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1989]

THE UNCONSTITUTIONALITY OF MEDICAL MALPRACTICE
STATUTES OF REPOSE: JUDICIAL CONSCIENCE
VERSUS LEGISLATIVE WILL

I. INTRODUCTION

The Ohio Supreme Court, in two recent decisions, *Hardy v. Ver-Meulen*¹ and *Gaines v. Preterm-Cleveland, Inc.*,² found Ohio's medical malpractice statute of repose violative of the Ohio Constitution.³ Currently, state courts are divided on the constitutionality of medical malpractice statutes of repose.⁴ However, the two Ohio cases highlight an emerging

1. 32 Ohio St. 3d 45, 512 N.E.2d 626 (1987), *cert. denied*, 108 S. Ct. 1029 (1988). For a thorough discussion of *Hardy*, see *infra* notes 116-17 & 124-31 and accompanying text.

2. 33 Ohio St. 3d 54, 514 N.E.2d 709 (1987). For a thorough discussion of *Gaines*, see *infra* notes 118-23 & 132-39 and accompanying text.

3. For a discussion of the provisions of the Ohio Constitution violated by Ohio's medical malpractice statute of repose, see *infra* notes 110-14 and accompanying text. For a discussion of the definition of statute of repose, see *infra* notes 16-22 and accompanying text.

4. Courts finding medical malpractice statutes of repose constitutional include: *Barwick v. Celotex Corp.*, 736 F.2d 946 (4th Cir. 1984) (North Carolina law); *Fitz v. Dolyak*, 712 F.2d 330 (8th Cir. 1983) (Iowa law); *Jewson v. Mayo Clinic*, 691 F.2d 405 (8th Cir. 1982) (Minnesota law); *Bowlin Horn v. Citizens Hosp.*, 425 So. 2d 1065 (Ala. 1982); *Owen v. Wilson*, 260 Ark. 21, 537 S.W.2d 543 (1976); *Dunn v. St. Francis Hosp.*, 401 A.2d 77 (Del. 1979); *Carr v. Broward County*, 505 So. 2d 568 (Fla. Dist. Ct. App. 1987); *Holmes v. Iwasa*, 104 Idaho 179, 657 P.2d 476 (1983); *Anderson v. Wagner*, 79 Ill. 2d 295, 402 N.E.2d 560 (1979); *Johnson v. St. Vincent Hosp.*, 273 Ind. 374, 404 N.E.2d 585 (1980); *Koppes v. Pearson*, 384 N.W.2d 381 (Iowa 1986); *Stephens v. Snyder Clinic Ass'n*, 230 Kan. 115, 631 P.2d 222 (1981); *Crier v. Whitecloud*, 496 So. 2d 305 (La. 1986); *Hill v. Fitzgerald*, 304 Md. 689, 501 A.2d 27 (1985); *Ross v. Kansas City Gen. Hosp. & Medical Center*, 608 S.W.2d 397 (Mo. 1980); *Colton v. Dewey*, 212 Neb. 126, 321 N.W.2d 913 (1982); *Armijo v. Tandysh*, 98 N.M. 181, 646 P.2d 1245 (Ct. App. 1981), *cert. quashed*, 98 N.M. 336, 648 P.2d 794 (N.M.), *cert. denied*, 459 U.S. 1016 (1982); *Smith v. Smith*, 291 S.C. 420, 354 S.E.2d 36 (1987); *Harrison v. Schrader*, 569 S.W.2d 822 (Tenn. 1978); *Allen v. Intermountain Health Care*, 635 P.2d 30 (Utah 1981).

Courts finding the statutes unconstitutional include: *Kenyon v. Hammer*, 142 Ariz. 69, 688 P.2d 961 (1984) (violated state equal protection clause); *Austin v. Litvak*, 682 P.2d 41 (Colo. 1984) (violated state equal protection guarantees); *Phelan v. Hanft*, 471 So. 2d 648 (Fla. Dist. Ct. App. 1985) (violated state constitutional right of access to courts), *vacated*, 488 So. 2d 531 (Fla. 1986) (supreme court, in denying appeal, vacated lower court's alternative ruling that statute of repose was unconstitutional); *Shessel v. Stroup*, 253 Ga. 56, 316 S.E.2d 155 (1984) (violated equal protection clause); *Clark v. Singer*, 250 Ga. 470, 298 S.E.2d 484 (1983) (violated equal protection clause in wrongful death action); *Strahler v. St. Luke's Hosp.*, 706 S.W.2d 7 (Mo. 1986) (violated minor's state constitutional right of access to courts); *Carson v. Maurer*, 120 N.H. 925, 424 A.2d 825 (1980) (violated state equal protection guarantees); *Gaines v. Preterm-Cleveland, Inc.*, 33 Ohio St. 3d 54, 514 N.E.2d 709 (violated state equal

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trend of decisions finding such statutes unconstitutional.⁵ These two

protection, due process and right-to-a-remedy provisions); *Hardy v. VerMeulen*, 32 Ohio St. 3d 45, 512 N.W.2d 626 (violated right-to-a-remedy provision of state constitution), *cert. denied*, 108 S. Ct. 1029 (1988); *Mominee v. Scherbarth*, 28 Ohio St. 3d 270, 503 N.E.2d 717 (1986) (violated minors' state due process rights); *Reynolds v. Porter*, 760 P.2d 816 (Okla. 1988) (special statute limiting scope of recoverable damages constituted special legislation); *Neagle v. Nelson*, 685 S.W.2d 11 (Tex. 1985) (violated state open courts provision); *Nelson v. Krusen*, 678 S.W.2d 918 (Tex. 1984) (violated open courts provision of state constitution); *Sax v. Votteler*, 648 S.W.2d 661 (Tex. 1983) (violated minors' due process guarantees set forth in open courts provision of state constitution); *Khonke v. St. Paul Fire & Marine Ins. Co.*, 140 Wis. 2d 80, 410 N.W.2d 585 (Ct. App. 1987) (violated right-to-remedy provision of state constitution), *review granted*, 141 Wis. 2d 983, 416 N.W.2d 296 (Wis. 1987), *aff'd on other grounds and remanded*, 144 Wis. 2d 352, 424 N.W.2d 191 (Wis. 1988).

5. The chart below depicts the number of leading state court decisions initially passing on the constitutionality of a medical malpractice statute of repose in response to an equal protection, due process or open courts challenge, and the outcomes of the decisions in given years.

	'76	'77	'78	'79	'80	'81	'82	'83	'84	'85	'86	'87	'88
Constitutional	1 ^a	0	1 ^b	2 ^c	2 ^d	3 ^e	3 ^f	1 ^g	1 ^h	1 ⁱ	2 ^j	1 ^k	0
Unconstitutional	0	0	0	1 ^l	0	0	1 ^m	3 ⁿ	0	1 ^o	2 ^p	1 ^q	

a. *Owen v. Wilson*, 260 Ark. 21, 537 S.W.2d 543 (1976) (did not violate state or federal due process).

b. *Harrison v. Schrader*, 569 S.W.2d 822 (Tenn. 1978) (did not violate state or federal equal protection or state open courts provision).

c. *Dunn v. St. Francis Hosp.*, 401 A.2d 77 (Del. 1979) (did not violate state open courts provision); *Anderson v. Wagner*, 79 Ill. 2d 295, 402 N.E.2d 560 (1979) (did not violate state due process or equal protection).

d. *Johnson v. St. Vincent Hosp.*, 273 Ind. 374, 402-05, 404 N.E.2d 585, 603-04 (1980) (did not violate due process or equal protection); *Ross v. Kansas City Gen. Hosp. & Medical Center*, 608 S.W.2d 397 (Mo. 1980) (did not violate due process, equal protection or right to privacy).

e. *Stephens v. Snyder Clinic Ass'n*, 230 Kan. 115, 631 P.2d 222 (1981) (did not violate state or federal equal protection); *Armijo v. Tandys*, 98 N.M. 181, 646 P.2d 1245 (Ct. App. 1981) (did not violate due process or equal protection), *cert. quashed*, 98 N.M. 336, 648 P.2d 794 (N.M.), *cert. denied*, 459 U.S. 1016 (1982); *Allen v. Intermountain Health Care*, 635 P.2d 30 (Utah 1981) (did not violate state equal protection).

f. *Jewson v. Mayo Clinic*, 691 F.2d 405 (8th Cir. 1981) (Minnesota statute did not violate federal due process or equal protection); *Bowling Horn v. Citizens Hosp.*, 425 So. 2d 1065 (Ala. 1982) (statute did not create arbitrary classification); *Colton v. Dewey*, 212 Neb. 126, 321 N.E.2d 913 (1982) (did not violate state due process or open courts provisions or federal equal protection).

g. *Holmes v. Iwasa*, 104 Idaho 179, 657 P.2d 476 (1983) (did not violate federal equal protection).

h. *Barwick v. Celotex Corp.*, 736 F.2d 946 (4th Cir. 1984) (North Carolina statute did not violate state or federal equal protection or state open courts provision).

i. *Hill v. Fitzgerald*, 304 Md. 689, 501 A.2d 27 (1985) (did not violate state access to courts provision).

j. *Koppes v. Pearson*, 384 N.W.2d 381 (Iowa 1986) (did not violate state or federal equal protection); *Crier v. Whitecloud*, 496 So. 2d 305 (La. 1986) (nonviolative of state or federal equal protection or due process or state open courts provision).

cases, other recent decisions⁶ and language in several recent related cases⁷ indicates that the number of courts finding medical malpractice statutes of repose unconstitutional will increase. These recent decisions indicate judicial dissatisfaction with the harsh results that medical malpractice statutes of repose can create and with the enactment of the statutes in response to what is now termed the "perceived" medical malpractice insurance crisis of the 1970's.⁸ The reasoning of these recent decisions is consistent with the logic and fairness of applying the discovery rule to medical malpractice actions⁹ and with the principal purpose of tort law, compensating injured victims.¹⁰ Consequently, an increasing number of jurisdictions should follow the reasoning of recent decisions and find medical malpractice statutes of repose unconstitutional in the future.

This Note will first discuss the development of medical malpractice statutes of repose and their relation to the emergence of the discovery rule in medical malpractice actions and to the medical malpractice insur-

k. *Smith v. Smith*, 291 S.C. 420, 354 S.E.2d 36 (1987) (did not violate state or federal equal protection).

l. *Carson v. Maurer*, 120 N.H. 925, 424 A.2d 825 (1980) (violative of state equal protection).

m. *Sax v. Votteler*, 648 S.W.2d 661 (Tex. 1983) (violative of minors' due process guarantees set forth in open courts provision of state constitution).

n. *Kenyon v. Hammer*, 142 Ariz. 69, 688 P.2d 961 (1984) (violative of state equal protection clause); *Austin v. Litvak*, 682 P.2d 41 (Colo. 1984) (violative of state equal protection guarantees); *Shessel v. Stroup*, 253 Ga. 56, 316 S.E.2d 155 (1984) (violative of equal protection).

o. *Strahler v. St. Luke's Hosp.*, 706 S.W.2d 7 (Mo. 1986) (statute invalidated with respect to minors only).

p. *Hardy v. VerMeulen*, 32 Ohio St. 3d 45, 512 N.E.2d 626 (1987) (violated right-to-remedy provision), *cert. denied*, 108 S. Ct. 1029 (1988); *Gaines v. Preterm-Cleveland, Inc.*, 33 Ohio St. 3d 54, 514 N.E.2d 709 (1987) (violated equal protection, due process and right-to-a-remedy provisions).

q. *Reynolds v. Porter*, 760 P.2d 816 (Okla. 1988) (statute limiting recovery to medical expenses after running of statutory period violative of special legislation provision).

6. For a discussion of other recent state court decisions holding medical malpractice statutes of repose unconstitutional, see *infra* notes 95-109 and accompanying text.

7. Language in several recent related cases indicates that some courts which have already decided that these statutes are constitutional may be willing to reconsider their positions. For a discussion of these cases, see *infra* note 109 and accompanying text.

8. For a discussion of judicial dissatisfaction with medical malpractice statutes of repose, see *infra* notes 96-108 and accompanying text.

9. For a discussion of why the recent decisions are consistent with the application of the discovery rule, see *infra* notes 124-31 and accompanying text.

10. The law of torts "is directed toward the compensation of individuals, rather than the public, for losses which they have suffered within the scope of their legally recognized interests generally, rather than one interest only, where the law considers that compensation is required." W. KEETON, D. DOBBS, R. KEETON & D. OWEN, *PROSSER AND KEETON ON TORTS* § 1, at 5-6 (5th ed. 1984) [hereinafter *PROSSER & KEETON*].

ance crisis of the 1970's.¹¹ This Note will next examine the challenges made to medical malpractice statutes of repose under various federal and state constitutional provisions,¹² the reasoning of earlier decisions upholding these statutes as constitutional¹³ and the reasoning of later decisions finding these statutes unconstitutional.¹⁴ Finally, this Note will analyze the similarity between the history of medical malpractice statutes of repose and automobile guest statutes, which appears to indicate that an increasing number of courts will find medical malpractice statutes of repose unconstitutional in the future.¹⁵

I. BACKGROUND

A. *Development of Medical Malpractice Statutes of Repose*

1. *Statutes of Repose*

Statutes of repose and statutes of limitations are often confused.¹⁶ They are similar in that they both prescribe the time period within which a plaintiff may commence his suit.¹⁷ The distinguishing feature between the two is the time at which the respective periods commence. Generally, in medical malpractice actions, if the plaintiff's cause of action accrues and the statutory period commences when the injury occurs or, as is most often the case, when the plaintiff is or should be aware that he

11. For a discussion of the development of medical malpractice statutes of repose, see *infra* notes 16-42 and accompanying text.

While this Note restricts its discussion to medical malpractice statutes of repose, similar statutes have been enacted in other areas such as construction and products liability. For a discussion of statutes of repose generally, see McGovern, *The Variety, Policy and Constitutionality of Product Liability Statutes of Repose*, 30 AM. U.L. REV. 579 (1981); Note, *The Constitutionality of Statutes of Repose: Federalism Reigns*, 38 VAND. L. REV. 627 (1985). While some articles address statutes of repose generally, this Note submits that the development of medical malpractice statutes of repose may not necessarily parallel the development of statutes of repose in other areas. Compare *Skinner v. Anderson*, 38 Ill. 2d 455, 231 N.E.2d 588 (1967) (construction statute of repose unconstitutional) with *Anderson v. Wagner*, 79 Ill. 2d 295, 402 N.E.2d 560 (1979) (medical malpractice statute of repose constitutional).

12. For a discussion of constitutional challenges to medical malpractice statutes of repose, see *infra* notes 43-66 and accompanying text.

13. For a discussion of early state cases upholding the constitutionality of medical malpractice statutes of repose, see *infra* notes 67-85 and accompanying text.

14. For a discussion of later state cases finding medical malpractice statutes of repose unconstitutional, see *infra* notes 94-139 and accompanying text.

15. For a comparison of the evolution of medical malpractice statutes of repose with the evolution of automobile guest statutes, see *infra* notes 140-59 and accompanying text.

16. Note, *supra* note 11, at 628-29. ("The term 'statute of repose' can create analytical difficulties because it lacks a precise definition and is often confused with 'statute of limitations.'").

17. *Id.* For a general discussion of the various definitions of statutes of repose, see McGovern, *supra* note 11, at 582-87.

has been injured, the statute is properly termed a statute of limitations.¹⁸ If the statutory period commences upon the occurrence of an event, regardless of when the injury occurs, at a time when the plaintiff may or may not be aware of any injury, the statute is properly termed a statute of repose.¹⁹ In the latter case the repose period commences upon the occurrence of an event, such as the negligent act or omission of the health care practitioner, but the injury caused by this act or omission may be latent and therefore not manifest itself until after the statutory period has elapsed. Consequently, the plaintiff's claim may be barred before he is or should be aware that he has been injured or has a claim.²⁰ This result may also occur under certain statutes of limitations if the limitations period commences on the date of the injury regardless

18. Limitations periods are generally thought to commence when an action accrues. See 1 D. LOUISELL & H. WILLIAMS, *MEDICAL MALPRACTICE* ¶ 13.07, at 13-20 to -21 (1988) (majority of jurisdictions construe "time of accrual of action" under medical malpractice statutes of limitations as date patient discovers injury, rather than utilizing time-of-negligent-act as date of accrual); see also Note, *supra* note 11, at 629 (statutes of limitations triggered at time cause of action accrues).

Some repose periods also commence when an action "accrues." For example, the Arkansas medical malpractice statute of repose provided: "Hereafter all actions . . . against physicians . . . shall be commenced within two [2] years after the cause of action accrues. The date of the accrual of the cause of action shall be the date of the wrongful act complained of, and no other time." Owen v. Wilson, 260 Ark. 21, 23-24, 537 S.W.2d 543, 544 (1976) (quoting ARK. STAT. ANN. § 37-205 (1962)).

Adoption of the discovery rule changed the judicial interpretation of when a cause of action "accrued" under a medical malpractice statute of limitations from the date of the negligent act or omission of the health care practitioner to the date on which the plaintiff discovered or should have discovered his injury. 1 D. LOUISELL & H. WILLIAMS, *supra* ¶ 13.07, at 13-20. For a discussion of the discovery rule, see *infra* notes 23-27 and accompanying text.

19. Reynolds v. Porter, 760 P.2d 816, 820 (Okla. 1988).

20. For example, in Laughlin v. Forgrave, 432 S.W.2d 308, 310 (Mo. 1968), a surgeon negligently left a surgical instrument in a plaintiff's back during an operation performed in 1951. The plaintiff did not discover that the instrument had been left inside her until 1962, 11 years later. *Id.* at 311. The applicable statute of limitations provided that all medical malpractice actions must be commenced within two years of the occurrence of the negligent act. *Id.* at 310. Consequently, the plaintiff's cause of action against the physician accrued in 1951 and was barred in 1953, two years from the date of the back surgery. Therefore, the plaintiff's claim was barred more than nine years before she was aware that she had been injured. Many statutes contain limitations *and* repose provisions. For example, Illinois' medical malpractice statute of repose provided:

No action for damages for injury or death against any physician or hospital . . . shall be brought more than 2 years after the date on which the claimant knew, or through the use of reasonable diligence should have known, . . . of the injury . . . but in no event shall such action be brought more than 4 years after the date on which occurred the act or omission or occurrence alleged . . . to have been the cause of such injury or death.

Anderson v. Wagner, 79 Ill. 2d 295, 299, 402 N.E.2d 560, 561 (1979) (quoting ILL. REV. STAT. ch. 83, ¶ 22.1 (1977)). In this statute the two-year period is the limitations period while the four-year period is the repose period.

of whether the plaintiff has discovered it.²¹ However, if the limitations period commences upon the discovery of an injury, the plaintiff is aware that he has been injured, and that he therefore has a claim, before the statutory period begins to elapse. Consequently, he has the statutorily prescribed period to organize his affairs and commence his suit. For the purposes of this Note, the term statute of repose includes any statute that can bar a plaintiff's claim before he is or should be aware that one exists.

Prior to the 1960's and 1970's, most medical malpractice statutes of limitations were essentially statutes of repose. In the majority of states during this period, a claimant's cause of action accrued on the date on which the negligent act of the health care practitioner occurred.²² Consequently, if an injury caused by a health care practitioner's negligence did not manifest itself within the statutorily prescribed period, the in-

21. Some courts have noted the distinction between statutes of repose and statutes of limitations without the benefit of the discovery rule that commence on the date the injury occurs. *See, e.g.,* *Kenyon v. Hammer*, 142 Ariz. 69, 73, 688 P.2d 961, 965 (1984); *Reynolds*, 760 P.2d at 819-21. The date of the injury and therefore the time the statutory period commences, may be considered to be the time when all the elements of a cause of action are complete. *See* McGovern, *supra* note 11, at 584-86. In the majority of medical malpractice cases, the injury occurs contemporaneously with the negligent act. *Reynolds*, 760 P.2d at 820-21. In such cases, there may be no real distinction between statutes of repose and statutes of limitations. However, in some cases injury may occur after the negligent act. Thus, a statutory period commencing on the date of the injury may begin to elapse later than that of a statute of repose. *See* McGovern, *supra* note 11, at 585-86. Of course, statutes of limitations without the benefit of the discovery rule that commence on the date of injury may also begin to run before the plaintiff is aware of his injury, and therefore, like a statute of repose, bar a plaintiff's claim before he is aware that he has been injured. *Id.* For example, in *Kenyon* the plaintiff came under a physician's care for her pregnancy. *Kenyon*, 142 Ariz. at 71, 688 P.2d at 963. During a prenatal examination the physician's nurse negligently annotated the plaintiff's chart to indicate that the plaintiff had Rh positive instead of Rh negative blood. *Id.* Since the plaintiff had Rh negative blood she required a dosage of RhoGam within 72 hours of giving birth, otherwise her ability to bear additional children would be substantially impaired. *Id.* Because of the nurse's error, the physician failed to administer the RhoGam when the plaintiff gave birth. *Id.* As a result, the plaintiff's second pregnancy, five years later, resulted in a stillborn child. *Id.* The court held that the injury to the plaintiff occurred when the doctor failed to administer the RhoGam since that was when her physical condition changed for the worse. *Id.* at 75, 688 P.2d at 967. Consequently, she did not discover her injury until nearly five years later when her second child was stillborn and after the two-year statutory period had elapsed. *Id.* Therefore, under Arizona's statute of limitations, as is often the case with statutes of repose, the plaintiff's claim was barred before she was or should have been aware that she had been injured. *Id.* at 76, 688 P.2d at 968.

Although statutes of repose and statutes of limitations without the benefit of the discovery rule are distinguishable, their effect on a plaintiff's potential claim appears to be quite similar. Consequently, for the purposes of this Note both types of statutes will be included under the term statute of repose.

22. *See* D. LOUISELL & H. WILLIAMS, *supra* note 18, ¶ 13.07, at 13-20 to -21 (greatest change in law of malpractice in past 20 years is overwhelming acceptance of discovery rule by most states in place of time-of-negligent-act rule).

jured party was barred from bringing his claim before he was ever aware that he had been injured.

2. *The Discovery Rule*

In response to the manifest unfairness that early medical malpractice statutes of limitations produced, during the 1960's and 1970's many state legislatures and some state judiciaries adopted the discovery rule.²³ This rule provided that a medical malpractice claimant's cause of action did not accrue until he discovered, or through the exercise of reasonable diligence should have discovered, the injury caused by the health care practitioner's negligence.²⁴ However, many state legislatures and judiciaries did not apply the discovery rule to all situations. Many state legislatures, responding to a judicial adoption of the discovery rule, enacted statutes of repose that permitted only a limited application of the discovery rule.²⁵ Although these legislatures sought to promote fairness, they enacted statutes that still contained outer limit repose provisions.²⁶ In addition, some of the statutes and even some of the judicial opinions adopting the discovery rule restricted use of the rule to certain cases such as those involving plaintiffs who discovered foreign objects within their bodies.²⁷ Consequently, a meritorious claim

23. *Id.* State courts adopting the discovery rule during this time period include: *Mayer v. Good Samaritan Hosp.*, 14 Ariz. App. 248, 482 P.2d 497 (1971); *Spath v. Morrow*, 174 Neb. 38, 115 N.W.2d 581 (1962); *Gaddis v. Smith*, 417 S.W.2d 577 (Tex. 1967).

24. I D. LOUISELL & H. WILLIAMS, *supra* note 18, ¶ 13.07, at 13-20 to -25. Some statutes further provided that the cause of action did not accrue until the plaintiff discovered not only the injury, but also that the injury was caused by the health care practitioner's negligence. *Id.* at 13-21 to -25 & n.54.

Two underlying reasons have been suggested as to why state courts and legislatures found the original "statutes of limitations" unfair and consequently adopted the discovery rule in medical malpractice actions. First, "the statutory period within which the action must be initiated is short—one year, or at most two, being the common time limit." RESTATEMENT (SECOND) OF TORTS, § 899 comment e (1977). Second, "the nature of the tort itself and the character of the injury will frequently prevent knowledge of what is wrong, so that the plaintiff is forced to rely upon what he is told by the physician or surgeon." *Id.*

25. The Idaho legislature, for example, enacted IDAHO CODE § 5-219(4) (1971) in response to the judicial adoption of the discovery rule in misdiagnosis cases. *Holmes v. Iwasa*, 104 Idaho 179, 181-82, 657 P.2d 476, 478-79 (1983). This statute limited use of the discovery rule to cases involving foreign objects left within patients' bodies. *Id.* at 182, 657 P.2d at 479.

26. *See Colton v. Dewey*, 212 Neb. 126, 128, 321 N.W.2d 913, 915 (1982) (NEB. REV. STAT. § 25-222 (1972) (reissued 1985) (one year from date of discovery of negligence but not more than 10 years from negligent act)). For an example of a bifurcated statute with an outer limit repose provision, see *supra* note 20.

27. *See Holmes v. Iwasa*, 104 Idaho 179, 182, 657 P.2d 476, 478-79 & n.4 (1983) (IDAHO CODE § 5-219(4) (1971) (restricted application of discovery rule to cases where patient discovered foreign object in his or her body); *Billings v. Sisters of Mercy*, 86 Idaho 485, 497-98, 389 P.2d 224, 232 (1964) (judicial adoption of discovery rule limited to cases in which foreign object was left inside patient's body); *Renner v. Edwards*, 93 Idaho 836, 838, 475 P.2d 530, 532

could still be barred in many situations if a claimant did not discover his or her injury within the applicable repose period. Therefore, many of the new statutes and decisions created medical malpractice statutes of repose with a limited use of the discovery rule.

3. *The Medical Malpractice Insurance Crisis of the 1970's*

In the early and mid 1970's many state legislatures enacted medical malpractice statutes of repose in response to what was termed the medical malpractice insurance crisis of the 1970's.²⁸ Furthermore, many states with existing medical malpractice statutes of repose enacted ones containing shorter repose periods.²⁹ The legislative purpose of these statutes was to control the "long tail" effect³⁰ created by the adoption of the discovery rule.³¹

Insurance groups asserted that because of this "long tail" effect and

(1969) (discovery rule extended to misdiagnosis); *Anderson v. Wagner*, 79 Ill. 2d 295, 308-09, 402 N.E.2d 560, 566 (1979) (court, citing several statutes, noted discovery rule is available in actions against nurses and other medical personnel, but not against limited group of health care providers such as physicians, surgeons and hospitals).

28. Decisions which recognize that the medical malpractice statute of repose in question was enacted in response to the "medical malpractice insurance crisis of the 1970's" include: *Reese v. Rankin Fite Memorial Hosp.*, 403 So. 2d 158, 160-61 (Ala. 1981); *Kenyon v. Hammer*, 142 Ariz. 69, 72, 688 P.2d 961, 964 (1984); *Anderson v. Wagner*, 79 Ill. 2d 295, 305, 402 N.E.2d 560, 564 (1979); *Harrison v. Schrader*, 569 S.W.2d 822, 824 (Tenn. 1978). For a thorough discussion of legislation passed in response to this crisis, see Redish, *Legislative Response to the Medical Malpractice Insurance Crisis: Constitutional Implications*, 55 TEX. L. REV. 759 (1977).

29. See, e.g., *Anderson v. Wagner*, 79 Ill. 2d 295, 306-07, 402 N.E.2d 560, 565 (1979) (10-year repose period provided for in ILL. REV. STAT. ch. 83, ¶ 22.1 (1965) was reduced by amendment in 1975 to five years and further reduced by amendment to four years in 1976); *Stephens v. Snyder Clinic Ass'n*, 230 Kan. 115, 119-20, 631 P.2d 222, 226-27 (1981) (KAN. STAT. ANN. § 60-513 (Supp. 1974) was amended in 1976, reducing personal injury repose period from 10 years to four years for health care providers).

30. Since medical malpractice insurance has traditionally been sold on an occurrence basis, health care providers are protected against claims that may arise in the future from negligent acts that occur during the policy year. Redish, *supra* note 28, at 765. Consequently, it was asserted that "[t]he rate determining process is dependent upon knowing with some degree of certainty the total potential losses for a policy year, and any extension of the statutory period makes rate-setting that much more difficult." *Id.* (citing U.S. DEP'T OF HEALTH, EDUC. & WELFARE, PUB. NO. 73-88, MEDICAL MALPRACTICE: REPORT OF THE SECRETARY'S COMM'N ON MEDICAL MALPRACTICE 22, 38-40 (1973)). Consequently, the longer the relevant period during which a claim can arise, "the longer the period of risk (or 'long tail') extends for the insurance company." *Id.*

31. See *Kenyon v. Hammer*, 142 Ariz. 69, 87, 688 P.2d 961, 979 (1984) (problem of "long tail" which may be created by discovery rule was not significant enough to support legislative enactment abolishing such rule); *Stephens v. Snyder Clinic Ass'n*, 230 Kan. 115, 130, 631 P.2d 222, 235 (1981) (principal cause of increased cost and unavailability of medical malpractice insurance was attributed by legislature to the "long tail" created by discovery rule).

for other reasons,³² exorbitant medical malpractice liability insurance premiums were required to cover current and possible future malpractice claims against health care practitioners.³³ As a result, medical malpractice liability insurance premiums skyrocketed.³⁴ Insurance and health care special interest groups then applied pressure upon state legislatures to enact legislation abrogating or limiting the use of the discovery rule, as well as imposing other limitations on medical malpractice actions, to help reduce medical malpractice insurance premiums.³⁵ In response to this lobbying pressure many states enacted medical malpractice acts which restricted various aspects of medical malpractice actions.³⁶ Many of these acts contained medical malpractice statutes of repose.³⁷

32. Other reasons for the crisis include the increase in the frequency of claims and rising jury awards. Redish, *supra* note 28, at 761.

33. *Id.* at 761, 765.

34. McKay, *Rethinking the Tort Liability System: A Report From the ABA Commission*, 32 VILL. L. REV. 1219, 1220 (1987) (as result of medical malpractice "crisis" of mid 1970's, insurance companies raised malpractice insurance rates dramatically). Between 1960 and 1970, insurance rates for surgeons rose 942.2% and rates for nonsurgical physicians increased 540.8%. Redish, *supra* note 28, at 759-60 (citing U.S. DEP'T OF HEALTH, EDUC. & WELFARE, PUB. NO. 73-88, MEDICAL MALPRACTICE: REPORT OF THE SECRETARY'S COMM'N ON MEDICAL MALPRACTICE 13 (1973)). In some states, premiums paid by physicians rose more than 100% between 1974 and mid-1975 alone. *Id.*

35. "[T]he perceptions of a panicked public as well as ferocious lobbying by the medical profession and insurance industry generated intense pressure on state legislatures to enact remedial [medical malpractice] legislation." Learner, *Restrictive Medical Malpractice Compensation Schemes: A Constitutional "Quid Pro Quo" Analysis to Safeguard Individual Liberties*, 18 HARV. J. ON LEGIS., 143, 144 (1981). "As a result of the complaints of the powerful medical profession, many states adopted legislation designed to reduce the recoveries and thus to influence a downturn in rates." McKay, *supra* note 34, at 1220.

36. Five of the most common legislative proposals included:

- (1) limiting either the amount of recovery by plaintiffs or the liability of individual health care providers;
- (2) reducing the statute of limitations applicable to medical malpractice actions;
- (3) abrogating the collateral source rule in medical malpractice actions;
- (4) establishing medicolegal screening panel plans; and
- (5) establishing either compulsory or voluntary arbitration plans.

Redish, *supra* note 28, at 761; see also Turkington, *Constitutional Limitations on Tort Reform: Have the State Courts Placed Insurmountable Obstacles in the Path of Legislative Responses to the Perceived Liability Insurance Crisis?*, 32 VILL. L. REV. 1299, 1300-01 (1987) (citing similar proposals regarding medical malpractice legislation). State legislatures enacting such legislation usually indicated that while they sought to reduce medical malpractice insurance premiums for health care practitioners, they did so to ensure adequate health care would be available to the general public. See *American Bank & Trust Co. v. Community Hosp.*, 36 Cal. 3d 359, 371, 683 P.2d 670, 677-78, 204 Cal. Rptr. 671, 678-79 (1984) (as result of "skyrocketing" medical malpractice insurance rates many doctors decided to stop providing medical care with respect to high risk procedures, to terminate their practice in the state altogether or to practice without medical malpractice insurance).

37. See *Carson v. Maurer*, 120 N.H. 925, 935, 424 A.2d 825, 833 (1980)

The validity and severity of this medical malpractice insurance crisis of the 1970's as well as the effectiveness of the legislation enacted in response to it³⁸ has been disputed.³⁹ One commentator suggests that the crisis may have been caused by insurance companies receiving low returns on investments while payments for medical malpractice claims increased rapidly.⁴⁰ He suggests further that the crisis probably subsided because insurance companies began receiving higher returns on their investments due to the dramatic rise in interest rates during the late 1970's and early 1980's and because doctors passed the increased cost of medical malpractice liability insurance onto their patients.⁴¹ Many courts, feeling that this crisis was in fact illusory or that this legislation was inappropriate, have held that much of this legislation, including many medical malpractice statutes of repose, is unconstitutional.⁴²

(New Hampshire act limiting various aspects of medical malpractice actions contained medical malpractice statute of limitations with limited use of discovery rule).

38. "Much of the legislation was ill-conceived, or at least did not perform as intended." McKay, *supra* note 34, at 1220.

At least one authority suggests that medical malpractice statutes of repose have a minimal effect on alleviating the "long tail" effect and reducing medical malpractice liability insurance premiums. Indications are that "88% of all medical malpractice injuries which result in claims are reported within the first two years following injury, that 95 to 96% of all claims have been reported within three years, 97% within four years and only 2% are reported after five years." Kenyon v. Hammer, 142 Ariz. 69, 86, 688 P.2d 961, 978 (1984) (citing U.S. DEP'T OF HEALTH, EDUC. & WELFARE, PUB. NO. 73-88, MEDICAL MALPRACTICE: REPORT OF THE SECRETARY'S COMM'N ON MEDICAL MALPRACTICE 254 (1973)).

39. Turkington, *supra* note 36, at 1299-1300 & n.3 (congressional reports and other forums questioned the bona fide nature of the supposed "crisis").

40. See McKay, *supra* note 34, at 1220; see also Mominee v. Scherbarth, 28 Ohio St. 3d 270, 280-81, 503 N.E.2d 717, 725-26 (1986) (Celebreeze, J., concurring) (medical malpractice insurance crisis may have been attributable, at least in part, to insurance cycles). One commentator has suggested that the high incidence of medical malpractice claims may be attributable to some physicians' poor intake diagnostic practices and to the increased risks of error accompanying the use of complex medical technology. Learner, *supra* note 35, at 146 & n.15.

41. See McKay, *supra* note 34, at 1220. It should be noted that another liability insurance "crisis" allegedly occurred in the mid-1980's. See *id.* at 1221. The cause of this crisis may also have been largely attributable to insurance companies earning low returns on investments while charging artificially low premiums. *Id.* at 1220-21; see also Mooney, *The Liability Crisis—A Perspective*, 32 VILL. L. REV. 1235 (1987) (discusses causes and possible solutions to liability insurance crisis of 1980's).

42. See, e.g., Kenyon v. Hammer, 142 Ariz. 69, 87, 688 P.2d 961, 979 ("long tail" effect has minimal effect on price and availability of health care); Arneson v. Olson, 270 N.W.2d 125, 136 (N.D. 1978) ("The evidence in the case before us . . . indicates that either the Legislature was misinformed or subsequent events have changed the situation substantially . . . [because malpractice insurance] premiums in North Dakota are the sixth lowest in the United States."). One court, in refusing to uphold further reform legislation enacted subsequent to the perceived crisis of the 1970's when it appeared no crisis existed, stated: "Absent a crisis to justify the enactment of such legislation, we can ascertain no satisfactory

B. Constitutional Challenges

Medical malpractice statutes of repose have been challenged on various state and federal constitutional grounds prior to and following the perceived medical malpractice insurance crisis of the 1970's. Earlier cases uniformly held that the statutes did not violate various state or federal constitutional provisions.⁴³ In later cases, medical malpractice statutes of repose have continued to survive federal constitutional attacks, but an emerging segment of state courts has begun to find the statutes violative of various state constitutional provisions.⁴⁴

1. Federal Constitutional Challenges

Medical malpractice statutes of repose have often been challenged as violating the due process and equal protection clauses of the fourteenth amendment of the United States Constitution.⁴⁵ None of these challenges has succeeded, however, due to the Supreme Court's rigid and deferential approach to reviewing legislation asserted to be violative of the equal protection or due process clauses.⁴⁶ This approach consists of three standards of judicial review: (1) strict scrutiny,⁴⁷ (2) rational

reason for the separate and unequal treatment that it imposes on medical malpractice litigants." *Boucher v. Sayeed*, 459 A.2d 87, 93 (R.I. 1983).

43. For a discussion of early state court decisions upholding the constitutionality of medical malpractice statutes of repose, see *infra* notes 67-85 and accompanying text.

44. For a discussion of state court decisions finding medical malpractice statutes of repose unconstitutional under various state constitutional provisions, see *infra* notes 94-109 and accompanying text.

45. See, e.g., *Jewson v. Mayo Clinic*, 691 F.2d 405, 411 (8th Cir. 1982) (asserted that Minnesota statute violated federal equal protection and due process); *Harrison v. Schrader*, 569 S.W.2d 822, 824-25 (Tenn. 1978) (asserted that statute violated federal equal protection).

46. One court may have held that a medical malpractice statute of repose violated federal equal protection. In *Shessel v. Stroup*, 253 Ga. 56, 56, 316 S.E.2d 155, 156 (1984), and *Clark v. Singer*, 250 Ga. 470, 471, 298 S.E.2d 484, 485 (1983), Georgia's medical malpractice statute of repose was challenged as violating state and federal equal protection. In both cases the Georgia Supreme Court held that the statute violated equal protection but did not specify whether its holding was based on state or federal constitutional grounds or both. *Shessel*, 253 Ga. at 59, 316 S.E.2d at 158; *Clark*, 250 Ga. at 472, 298 S.E.2d at 486.

For a general discussion of the Supreme Court's equal protection and due process standards of review and their effect on medical malpractice reform legislation, see *Turkington*, *supra* note 36, at 1308-17 and *infra* notes 47-49 and accompanying text. For a general discussion of constitutional challenges to statutes of repose, see Note, *supra* note 11, at 635-48.

47. The strict scrutiny analysis subjects the legislation to the highest level of judicial review. See *Turkington*, *supra* note 36, at 1313-14. For this level of scrutiny to be applied, a fundamental right, *Kramer v. Union Free School Dist. No. 15*, 395 U.S. 621 (1969) (right to vote); *Shapiro v. Thompson*, 394 U.S. 618 (1969) (right to travel), or a suspect class, *Graham v. Richardson*, 403 U.S. 365 (1971) (alienage); *Loving v. Virginia*, 388 U.S. 1 (1967) (race), must be affected by the legislation. See *Turkington*, *supra* note 36, at 1315. If a fundamental right or suspect class is affected, the legislation is presumed to be unconstitutional

basis⁴⁸ and (3) intermediate scrutiny.⁴⁹ Since medical malpractice statutes of repose do not affect a suspect class⁵⁰ or a fundamental right⁵¹ under the United States Constitution, and do not affect classes based on illegitimacy or gender, courts have applied the lowest level of judicial review, the rational basis test, when passing on the constitutionality of these statutes.⁵² Unless the party challenging the legislation can demonstrate that the law is not rationally related to furthering a legitimate state interest, courts will generally exercise great deference to leg-

and the state must demonstrate that the legislation is necessary to further a compelling state interest. *Id.* at 1314.

48. The rational basis test subjects the legislation to the least demanding level of judicial scrutiny. Turkington, *supra* note 36, at 1310-13; *see also* Vance v. Bradley, 440 U.S. 93, 97 (1979) (Court will not overturn statute not burdening suspect class or fundamental interest unless legislative actions were irrational). This level of review is normally applied to economic and social welfare legislation not affecting a suspect class or a fundamental right. *See* Turkington, *supra* note 36, at 1308-13. Under this analysis there is a strong presumption that the legislation is constitutional. *Vance*, 440 U.S. at 97. To overcome this presumption the party challenging the legislation must demonstrate that the legislation is not "rationally related to furthering a legitimate state interest." *Id.* (quoting Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 312 (1976)). Moreover, the Court will not consider the empirical success or failure of the legislation under this standard of review in determining whether or not a rational basis existed. *See* Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 463-64 (1981) (states are not required to convince courts of correctness of their legislative judgments in light of empirical evidence regarding effectiveness of legislation). Consequently, this level of review in effect immunizes the legislation from any type of judicial action. *See* Turkington, *supra* note 36, at 1310-13.

49. The intermediate scrutiny standard falls somewhere between strict scrutiny and the rational basis test. The Supreme Court has limited the use of this level of scrutiny to legislation distinguishing on the basis of illegitimacy or gender. Turkington, *supra* note 36, at 1315. When this level of review is applied, the legislation is again presumed to be unconstitutional and the state must demonstrate that the legislation substantially furthers a significant state interest. *Id.* at 1314. Although the intermediate level of scrutiny is less rigorous than the strict scrutiny standard, a court's utilization of the intermediate scrutiny standard still makes it more likely than not that the legislation will be found unconstitutional. *Id.* at 1314-15.

50. The Supreme Court has viewed a class as "suspect" when legislation establishes classifications based on alienage, nationality or race, or when legislation affects "discrete and insular minorities." *Graham v. Richardson*, 403 U.S. 365, 372 (1971). For a discussion of the standard used to evaluate legislation affecting suspect classes, *see supra* note 47 and accompanying text.

51. *See* *Duke Power Co. v. Carolina Evtl. Study Group*, 438 U.S. 59, 82-84 (1978) (implying right to recover damages in tort not fundamental right). For a discussion of fundamental rights and the strict scrutiny standard, *see supra* note 47 and accompanying text.

52. *See* *Barwick v. Celotex Corp.*, 736 F.2d 946, 958 (4th Cir. 1984) ("[r]ational basis is the proper test, because the statute of repose does not infringe a fundamental right nor does it involve a suspect classification"); *Jewson v. Mayo Clinic*, 691 F.2d 405, 411 (8th Cir. 1982) (statute of repose held constitutional since statute's provisions were not irrational with respect to its legitimate purpose); *Harrison v. Schrader*, 569 S.W.2d 822, 825 (Tenn. 1978) (medical malpractice statute of repose evaluated under rational basis standard).

islative determinations and uphold the legislation when reviewing it under the rational basis test.⁵³ Consequently, legislation is rarely found unconstitutional when scrutinized under this standard of review. Therefore, since state legislators could have rationally believed that medical malpractice statutes of repose further the legitimate state interest of providing adequate and affordable health care to the public, state and federal courts have uniformly held that medical malpractice statutes of repose do not violate the due process or equal protection clauses of the fourteenth amendment.⁵⁴

Although some commentators feel the Supreme Court could take a more activist posture in reviewing economic and social welfare legislation in the future,⁵⁵ others disagree.⁵⁶ Consequently, it appears uncertain whether the Court's deference to legislative determinations in this area will continue. However, as long as the rational basis test is the standard of judicial review for medical malpractice statutes of repose challenged under the due process and equal protection clauses of the fourteenth amendment, it is unlikely that the statutes will be found violative of the United States Constitution.

2. *State Constitutional Challenges*

While challenges to medical malpractice statutes of repose under the federal constitution have been unsuccessful, challenges under various state constitutional provisions have enjoyed greater success in several states. These challenges have asserted that the statutes are violative of state equal protection⁵⁷ or due process⁵⁸ constitutional guarantees,

53. For a discussion of the rational basis test, see *supra* note 48 and accompanying text.

54. For a discussion of cases addressing the constitutionality of medical malpractice statutes of repose, see *supra* notes 4-5 and accompanying text.

55. One commentator believes that while a present majority of the Court will not engage in a heightened level of judicial scrutiny concerning economic or social welfare legislation, there is a sufficient number of members on the Court who, if joined by several new members, would create a majority that would engage in such a level of review. J. NOWAK, R. ROTUNDA & J. YOUNG, *CONSTITUTIONAL LAW* § 14.3, at 535-37 (3d ed. 1986). Whether the Court would extend this level of judicial scrutiny to medical malpractice legislation is uncertain.

56. Professor Turkington asserts that the Supreme Court's attitude toward tort-reform-type legislation will not change in the foreseeable future. Turkington, *supra* note 36, at 1316. He asserts that even the members of the Court who take a more expansive view of the Court's role in reviewing state legislation would be reluctant to engage in a heightened level of judicial scrutiny in reviewing tort reform legislation. *Id.* This is because these Justices believe "the Court's role in protecting individual rights and in preventing injustice ought to be primarily focused on noneconomic fundamental rights such as privacy, speech or association, or on legislation unfairly directed at groups such as racial minorities, or women" *Id.*

57. Medical malpractice statutes of repose have been challenged as violating equal protection on the basis that they create various arbitrary and unreasonable classifications. Classifications asserted by various plaintiffs include: plaintiffs who discover their injuries within the repose period and those who do

or "open courts" or "right-to-a-remedy" provisions also contained in many state constitutions.⁵⁹

State courts have generally followed the Supreme Court's three-tiered approach when reviewing legislation challenged on state due process or equal protection grounds.⁶⁰ But since states may grant their citizens greater rights than those granted by the federal constitution,⁶¹ some state courts have recently been more willing to engage in a height-

not, *Jewson v. Mayo Clinic*, 691 F.2d 405, 411 (8th Cir. 1982) (Minnesota law, constitutional); *Gaines v. Preterm-Cleveland, Inc.*, 33 Ohio St. 3d 54, 58, 514 N.E.2d 709, 714 (unconstitutional); medical malpractice plaintiffs and all other tort plaintiffs, *Crier v. Whitecloud*, 496 So. 2d 305, 312 (La. 1986) (Lemmon, J., concurring) (constitutional); *Reynolds v. Porter*, 760 P.2d 816, 823 (Okla. 1988) (special statute limiting scope of recoverable damages unconstitutional); medical malpractice claimants without benefit of discovery rule and all other malpractice claimants, *Kenyon v. Hammer*, 142 Ariz. 69, 83, 688 P.2d 961, 975 (1984) (unconstitutional); plaintiffs with a foreign object negligently left in their body and all other medical malpractice plaintiffs, *Fitz v. Dolyak*, 712 F.2d 330, 332 (8th Cir. 1983) (Iowa law, constitutional); *Austin v. Litvak*, 682 P.2d 41, 48 (Colo. 1984) (unconstitutional); *Ross v. Kansas City Gen. Hosp. & Medical Center*, 608 S.W.2d 397, 398 (Mo. 1980) (constitutional); *Carson v. Maurer*, 120 N.H. 925, 936, 424 A.2d 825, 833 (1980) (unconstitutional); and health care practitioners and other tortfeasors, *Anderson v. Wagner*, 79 Ill. 2d 295, 318-19, 402 N.E.2d 560, 571 (1979) (statute which distinguished between physicians and hospitals, and all other health care providers found constitutional); *Stephens v. Snyder Clinic Ass'n*, 230 Kan. 115, 127, 631 P.2d 222, 233 (1981) (constitutional); *Armijo v. Tandys*, 98 N.M. 181, 183, 646 P.2d 1245, 1247 (Ct. App. 1981), *cert. quashed*, 98 N.M. 336, 648 P.2d 794 (N.M.), *cert. denied*, 459 U.S. 1016 (1982) (constitutional); *Harrison v. Schrader*, 569 S.W.2d 822, 824-25 (Tenn. 1978) (constitutional); *Allen v. Intermountain Health Care*, 635 P.2d 30, 31 (Utah 1981) (constitutional).

58. *See, e.g., Crier v. Whitecloud*, 496 So. 2d 305, 308-09 (La. 1986) (constitutional); *Gaines v. Preterm-Cleveland, Inc.*, 33 Ohio St. 3d 54, 59, 514 N.E.2d 709, 715 (1987) (unconstitutional).

59. *See Dunn v. St. Francis Hosp.*, 401 A.2d 77, 80 (Del. 1979) (constitutional); *Hardy v. VerMeulen*, 32 Ohio St. 3d 45, 47, 512 N.E.2d 626, 629 (1987) (unconstitutional), *cert. denied*, 108 S. Ct. 1029 (1988). The Ohio Constitution's right-to-a-remedy provision is typical of those contained in other state constitutions. It provides: "All courts shall be open, and every person, for an injury done him in his land, goods, person or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay." OHIO CONST. art. I, § 16. There is no such analogous provision in the United States Constitution. *See Strahler v. St. Luke's Hosp.*, 706 S.W.2d 7, 9 (Mo. 1986).

60. *See Kenyon v. Hammer*, 142 Ariz. 69, 78-79, 688 P.2d 961, 970 (1984) (there are three tests available to determine constitutionality of statute under equal protection analysis); *Harrison v. Schrader*, 569 S.W.2d 822, 825 (Tenn. 1978) (strict scrutiny was inappropriate since statute did not interfere with fundamental right and all other classifications have generally been subjected to rational basis test). *But see Crier v. Whitecloud*, 496 So. 2d 305, 310 (La. 1986) (federal multilevel system is not appropriate model under Louisiana Constitution).

61. *See Sax v. Votteler*, 648 S.W.2d 661, 664 (Tex. 1983) (states can grant greater rights than those conferred by federal constitution) (citing *Prune Yard Shopping Center v. Robins*, 447 U.S. 74, 81 (1980)).

ened level of judicial review when passing on the constitutionality of medical malpractice statutes of repose.⁶² Consequently, several courts have found that medical malpractice statutes of repose do not sufficiently further the legitimate state interest of providing affordable health care to the general public and are therefore unconstitutional.⁶³

Several state courts have also found medical malpractice statutes of repose violative of states' open courts or right-to-a-remedy constitutional provisions. Under these provisions, statutes of repose have been found to deny a plaintiff access to the courts for a remediable wrong,⁶⁴ deny him his remedy without providing a suitable substitute⁶⁵ and make a remedy contingent on an impossible condition.⁶⁶ Consequently, an increasing number of recent state court decisions have held that medical malpractice statutes of repose are violative of open courts or right-to-a-remedy provisions.

3. *Early Decisions*

Prior to 1980, medical malpractice statutes of repose were uniformly upheld against numerous state and federal constitutional challenges.⁶⁷ Several of these decisions concerned statutes enacted by a legislature in response to judicial adoption of the discovery rule or before the state had adopted the discovery rule, rather than in response to the perceived medical malpractice insurance crisis of the 1970's.⁶⁸ The legislative purpose of these earlier statutes was generally held to be

62. See, e.g., *Kenyon v. Hammer*, 142 Ariz. 69, 83, 688 P.2d 961, 975 (1984) (abolition of discovery rule valid only if it serves compelling state interest); *Carson v. Maurer*, 120 N.H. 925, 932, 424 A.2d 825, 830-31 (1980) (rights affected by medical malpractice statute of repose and other reform legislation are sufficiently important to require more rigorous judicial scrutiny than allowed under rational basis test); *Reynolds v. Porter*, 760 P.2d 816, 824-25 (Okla. 1988) (statute not reasonably and substantially related to high cost of medical malpractice insurance).

63. For examples of courts holding that medical malpractice statutes of repose do not further legitimate state interests, see cases cited *supra* note 62.

64. See *Hardy v. VerMeulen*, 32 Ohio St. 3d 45, 46, 512 N.E.2d 626, 627-28 (1987) ("Appellant has no remedy for an injury to his body when his claim is extinguished before he knew of injury or could have reasonably discovered it.").

65. See *Sax v. Votteller*, 648 S.W.2d 661, 665-67 (Tex. 1983) (since statute abolished minor's right to bring well established common-law cause of action without providing reasonable alternative, it violated open courts provision).

66. *Nelson v. Krusen*, 678 S.W.2d 918, 921 (Tex. 1984) (legislature has no power to make remedy contingent on impossible condition).

67. For a list of pre-1980 cases upholding the constitutionality of such statutes and of post-1980 cases finding such statutes unconstitutional, see *supra* notes 4-5.

68. See, e.g., *Owen v. Wilson*, 260 Ark. 21, 26, 537 S.W.2d 543, 545-46 (1976) (statute enacted before adoption of discovery rule); *Holmes v. Iwasa*, 104 Idaho 179, 181-82, 657 P.2d 476, 478-79 (1983) (statute enacted in response to judicial adoption of discovery rule).

the preclusion of stale claims.⁶⁹ These earlier cases scrutinized the statutes under an assumption that the statutes were a legislative modification of a rule of common law⁷⁰ or a legislative determination as to what was a reasonable period of limitations for commencing a cause of action.⁷¹

In *Owen v. Wilson*,⁷² the Arkansas Supreme Court held that Arkansas' medical malpractice statute of repose did not violate due process.⁷³ The court treated the statute of repose as if it were a typical statute of limitations and held that a court "may not strike down a statute of limitations unless the period before the bar becomes effective is so short that it amounts to a virtual denial of the right itself or it can be said that the legislature has committed palpable error."⁷⁴ The court held that this limitations period, which could potentially bar a plaintiff's claim before he discovered it, was reasonable.⁷⁵ The court further noted that statutes of limitations are practical devices necessary to spare the courts from litigating stale claims.⁷⁶ Arkansas had not yet adopted the discovery rule when *Owen* was decided.⁷⁷ The court concluded its opinion by holding that the plaintiff's arguments might be more appropriately addressed to the legislature.⁷⁸ The *Owen* decision effectively held that adoption of the discovery rule was not constitutionally compelled.

Medical malpractice statutes like the one in *Owen*, containing express statutory language that the claimant's cause of action accrued on the date of the negligent act, were relatively rare prior to the medical malpractice insurance crisis of the 1970's.⁷⁹ However, many similarly

69. For a further discussion of the purpose of these statutes, see *infra* note 124 and accompanying text.

70. See *Hill v. Fitzgerald*, 304 Md. 689, 703, 501 A.2d 27, 34 (1985) (since there is no vested right in rule of common law, discovery rule may be modified by statute).

71. See *Owen v. Wilson*, 260 Ark. 21, 24-25, 537 S.W.2d 543, 545 (1976) (court may not invalidate limitations period unless it is unreasonable); *Laughlin v. Forgrave*, 432 S.W.2d 308, 314 (Mo. 1968) (statute of limitations is not unconstitutional unless time allowed for commencement of action and date fixed when statute commences to run are clearly and plainly unreasonable).

72. 260 Ark. 21, 537 S.W.2d 543 (1976). The statute provided that an action for medical malpractice must be commenced within two years of when the action accrued. *Id.* at 23-24, 537 S.W.2d at 544 (quoting ARK. STAT. ANN. § 37-205 (1962)). The statute expressly stated that a cause of action against a physician accrued on the date of the wrongful act complained of. *Id.* at 24, 537 S.W.2d at 544. In *Owen*, the plaintiff did not discover that the defendant physician had negligently left a surgical instrument inside him until six years after the surgery was performed. *Id.* at 23, 537 S.W.2d at 544.

73. *Id.* at 24-26, 537 S.W.2d at 545-46.

74. *Id.* at 25, 537 S.W.2d at 545.

75. *Id.*

76. *Id.* at 26, 537 S.W.2d at 545-46.

77. See *id.* at 24, 537 S.W.2d at 544.

78. *Id.* at 26, 537 S.W.2d at 545-46.

79. See *Anderson v. Wagner*, 79 Ill. 2d 295, 305, 402 N.E.2d 560, 564

worded statutes were enacted in response to the crisis. When these similarly worded statutes were originally challenged, *Owen* and other similar cases were fairly representative of the existing case law concerning the constitutionality of medical malpractice statutes of repose.⁸⁰ Therefore, up until 1983, *Owen* and the other similar cases⁸¹ were frequently followed by state courts upholding the constitutionality of medical malpractice statutes of repose.⁸² These opinions typically demonstrated great deference to determinations made by state legislatures.⁸³

Courts had generally followed the rationale of the *Owen* decision when addressing the constitutionality of medical malpractice statutes of repose.⁸⁴ In the early 1980's, however, several courts began to utilize a state equivalent of the rational basis test when passing on the constitutionality of medical malpractice statutes of repose enacted in response to the medical malpractice insurance crisis of the 1970's.⁸⁵ Initially, this

(1979) (prior to medical malpractice insurance crisis, few states had special limitations statutes for medical malpractice cases). Other statutes, while not expressly stating that the cause of action accrued on the date of the negligent act, provided for the same time of accrual by not adopting the discovery rule. For a general discussion of the development of statutes of repose and the discovery rule, see *supra* notes 16-27 and accompanying text.

80. In *Dunn v. St. Francis Hosp., Inc.*, the Delaware Supreme Court held that Delaware's medical malpractice statute of repose was not violative of the Delaware Constitution's open courts provision. 401 A.2d 77, 80-81 (Del. 1979). This statute was enacted in response to the medical malpractice insurance crisis of the 1970's. *Id.* at 79. The court, citing *Owen* and some similarly decided cases as being representative of the general law concerning medical malpractice statutes of repose, held that Delaware's statute was constitutional. *Id.* at 80-81; *accord* *Anderson v. Wagner*, 79 Ill. 2d 295, 311-12, 402 N.E.2d 560, 567 (1979) (citing similarly decided cases, noted all cases researched sustained the validity of medical malpractice statutes of repose); *Hill v. Fitzgerald*, 304 Md. 689, 703 & n.4, 501 A.2d 27, 34 & n.4 (1985) (citing *Owen* and later similarly decided cases, held that great majority of jurisdictions had upheld medical malpractice statutes of repose).

81. In *Landgraff v. Wagner*, 26 Ariz. App. 49, 54-55, 546 P.2d 26, 31 (1976), and *Laughlin v. Forgrave*, 432 S.W.2d 308, 314 (Mo. 1968), the courts held that the repose periods in two respective medical malpractice statutes of repose were reasonable. As such, both decisions were frequently cited in later cases which upheld the constitutionality of such statutes.

82. For a discussion of cases finding medical malpractice statutes of repose constitutional, see *supra* notes 80-82 and accompanying text.

83. See *Owen v. Wilson*, 260 Ark. 21, 26, 537 S.W.2d 543, 546 (1976) (issue would be more appropriately addressed to general assembly as policy matter).

84. The reasoning of *Owen* has been relied upon to sustain the constitutionality of medical malpractice statutes of repose when challenged under open courts provisions, see *Dunn v. St. Francis Hosp.*, 401 A.2d 77, 80-81 (Del. 1979), and equal protection or due process provisions, see *Stephens v. Snyder Clinic Ass'n*, 230 Kan. 115, 131-32, 631 P.2d 222, 235 (1981) (equal protection); *Anderson v. Wagner*, 79 Ill. 2d 295, 311-12, 402 N.E.2d 560, 567 (1979) (due process). The rational basis test has also been used to sustain a medical malpractice statute of repose challenged under an open courts provision. See *Hill v. Fitzgerald*, 304 Md. 689, 703, 501 A.2d 27, 34 (1985).

85. See, e.g., *Anderson v. Wagner*, 79 Ill. 2d 295, 315-17, 402 N.E.2d 560, 569-70 (1979) ("In the cases now before us there clearly is a sound and rational

group of courts applying the rational basis test uniformly held that the statutes were constitutional, with the result that the statutes were sustained under the reasonable limitations period rationale of *Owen* and under state equivalents of the Supreme Court's due process and equal protection analysis.

4. *Carson v. Maurer*

In 1980, the New Hampshire Supreme Court in *Carson v. Maurer*⁸⁶ became the first state high court to find a medical malpractice statute of repose unconstitutional.⁸⁷ In *Carson*, the plaintiff asserted that New Hampshire's medical malpractice statute of repose⁸⁸ violated the equal protection provision of the New Hampshire Constitution.⁸⁹ In determining that the statute of repose violated the claimant's equal protection rights, the court applied a level of judicial scrutiny similar to that of the United States Supreme Court's intermediate scrutiny test.⁹⁰ While concluding that the right to recover for injuries to one's person is not a fundamental right, the court held that it is an "important substantive right" that is therefore worthy of a higher standard of judicial review.⁹¹ The court further concluded that the legislature may not abolish the discovery rule with respect to any one class of medical malpractice plaintiffs and found the statute unconstitutional.⁹² The *Carson* decision was important to the future of medical malpractice statutes of repose not only because it was the first case in which a court held such a statute unconstitutional but because it was also the first to apply an intermediate level of judicial review to a medical malpractice statute of repose.⁹³

basis for the classification at issue."); *Harrison v. Schrader*, 569 S.W.2d 822, 824-25 (Tenn. 1978) (rational basis test appropriate standard of review).

86. 120 N.H. 925, 424 A.2d 825 (1980).

87. *Id.* at 937, 424 A.2d at 834.

88. The plaintiff also asserted that other elements of New Hampshire's medical malpractice reform statute were unconstitutional. *Id.* at 930, 424 A.2d at 829-30 (citing N.H. REV. STAT. ANN. § 507-C (Supp. 1979)).

89. *Id.* at 930-31, 424 A.2d at 830. The statute in question in *Carson* was actually enacted as a statute of limitations with a limited application of the discovery rule. The statute provided an absolute two-year period of repose commencing from the date of the negligent act for all medical malpractice claimants except for claimants who discovered that a foreign object had been negligently left within their bodies. *Id.* at 935, 424 A.2d at 833. This latter class of claimants had two years from the date of discovering the object to commence their action. *Id.*

90. *Id.* at 931-32, 424 A.2d at 830-31.

91. *Id.*

92. *Id.* at 936, 424 A.2d at 833.

93. The New Hampshire Supreme Court in *Carson* was also one of the first state courts to apply a heightened level of judicial scrutiny to medical malpractice reform legislation generally. See *Turkington*, *supra* note 36, at 1328-29.

5. *Later Decisions*

Following *Carson*, the majority of jurisdictions considering the constitutionality of medical malpractice statutes of repose continued to find them constitutional.⁹⁴ It was not until 1983 that this trend shifted to where an increasing number of courts began to find medical malpractice statutes of repose violative of various state constitutional provisions.⁹⁵ This trend appears to have coincided with growing judicial sentiment that the medical malpractice insurance crisis of the 1970's was illusory and that the legislation enacted in response to it was inappropriate.⁹⁶ This sentiment induced an increasing number of state courts to engage in a heightened level of judicial scrutiny, resulting in decisions that medical malpractice statutes of repose violated equal protection, due process⁹⁷ or respective states' open courts or right-to-a-remedy provisions.⁹⁸ The opinions sound in fairness and the protection of individual rights.⁹⁹

In *Kenyon v. Hammer*,¹⁰⁰ the Arizona Supreme Court held, based on specific provisions of the Arizona Constitution, that the right to bring an

94. For a list of cases holding such statutes constitutional, see *supra* note 4. For a graphic depiction of the the leading post-1980 cases still holding medical malpractice statutes of repose constitutional after *Carson*, see chart, *supra* note 5.

95. For a list of post-1983 cases holding medical malpractice statutes of repose unconstitutional, see *supra* note 4. For a graphic depiction of the trend of leading post-1983 decisions finding such statutes unconstitutional, see chart, *supra* note 5.

96. Some of the earlier courts to address the constitutionality of medical malpractice statutes of repose considered the medical malpractice crisis legitimate. See *Anderson v. Wagner*, 79 Ill. 2d 295, 301, 402 N.E.2d 560, 562 (1979) ("It is generally agreed that in the early 1970's what has been termed a medical malpractice insurance crisis existed in most jurisdictions in this country."); *Harrison v. Schrader*, 569 S.W.2d 822, 826 (Tenn. 1978) ("[T]his state and the nation were in the throes of what was properly described as a 'medical malpractice insurance crisis.'"). However, an increasing number of later courts began to refer to the crisis as "perceived." See *Kenyon v. Hammer*, 142 Ariz. 69, 72, 688 P.2d 961, 964 (1984) (perceived malpractice crisis); *Hardy v. VerMeulen*, 32 Ohio St. 3d 45, 48, 512 N.E.2d 626, 629 (1987) (perceived crisis in area of malpractice insurance), *cert. denied*, 108 S. Ct. 1029 (1988).

97. See *Kenyon v. Hammer*, 142 Ariz. 69, 87, 688 P.2d 961, 979 (1984) (violated state equal protection); *Austin v. Litvak*, 682 P.2d 41, 52 (Colo. 1984) (violated state equal protection); *Carson v. Maurer*, 120 N.H. 925, 944, 424 A.2d 825, 838 (1980) (violated state equal protection); *Gaines v. Preterm-Cleveland, Inc.*, 33 Ohio St. 3d 54, 59, 514 N.E.2d 709, 715 (1987) (violated state due process).

98. See *Hardy v. VerMeulen*, 32 Ohio St. 3d 45, 47, 512 N.E.2d 626, 629 (1987) (violated state constitution's right-to-a-remedy provision), *cert. denied*, 108 S. Ct. 1029 (1988); *Nelson v. Krusen*, 678 S.W.2d 918, 922 (Tex. 1984) (violated open courts provision of state constitution).

99. See *Gaines v. Preterm-Cleveland, Inc.*, 33 Ohio St. 3d 54, 60, 514 N.E.2d 709, 716 (1987) (medical malpractice statutes of repose are simply unfair). For a related discussion, see *infra* note 134 and accompanying text.

100. 142 Ariz. 69, 688 P.2d 961 (1984).

action to recover damages for bodily injury was a fundamental right.¹⁰¹ Consequently, it applied a level of judicial scrutiny similar to that of the Supreme Court's strict-scrutiny analysis.¹⁰² The court then found Arizona's medical malpractice statute of repose violative of equal protection since the statute was not necessary to promote the state's interest in ensuring that affordable health care was available to the general public.¹⁰³ In determining that the purpose of the statute must be to provide affordable quality health care to the general public instead of merely to lower the cost of medical malpractice insurance premiums,¹⁰⁴ the court expressed a dissatisfaction, shared by several courts, with medical malpractice statutes of repose and general medical malpractice reform legislation enacted in response to the "perceived" medical malpractice insurance crisis of the 1970's.

[W]e believe that the state has neither a compelling nor legitimate interest in providing economic relief to one segment of society by depriving those who have been wronged of access to, and remedy by, the judicial system. If such a hypothesis were once approved, any profession, business or industry experiencing difficulty could be made the beneficiary of special legislation designed to ameliorate its economic adversity by limiting access to the courts by those whom they have damaged. Under such a system, our constitutional guarantees would be gradually eroded, until this state became no more than a playground for the privileged and influential.¹⁰⁵

This language clearly indicates that the court was unwilling to uphold this statute if its only effect would be to reduce medical malpractice liability insurance premiums. Without evidence that these statutes have any noticeable effect on the availability or affordability of health care, medical malpractice statutes of repose become increasingly vulnerable

101. *Id.* at 83, 688 P.2d at 975. The court interpreted three provisions of the Arizona Constitution to mean that the right to bring an action to recover damages for bodily injury was a fundamental right in Arizona. *Id.* at 79-83, 688 P.2d at 971-75. First, the open courts provision prohibited abrogation of "the right of action to recover damages" and further provided that "the amount recovered shall not be subject to any statutory limitation." *Id.* at 79, 688 P.2d at 971 (citing ARIZ. CONST. art. 18, § 6). Second, the Arizona equal protection clause provides: "No law shall be enacted granting to any citizen, class of citizens . . . privileges or immunities which, upon the same terms, shall not equally belong to all citizens . . ." *See id.* at 77, 688 P.2d at 969 (citing ARIZ. CONST. art. 2, § 13). Third, the constitution provides that "no law shall be enacted in this state limiting the amount of damages to be recovered for causing the death or injury of any person." *Id.* at 79, 688 P.2d at 971 (citing ARIZ. CONST. art. 2, § 31).

102. *Id.* at 83, 688 P.2d at 975.

103. *Id.* at 87, 688 P.2d at 979.

104. *Id.* at 84, 688 P.2d at 976.

105. *Id.*

to judicial invalidation.¹⁰⁶ With more and more courts beginning to share the sentiment expressed by the *Kenyon* court, an increasing number of medical malpractice statutes of repose have been found to be unconstitutional.¹⁰⁷ Moreover, several courts having already upheld medical malpractice statutes of repose under one constitutional challenge have found them unconstitutional under different circumstances¹⁰⁸ or have indicated in language of later related opinions that the statutes may be found unconstitutional on different grounds.¹⁰⁹

106. The *Kenyon* court required a causal connection between the statute of repose and the affordability and availability of health care. However, one commentator has also noted that inadequate demonstration that medical malpractice reform legislation is causally connected to medical malpractice insurance premiums and the "lack of evenhandedness in distributing the burdens of cost containment" present obstacles to the survivability of this legislation. Turkington, *supra* note 36, at 1330.

107. For a list of decisions holding medical malpractice statutes of repose unconstitutional, see *supra* note 4. For a graphic depiction of the trend of recent decisions holding such statutes unconstitutional, see chart, *supra* note 5.

108. In Georgia, GA. CODE ANN. § 9-3-71 (1976) was originally upheld when challenged as arbitrarily classifying plaintiffs on the basis of those who discover a foreign object within their bodies and those who do not. *Allrid v. Emory Univ.*, 249 Ga. 35, 38, 285 S.E.2d 521, 524-25 (1982). Subsequently, this statute was found to be unconstitutional when challenged as distinguishing between plaintiffs who discover their injuries within the statutory period and those who do not. *Shessel v. Stroup*, 253 Ga. 56, 57-59, 316 S.E.2d 155, 158 (1984).

109. In *Farley v. Engelken*, the Supreme Court of Kansas, for the first time, applied a heightened level of judicial scrutiny to medical malpractice reform legislation that was enacted in response to the medical malpractice insurance crisis of the 1970's. 241 Kan. 663, 672-73, 740 P.2d 1058, 1064-65 (1987). While this case dealt specifically with legislation abrogating the collateral source rule, the court noted that it had previously applied the rational basis test in upholding the constitutionality of Kansas' medical malpractice statute of repose. *Id.* at 674, 740 P.2d at 1065 (citing *Stephens v. Snyder Clinic Ass'n*, 230 Kan. 115, 631 P.2d 222 (1981)). However, the court went on to hold that this previous decision did not consider whether a heightened standard of review was appropriate. *Id.* These dicta imply that the court may be willing to apply a heightened standard of judicial scrutiny to Kansas' medical malpractice statute of repose in the future, and possibly find it unconstitutional as it did the legislation abrogating the collateral source rule.

In *Berry v. Beech Aircraft Corp.*, the Supreme Court of Utah held that Utah's products liability statute of repose violated the open courts provision of the Utah Constitution. 717 P.2d 670, 683 (Utah 1985). The court noted that it had previously upheld the constitutionality of Utah's medical malpractice statute of repose against equal protection and due process challenges, but that the statute had not been challenged under the open courts provision. *Id.* at 683 (citing *Allen v. Intermountain Health Care*, 635 P.2d 30 (Utah 1981)). The court went on to hold that there had been no showing in the earlier case that the medical malpractice statute would not achieve its legislative purpose. *Id.* Consequently, an open courts challenge to Utah's medical malpractice statute of repose supported with proper empirical data could be successful.

In *Treat v. Kreutzer*, the Arkansas Supreme Court noted that it was aware of the "very respectable authority" holding that certain medical malpractice statutes of repose were violative of equal protection. 290 Ark. 532, 536, 720 S.W.2d 716, 718 (1986). The Arkansas Supreme Court went on to hold that since this issue was not before the court it would be left for future consideration. *Id.* at

Consequently, courts that have already decided the issue may be willing to rethink their positions and strike down the statutes in the context of future challenges.

III. ANALYSIS

A. *Future of Medical Malpractice Statutes of Repose*

The future of medical malpractice statutes of repose depends primarily upon judicial willingness to protect individual rights by overriding legislative determinations. With a growing feeling that the medical malpractice insurance crisis of the 1970's was in fact "perceived," that these statutes have little effect on the availability of affordable health care and with tort law's marked shift in favor of plaintiff's rights during recent years, it appears likely that an increasing number of medical malpractice statutes of repose will be found unconstitutional.

1. *1987 Ohio State Court Decisions*

The Ohio Supreme Court found Ohio's medical malpractice statute of repose violative of the Ohio Constitution's right-to-a-remedy provision¹¹⁰ in *Hardy*.¹¹¹ The court then found the statute violative of the

536, 720 S.W.2d at 719. This may imply that the Arkansas Supreme Court is willing to find Arkansas' medical malpractice statute of repose unconstitutional and therefore distinguish or overrule *Owen v. Wilson*, 260 Ark. 21, 537 S.W.2d 543 (1976).

In *Theriault v. A.H. Robbins Co.*, a dissenting justice indicated that while Idaho's medical malpractice statute of repose had been held not to violate equal protection or due process, it did appear to violate the Idaho Constitution's open courts provision. 108 Idaho 303, 309-11, 698 P.2d 365, 371-73 (1985) (Bistline, J., dissenting). Justice Bistline and another justice also suggested that the statute could be found violative of equal protection if challenged on this ground in the future. *Id.* at 309-15, 698 P.2d at 371-77 (Bistline, J., dissenting, and Huntley, J., concurring). The statute has yet to be challenged under the open courts provision. *Id.* at 309-11, 698 P.2d at 371-73.

In *Young v. Haines*, the Supreme Court of California implied that California's medical malpractice statute of repose, at least as it applies to minors, would not survive an equal protection challenge. 41 Cal. 3d 883, 900-01, 718 P.2d 909, 919, 226 Cal. Rptr. 547, 557 (1986). The goal of this statute was to provide insurers with greater certainty about their liability. *Id.* at 900, 718 P.2d at 919, 226 Cal. Rptr. at 557. The court held:

This court is not presented with the question whether a restricted statute of limitations with narrow tolling provisions for all malpractice plaintiffs is rationally related to this goal. However, it is difficult to see how discrimination against minor malpractice plaintiffs vis-a-vis adults is rationally related to this or any other ascertainable legislative goal. The fact that such discrimination against minors would bar some meritorious claims and thereby reduce total malpractice liability is not enough to justify it. If claims are reduced in an arbitrary manner, the classification scheme denies equal protection of the law.

Id. at 900-01, 718 P.2d at 919, 226 Cal. Rptr. at 557. The court then decided the case on nonconstitutional grounds. *Id.* at 901-02, 718 P.2d at 919, 226 Cal. Rptr. at 557.

110. OHIO CONST. art. I, § 16.

equal protection¹¹² and due process¹¹³ provisions in *Gaines*.¹¹⁴ Ohio's medical malpractice statute of repose provides that medical malpractice actions must be commenced within four years following the act or omission constituting the alleged malpractice.¹¹⁵

In *Hardy*, the plaintiff discovered an injury to his ear allegedly caused by surgery negligently performed by the defendant physician ten years earlier.¹¹⁶ The court held that the statute violated the right-to-a-remedy provision of the Ohio Constitution because a plaintiff discovering his injury after the statutory period had elapsed was not permitted a reasonable time within which to commence his action.¹¹⁷

In *Gaines*, the plaintiff had undergone surgery in 1980 to have an intrauterine device ("IUD") removed.¹¹⁸ In 1983, approximately three and one-half years following the surgery, the plaintiff discovered that the IUD was still inside her, and that it had perforated her uterus and had become embedded in her left ligament.¹¹⁹ In 1985, more than four years from the date of the surgery, the plaintiff filed suit against the allegedly negligent surgeon who had performed the surgery.¹²⁰ Although the plaintiff had discovered her injury within the four year repose period, she still had less than one year to commence her action.¹²¹ The court held that the statute was violative of equal protection because distinguishing between medical malpractice claimants "who discover their [injuries] in time to enjoy a full year to organize a legal action, and those who do not, does not rationally further the goal of alleviating the alleged

111. *Hardy v. VerMeulen*, 32 Ohio St. 3d 45, 47, 512 N.E.2d 626, 627-28 (1987), *cert. denied*, 108 S. Ct. 1029 (1988).

112. OHIO CONST. art. I, § 2.

113. *Id.* § 16.

114. *Gaines v. Preterm-Cleveland, Inc.*, 33 Ohio St. 3d 54, 59, 514 N.E.2d 709, 715 (1987) (court also again found statute violative of right-to-remedy provision).

115. *Hardy*, 32 Ohio St. 3d at 45, 512 N.E.2d at 627 (citing OHIO REV. CODE ANN. § 2305.11(B) (Anderson 1982)).

116. *Id.*

117. *Id.* at 47, 512 N.E.2d at 628. The court further held: "When the Constitution speaks of remedy and injury to person, property, or reputation, it requires an opportunity granted at a meaningful time and in a meaningful manner." *Id.*

118. *Gaines*, 33 Ohio St. 3d at 54, 514 N.E.2d at 711.

119. *Id.*

120. *Id.* Before plaintiff could file suit she was also required to provide 180 day notice of her intent to sue. *Id.* (citing OHIO REV. CODE ANN. § 2305.11(B) (1982)). Consequently, since she underwent surgery on April 30, 1980, discovered the injury on October 18, 1983 and was required to provide 180-day notice of her intent to sue, she had approximately 15 days from the discovery of the injury to forward her notice and preserve her claim which would have been barred if she had not filed her claim within four years of the surgery. *Id.*

121. *Id.* The Ohio Supreme Court had previously held that allowing a medical malpractice claimant one year from the discovery of his injury to commence a suit was a reasonable time. *Adams v. Sherk*, 4 Ohio St. 3d 37, 39, 446 N.E.2d 165, 167-68 (1983).

medical malpractice crisis in this state.”¹²² The *Gaines* court also found the statute violative of due process.¹²³ The *Hardy* and *Gaines* opinions demonstrate a marked shift in judicial reasoning concerning these statutes.

2. *The Significance of Hardy*

The court's holding in *Hardy* is significant not only because it reached a contrary conclusion to that of the *Owen* court using similar reasoning, but because the *Hardy* holding is more consonant with the purpose and logic of the discovery rule. *Owen* and its progeny applied a reasoning that is inconsistent with the discovery rule by treating statutes of limitations that could bar a plaintiff's claim before he discovered it as reasonable. Many of these cases held that the purpose of statutes of limitations is to “spare the courts from litigation of stale claims and the citizen from being put to his defense after memories have faded, witnesses have died or disappeared, and evidence has been lost.”¹²⁴ More appropriately though, statutes of limitations are designed to promote justice and prevent stale claims by “preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared,” and by requiring a plaintiff to put his “adversary on notice” of the plaintiff's just claim.¹²⁵ Obviously, as the *Gaines* court noted, a claim cannot be allowed to slumber unless one realizes that a claim exists.¹²⁶ In addition, one cannot have a just claim before he has any claim.¹²⁷

The courts in *Owen* and its progeny may have been reluctant to strike down medical malpractice statutes of repose because the discov-

122. *Gaines*, 33 Ohio St. 3d at 58, 514 N.E.2d at 714.

123. *Id.* at 59, 514 N.E.2d at 715.

124. *Owen v. Wilson*, 260 Ark. 21, 26, 537 S.W.2d 543, 545-46 (1976) (quoting *Chase Sec. Corp. v. Donaldson*, 325 U.S. 304, 314 (1945) (citing *Order of R.R. Telegraphers v. Railway Express Agency*, 321 U.S. 342, 349 (1944))).

125. *Order of R.R. Telegraphers v. Railway Express Agency*, 321 U.S. 342, 348-49 (1944); see *Clark v. Singer*, 250 Ga. 470, 472, 298 S.E.2d 484, 486 (1983) (“A claim which has not arisen has not been slumbering and is not stale.”). While the Supreme Court has not directly addressed the constitutionality of any statute of repose, it has adopted the discovery rule for medical malpractice claims under the Federal Tort Claims Act, 28 U.S.C. § 2401(b) (1982 & Supp. IV 1986), see *United States v. Kubrick*, 444 U.S. 111, 118-25 (1979), and under the Federal Employers' Liability Act, 45 U.S.C. § 56 (1982), see *Urie v. Thompson*, 337 U.S. 163, 169-70 (1949).

126. See *Gaines*, 33 Ohio St. 3d at 59, 514 N.E.2d at 715. (“The fact that [plaintiff] did not discover his claim until after three years had passed does not necessarily indicate that he ‘slept on his rights’ since in many cases he will be unaware that he had any rights.”).

127. One justice stated that “[i]t is axiomatic that a statute of limitations does not begin to run against a cause of action before that cause of action exists.” *Austin v. Litvak*, 682 P.2d 41, 54 (Colo. 1984) (Dubofsky, J., concurring) (quoting *Dincher v. Marlin Firearms Co.*, 198 F.2d 821, 823 (2d Cir. 1952) (Frank, J., dissenting)).

ery rule was, at that time, a relatively new and significant modification of established tort law.¹²⁸ Permitting limited use of the discovery rule may have seemed reasonable when earlier cases were decided because plaintiffs' rights were enlarged while the established doctrine was not totally abrogated.¹²⁹ This reasoning is consistent with many courts' and legislatures' original limitation of the discovery rule to particular circumstances.¹³⁰ With the growing acceptance of the discovery rule in medical malpractice actions,¹³¹ these original inhibitions may have decreased to the point where courts may now be willing to apply the discovery rule more freely. Consequently, future courts considering the reasonableness of a limitations period that can bar a plaintiff's claim before he is or should be aware that one exists may be more willing to follow the holding of *Hardy* rather than *Owen*.

3. *The Significance of Gaines*

Gaines is significant because it is one of the first state court decisions to invalidate a medical malpractice statute of repose using a state equivalent of the rational basis test.¹³² This court went the furthest of any court to date in overriding the will of a state legislature in the area of medical malpractice statutes of repose. The *Gaines* court went so far as to say that even if the statute actually achieved its purpose of reducing the cost of health care, it would still be unconstitutional since the means of achieving this goal "are unreasonable and arbitrary."¹³³ This court

128. For a discussion of the adoption of the discovery rule in medical malpractice actions, see *supra* notes 23-27 and accompanying text.

129. See *Hill v. Fitzgerald*, 304 Md. 689, 704-05, 501 A.2d 27, 35 (1985) (since time period provided in Maryland's medical malpractice statute of repose is longer than that provided by law existing at time open courts provision to Maryland Constitution was adopted, no violation of that constitutional provision was found); see also *Barwick v. Celotex Corp.*, 736 F.2d 946, 955-56 (4th Cir. 1984) (purpose of North Carolina statute of repose was to enlarge, not to restrict, time within which action could be brought).

130. For a discussion of the limitation of the discovery rule to particular situations, see *supra* notes 23-27 and accompanying text.

131. For a discussion of the growing acceptance of the discovery rule, see *supra* notes 23-27 and accompanying text.

132. *Gaines v. Preterm-Cleveland, Inc.*, 33 Ohio St. 3d 45, 59, 514 N.E.2d 626, 715 (1987). The Colorado Supreme Court in *Austin v. Litvak*, 682 P.2d 41, 49-53 (Colo. 1984), also invalidated a medical malpractice statute of repose using the rational basis test. However, the *Austin* court followed the reasoning of *Carson* which had applied the intermediate test of judicial scrutiny. *Id.* at 52 (citing *Carson v. Maurer*, 120 N.H. 925, 424 A.2d 825 (1980)). Consequently, the *Austin* court's rational basis test may be more akin to the intermediate scrutiny test. See also *Shessel v. Stroup*, 253 Ga. 56, 58-59, 316 S.E.2d 155, 158 (1984) (distinguishing between plaintiffs who discover their injuries before expiration of repose period and those who do not is arbitrary).

133. *Gaines*, 33 Ohio St. 3d at 59, 514 N.E.2d at 715. While this Note suggests that courts finding medical malpractice statutes of repose unconstitutional are in fact overriding the will of state legislatures, at least one justice has asserted that this is not the case, and that these courts are merely determining if

expressly stated what many other courts finding these statutes unconstitutional have merely intimated: medical malpractice statutes of repose are "simply unfair."¹³⁴

While even the *Gaines* court indicated that unfairness alone is insufficient to find a statute violative of any constitutional provision,¹³⁵ unfairness will be the determinative factor in moving future courts to protect the individual rights of medical malpractice claimants by finding medical malpractice statutes of repose unconstitutional. While other limitations on medical malpractice actions may or may not be upheld, courts may be more willing to find statutes of repose unconstitutional since a plaintiff's entire claim may be barred before he is aware of his injury.¹³⁶ The effect of judicial dissatisfaction with a limitation or abrogation of the discovery rule, combined with a similar dissatisfaction with general medical malpractice legislation enacted in response to a perceived medical malpractice insurance crisis, may be sufficient to move future courts to find medical malpractice statutes of repose unconstitutional, while sustaining other less restrictive medical malpractice reform legislation.

Although earlier courts may have been willing to uphold medical malpractice statutes of repose when the medical malpractice insurance crisis seemed real and threatening, present and future courts may find it increasingly difficult to turn away injured plaintiffs when it appears that this crisis was illusory or that the legislation enacted in response to it was inappropriate. At least one commentator has noted that potential medical malpractice claimants are not an influential group with the power or organization to appeal to a legislature for protection of its rights.¹³⁷ This group's only effective remedy may be through judicial

these statutes are consistent with constitutional guarantees. *Mominee v. Scherbarth*, 28 Ohio St. 3d 270, 279 & n.8, 503 N.E.2d 717, 724 & n.8 (1986) (Celebrezze, J., concurring).

134. *Gaines*, 33 Ohio St. 3d at 60, 514 N.E.2d at 716. In its opinion the court also noted that the state had not offered evidence that Ohio's medical malpractice statute of repose had reduced medical malpractice insurance premiums or the cost of health care. *Id.* at 59, 514 N.E.2d at 715.

135. *Id.* at 61, 514 N.E.2d at 716.

136. In *Kenyon v. Hammer*, 142 Ariz. 69, 83, 688 P.2d 961, 975 (1984), the court noted that it had upheld several other sections of Arizona's medical malpractice act including the use of medical screening panels, the admission of the panel's findings into evidence and abolition of the collateral source rule. The court held that these sections merely regulate "what is done with the action after it is brought and prescribe the procedure to be followed before trial and the admission of evidence at trial" and do not therefore "affect the essence of the right to bring a lawsuit." *Id.*

137. See *Lerner*, *supra* note 35, at 185. *Lerner* asserts that medical malpractice victims should be treated as a "suspect" or "semi-suspect" class since they, as potential victims, "possess no readily identifiable personal characteristics that facilitate their political organization in opposition to legislation restricting malpractice recovery." *Id.* at 185-86. He also asserts that the right to bodily freedom from uncompensated private assault should be a "quasi-fundamental

action.¹³⁸ Consequently, consistent with tort law's principal purpose of compensating injured victims,¹³⁹ courts should be more willing to engage in a heightened level of judicial review, such as the *Carson* and *Kenyon* courts did, or merely reject medical malpractice statutes of repose as the *Gaines* court did.

4. *Automobile Guest Statutes*

In determining if a judicial sense of fairness will be sufficient to find medical malpractice statutes of repose unconstitutional in the future, the history of the automobile guest statute is illustrative.¹⁴⁰ In the 1920's and 1930's many state judiciaries adopted a common law rule that a driver was liable to any nonpaying passenger for any injury caused by the driver's "ordinary" negligence.¹⁴¹ In response to the adoption of this rule, insurance lobbyists pressured various state legislatures to enact automobile guest statutes.¹⁴² These statutes normally provided that a driver was only liable for any injury caused to the nonpaying passenger by the driver's gross negligence or willful or wanton conduct.¹⁴³ Ini-

right." *Id.* at 189-95. These "quasi" classifications could therefore justify a heightened standard of review under the Supreme Court's three-tiered analysis or the use of the quid pro quo concept proposed by Learner. *Id.* at 195-201; see also *Farley v. Engelken*, 241 Kan. 663, 740 P.2d 1058, 1064 (1987) (opinion relied on Learner's reasoning in justifying court's application of heightened level of judicial scrutiny to medical malpractice reform legislation).

138. Concerning the constitutionality of a medical malpractice statute of repose, one justice has commented: "Justice in this case cries out for a remedy. How can *anyone* be precluded from asserting a claim by a statute of limitations which expires before the discovery of the injury? How can anyone charged with the responsibility of administering justice allow such an absurdity?" *Mominee v. Scherbarth*, 28 Ohio St. 3d 270, 293, 503 N.E.2d 717, 735 (1986) (Douglas, J., concurring) (emphasis supplied by the court) (quoting *Amer v. Akron City Hosp.*, 47 Ohio St. 2d 85, 93, 351 N.E.2d 479, 485 (1976) (Celebreeze, J., dissenting)).

139. PROSSER & KEETON, *supra* note 10, at 5-6.

140. For a history of the development and downfall of automobile guest statutes, see Comment, *The Constitutionality of Automobile Guest Statutes: A Roadmap to the Recent Equal Protection Challenges*, 1975 B.Y.U. L. REV. 99 [hereinafter Comment, *Constitutionality of Automobile Guest Statutes*]; Comment, *The Common Law Basis of Automobile Guest Statutes*, 43 U. CHI. L. REV. 798 (1976) [hereinafter Comment, *The Common Law Basis*].

141. See Comment, *The Constitutionality of Automobile Guest Statutes*, *supra* note 140, at 99.

142. PROSSER & KEETON, *supra* note 10, at 215 (automobile guest statutes are generally acknowledged to have been the result of persistent and effective lobbying by insurance companies). *But see* Comment, *The Common Law Basis*, *supra* note 140, at 801-09 (asserting that origin was based in common law duties of care); Comment, *Constitutionality of Automobile Guest Statutes*, *supra* note 140, at 104 (origin unclear).

143. See Comment, *The Common Law Basis*, *supra* note 140, at 798 ("host driver is only liable if his conduct involves 'gross negligence,' 'recklessness,' 'willfull misconduct,' intoxication, or some equivalent").

tially, these statutes withstood repeated constitutional challenges.¹⁴⁴ In 1973 however, the Supreme Court of California, in *Brown v. Merlo*,¹⁴⁵ held that California's guest statute violated the equal protection clauses of the United States and California Constitutions.¹⁴⁶ The court held that the statute did not substantially further the state's interest in preventing collusive lawsuits.¹⁴⁷ The opinion emphasized the manifest unfairness of the guest statute to nonpaying passengers and alluded to the pressure that the insurance lobbyists had applied to get the legislation enacted.¹⁴⁸ Soon thereafter, several courts followed the reasoning of *Merlo* and struck down their states' guest statutes.¹⁴⁹ Other states which originally refused to follow *Merlo* continued to follow the traditional decisions and sustained the constitutionality of these statutes.¹⁵⁰ Eventually, however, many of these later courts reversed themselves and struck down the statutes also.¹⁵¹ This trend continued until nearly every guest statute was found unconstitutional or repealed.¹⁵²

Similarly, many states adopted medical malpractice statutes of repose in response to a modification of tort law—the adoption of the discovery rule—or its alleged effect on the medical malpractice insurance crisis of the 1970's.¹⁵³ This legislation, at least the portion enacted in response to the medical malpractice insurance crisis, was the result of intense lobbying pressure by insurance and medical groups.¹⁵⁴ Medical malpractice statutes of repose, like automobile guest statutes, can totally

144. *Id.* at 799 (during first wave of constitutional attacks that occurred soon after statutes were enacted, statutes were uniformly upheld).

145. 8 Cal. 3d 855, 506 P.2d 212, 106 Cal. Rptr. 388 (1973).

146. *Id.* at 882, 506 P.2d at 231, 106 Cal. Rptr. at 407.

147. *Id.* at 859, 506 P.2d at 215, 106 Cal. Rptr. at 391. The court also held that the statute did not promote the state's other questionable interest in promoting hospitality. *Id.* at 864-72, 506 P.2d at 218-24, 106 Cal. Rptr. at 394-400.

148. Automobile guest statutes were the "result of persistent and effective lobbying on the part of insurance companies." *Id.* at 873, 506 P.2d at 225, 106 Cal. Rptr. at 401 (quoting W. PROSSER, *THE LAW OF TORTS* § 34, at 187 (4th ed. 1971)). "[T]he widespread antipathy to [guest] statutes is in large part a reflection of the irrationality and unfairness of these [statutes], which strip the single class of automobile guests of any protection from negligently inflicted injuries." *Id.* at 883, 506 P.2d at 232, 106 Cal. Rptr. at 408.

149. See Comment, *The Common Law Basis*, *supra* note 140, at 799 & n.8 (by 1975 eight other courts found their guest statutes unconstitutional).

150. *Id.* at 799-800 & n.8 (by 1975, 10 other courts upheld their guest statutes after reconsideration in light of *Merlo*).

151. See, e.g., *Bierkamp v. Rogers*, 293 N.W.2d 577, 585 (Iowa 1980) (finding Iowa's automobile guest statute violative of equal protection, overruling *Keasling v. Thompson*, 217 N.W.2d 687 (Iowa 1974)).

152. See *Malan v. Lewis*, 693 P.2d 661, 663 (Utah 1984) (indicating that almost every state which has enacted automobile guest statute has subsequently found it unconstitutional, repealed it or significantly modified it).

153. For a discussion of the enactment of medical malpractice statutes of repose in response to adoption of the discovery rule and the medical malpractice insurance crisis of the 1970's, see *supra* notes 28-42 and accompanying text.

154. For a discussion of the insurance industry's effect on the enactment of

bar certain injured victims' claims. Medical malpractice statutes of repose enacted in response to the medical malpractice insurance crisis, and earlier statutes enacted in response to the adoption of the discovery rule, initially withstood various constitutional challenges.¹⁵⁵ Many of the opinions holding medical malpractice statutes of repose unconstitutional allude to the manifest unfairness that such statutes produce.¹⁵⁶ Many of these opinions have also alluded to the invalidity of the medical malpractice insurance crisis or the ineffectiveness of the statutes.¹⁵⁷ While no state court has yet overruled itself, language in several cases indicates that courts will be willing to find these statutes unconstitutional in the future.¹⁵⁸ In addition, at least one court which has found a medical malpractice statute of repose unconstitutional has cited a decision striking down an automobile guest statute for support.¹⁵⁹ Consequently, the similarity between the development and downfall of automobile guest statutes and the history of medical malpractice statutes of repose may indicate that future courts will be willing to protect individual rights and find medical malpractice statutes of repose unconstitutional.

Another factor that may influence future courts to find medical malpractice statutes of repose unconstitutional is the number of cases holding these statutes constitutional or unconstitutional. The law in the area of medical malpractice statutes of repose appears to be quite sensitive to trends.¹⁶⁰ Several of the decisions addressing the constitutionality of medical malpractice statutes of repose indicated that they were influ-

medical malpractice statutes of repose, see *supra* notes 32-36 and accompanying text.

155. For a discussion of such constitutional challenges, see *supra* notes 43-85 and accompanying text.

156. For a discussion of the unfairness of medical malpractice statutes of repose, see *supra* notes 134-39 and accompanying text.

157. For a discussion of the differing viewpoints concerning the legitimacy of the medical malpractice insurance crisis of the 1970's, see *supra* notes 38-42 and accompanying text.

158. For a discussion of cases implying a willingness to overrule such statutes in the future, see *supra* note 109 and accompanying text.

159. See, e.g., *Hardy v. VerMeulen*, 32 Ohio St. 3d 45, 47, 512 N.E.2d 626, 628 (1987), *cert. denied*, 108 S. Ct. 1029 (1988) (citing *Primes v. Tyler*, 43 Ohio St. 2d 195, 205, 331 N.E.2d 723, 729 (1975)). One state court justice has expressed the difficulty in distinguishing between upholding medical malpractice reform legislation generally and automobile guest statutes. See *Bierkamp v. Rogers*, 293 N.W.2d 577, 586 (Iowa 1980) (LeGrand, J., dissenting) ("[T]he legislative desire to protect the health-care practitioner directly and society indirectly from high insurance premiums in the one case is the same as the legislative desire to protect the host motorist directly and the motoring public indirectly from high insurance premiums in the other."). *But see* *Owen v. Wilson*, 260 Ark. 21, 24-25, 537 S.W.2d 543, 545 (1976) (refused to find medical malpractice statute of repose unconstitutional based on decision finding automobile guest statute unconstitutional).

160. See Note, *supra* note 11, at 653 (suggesting that opinions concerning statutes of repose rely simplistically on precedent).

enced by the majority of courts finding these statutes constitutional.¹⁶¹ Thus, if an increasing number of courts continue to find these statutes unconstitutional, this may be sufficient to induce courts having already decided the issue to reverse themselves or find the statutes unconstitutional on other grounds. Similar influence appears to have occurred during the downfall of the automobile guest statute.¹⁶² Therefore, an increasing number of medical malpractice statutes of repose may be found to be unconstitutional due to the sensitivity of this area of the law to trends.

Courts having already passed on the constitutionality of a medical malpractice statute of repose should be able to avoid a problem with stare decisis when the issue is reconsidered by them in the future. Courts should be able to distinguish future cases in several ways. First, the classification alleged to be created by the statute may be different from any previously analyzed under an equal protection challenge.¹⁶³ Also, the statute may be challenged under a different provision of a state's constitution.¹⁶⁴ Finally, a court may be willing to consider evidence concerning a statute's effectiveness in justifying the application of a heightened level of judicial scrutiny.¹⁶⁵ Consequently, future courts

161. See, e.g., *Fitz v. Dolyak*, 712 F.2d 330, 333 (8th Cir. 1983) (noting that majority of states adopting discovery rule have enacted statutes of repose); *Jewson v. Mayo Clinic*, 691 F.2d 405, 410 n.10 (8th Cir. 1982) (noting that majority of states adopting discovery rule have enacted statutes of repose); *Dunn v. St. Francis Hosp.*, 401 A.2d 77, 80-81 (Del. 1979) (reasoning of earlier cases upholding medical malpractice statutes of repose is representative of general law and must govern); *Anderson v. Wagner*, 79 Ill. 2d 295, 310-11, 402 N.E.2d 560, 567 (1979) (all cases uncovered by research sustained validity of medical malpractice statutes of repose); *Hill v. Fitzgerald*, 304 Md. 689, 703 & n.4, 501 A.2d 27, 34 & n.4 (1985) (great majority of jurisdictions considering medical malpractice statutes of repose have upheld them); *Armijo v. Tandysh*, 98 N.M. 181, 184, 646 P.2d 1245, 1248 (Ct. App. 1981) (citing four pre-1983 cases upholding medical malpractice statutes of repose as support for its holding), *cert. quashed*, 98 N.M. 336, 648 P.2d 794 (N.M.), *cert. denied*, 459 U.S. 1016 (1982).

162. See *Malan v. Lewis*, 693 P.2d 661, 663, 675 (Utah 1984) (relying heavily on overwhelming number of courts finding guest statutes unconstitutional).

163. For a discussion of the Georgia Supreme Court's determination that Georgia's medical malpractice statute of repose violated equal protection under one challenged classification after surviving a previous challenge under a different classification, see *supra* note 108 and compare *Shessel v. Stroup*, 253 Ga. 56, 57-59, 316 S.E.2d 155, 158 (1984) with *Allrid v. Emory Univ.*, 249 Ga. 35, 38, 285 S.E.2d 521, 524-25 (1982).

164. The Supreme Courts of Utah and Idaho have suggested that their states' medical malpractice statutes of repose may violate constitutional provisions under which the statutes have not yet been challenged. See *Therault v. A.H. Robbins Co.*, 108 Idaho 303, 309-11, 698 P.2d 365, 371-73 (1985) (Bistline, J., dissenting); *Berry v. Beech Aircraft Corp.*, 717 P.2d 670, 683 (Utah 1985). For a discussion of these cases, see *supra* note 109.

165. The Supreme Court of Utah also suggested that a showing that Utah's medical malpractice statute of repose does not substantially further its legislative purpose may be sufficient to find the statute unconstitutional. See *Berry v. Beech*

should have enough flexibility to avoid expressly overruling themselves in finding these statutes unconstitutional.

IV. CONCLUSION

An increasing number of state courts should continue to find medical malpractice statutes of repose unconstitutional. The reasoning of recent courts holding such statutes unconstitutional is logical, fair and consistent with the purpose of tort law. Completely eliminating meritorious claims to reduce medical malpractice insurance premiums should be unsettling to future courts, especially when it appears that the medical malpractice insurance crisis was perhaps more of an overreaction than a crisis, and when increased premiums still comprise only a small percentage of total health care costs.¹⁶⁶ In light of these developments, courts should be increasingly uncomfortable with placing the burden of paying for a health care practitioner's negligence on the one least able to pay and least responsible for the injury, the innocent victim.¹⁶⁷ Therefore, future state courts should be guided by their judicial consciences and should continue to find medical malpractice statutes of repose unconstitutional.

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Aircraft Corp., 717 P.2d 670, 683 (Utah 1985). For a discussion of this case, see *supra* note 109.

166. It appears that medical malpractice insurance premiums account for only a relatively minor proportion of health care costs and health care practitioners' incomes. "Even after the rapid growth in premiums during the mid-1970's, malpractice insurance costs seemed to be about one percent of total health care spending since 1976." *Mominee v. Scherbarth*, 28 Ohio St. 3d 270, 280, 503 N.E.2d 717, 725 (1986) (Celebreeze, J., concurring) (quoting Bovbjerg, Koller & Zuckerman, *Information on Malpractice: A Review of Empirical Research on Major Policy Issues*, LAW & CONTEMP. PROBS., Spring 1986 at 85, 93). Despite the continued increase in premium costs the ratio of these costs to the average health care practitioner's income has remained nearly constant. *Id.* "The AMA's [American Medical Association's] own surveys show that average premium costs as a percentage of physician's [sic] gross income were about 3.7% in 1983, down from 4.4% in 1976 and about the same as in 1979." *Id.* (quoting Robinson, *The Medical Malpractice Crisis of the 1970's: A Retrospective*, 49 LAW & CONTEMP. PROBS., Spring 1986 at 5, 31).

167. See Turkington, *supra* note 36, at 1329-30.

