2004 Ky. Acts, ch. 128, §§ 1–2; see also MARRIAGE AMENDMENT PAMPHLET, supra note 199.
201 MARRIAGE AMENDMENT PAMPHLET, supra note 199.
203 See supra note 68 and accompanying text.
to the jural rights doctrine and the ability of plaintiffs to recover damages in the future. The initial proposal would have allowed the Kentucky legislature to place limits on virtually any state tort cause of action, giving it the power to impose monetary restrictions and eliminate causes of action all together. Such an amendment seems short-sighted and flawed. The changes to the proposed amendment that would limit the potential legislative action to non-economic damages is certainly better than the previous proposal but is similarly overly broad in the power that it confers on the legislature. The current legislative majority that has established drastic tort reform as one of its goals seems to misunderstand the jural rights doctrine. The proposed constitutional amendment also only addressed Section 54 of the Kentucky Constitution and would leave untouched Section 14 and 241. While Section 54 is clearly the most important of the jural rights amendments and amending it to have the opposite effect would certainly undermine the entirety of the jural rights doctrine, the other amendments would retain some of their protective effect. By failing to consider the effect of these other amendments it appears that the legislature has not adequately considered how it should address the jural rights doctrine to achieve its goal of comprehensive tort reform. Eliminating a doctrine that has existed in Kentucky for nearly a century should require more careful and considered thought on the part of the legislature. If the legislature is unwilling to propose an amendment to the voters that is well-reasoned and that balances the interests of potential plaintiffs and defendants, the voters of the Commonwealth should reject it.

Moreover, the common law of Kentucky has proved flexible over the years, which gives additional support to the idea that these questions should be left to the judiciary. Kentucky has managed to keep with the times by judicially adopting a variety of now-widely accepted common law innovations. The jural rights doctrine is certainly more flexible than it may at first seem given that courts have pulled back on its expansive application in recent years, and if the court were to amend its approach so that it focused on preserving common law causes of action, rather than entirely eliminating the legislature’s ability to work around the edges of tort law, a workable compromise could be reached between the branches.

CONCLUSION

Given current political trends in the Commonwealth, it is likely that total Republican control of state government will continue for the foreseeable future. With this control will surely come a continued press for comprehensive tort reform. There is currently significant uncertainty for both the General Assembly and potential litigants regarding which of these laws will and which will not survive review by

204 See S.B. 2, 2018 Gen. Assemb., Reg. Sess. § 1 (Ky. 2018) (as introduced in Senate, Jan 2, 2018); see also Barton, supra note 17 (discussing why Kentucky lawmakers would like to see changes to liability laws implemented).

205 See supra notes 66–67 and accompanying text.


207 For example, Kentucky adopted comparative fault in 1984 through judicial action after an extended period of legislative inaction. See Hilen v. Hayes, 673 S.W.2d 713, 717, 720 (Ky. 1984).
Kentucky courts. It is critical that the Kentucky Supreme Court clarify its position on the jural rights doctrine, and it should do so by reaffirming the doctrine, but avoiding an overbroad interpretation of it. The Court should recognize the intentions behind Sections 54 and 241 and take a more critical eye towards legislation designed to benefit narrow interest groups at the expense of potential plaintiffs. With an approach that preserves the intention of the jural rights sections, while allowing for experimentation by the legislature in solving perceived issues that exist in the tort system, the Court can find a compromise that benefits all parties. The jural rights doctrine has become a critical protection in Kentucky law, and one that plays a crucial role in protecting the citizens of the Commonwealth. In the words of Justice Leibson in *Perkins*, "we can only commiserate with citizens of other states who do not enjoy similar protections." 208 The Kentucky Supreme Court would regret failing to heed those words.

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