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The Constitutionality of Statutes of Repose: Federalism Reigns

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I. INTRODUCTION

The development of common-law tort liability, especially since the late 1950s and early 1960s, has broken many of the barriers to plaintiff recovery. The abrogation of the privity requirement, the evolution of the discovery rule, and the advent of strict liability were primary agents in this "assault upon the citadel."[1] These developments have threatened many potential tort defendants, particularly members of the manufacturing and construction industries and the medical profession. In response to lobbying pressure from these groups, many state legislatures have adopted measures to limit tort recoveries.[2] One of the measures most popular among

1. *See generally* Turner, *The Counter-Attack to Retake the Citadel Continues: An Analysis of the Constitutionality of Statutes of Repose in Products Liability*, 46 J. AIR L. & COM. 449, 451-55 (1981) (discussing the evolution of products liability law); *cf.* Comment, *Limitation of Action Statutes for Architects and Builders—Blueprints for Non-Action*, 18 CATH. U.L. REV. 361, 361-64 (1969) (discussing the evolution of architect's liability).

2. For a discussion of some of the measures not addressed in this Note, particularly in the area of medical malpractice, see Smith, *Battling a Receding Tort Frontier: Constitu-*

defendants has been the enactment of statutes of repose, which restrict the time period in which a plaintiff can bring suit.[3] Ultimately, a statute of repose may bar a plaintiff's claim even before his injury occurs.

Statutes of repose are highly controversial and have become a subject of much litigation and commentary.[4] In particular, these statutes have faced various constitutional attacks. This Note examines the divergent approaches state courts have taken recently to statutes of repose and concludes that this diversity is appropriate in our federalist system. Part II of this Note defines a "statute of repose" and outlines the content of typical statutes in the products liability, construction, and medical malpractice areas. Part II also considers the principal arguments in favor of and against statutes of repose. Part III discusses the arguments and lines of analysis in three constitutional areas: equal protection, due process, and "open courts" or "access to courts." Part IV examines the effect of state constitutional law on statutes of repose and discusses possible directions courts may take in future decisions. Part IV then addresses two of the major debates this issue raises: first, whether Congress should adopt a federal statute of repose, and, second, the degree of deference courts should show legislatures in this area. Part V concludes that the entire controversy surrounding statutes of repose ultimately concerns a choice between promoting economic interests and preserving individuals' rights of recovery, a choice that should be left to the states.

II. STATUTES OF REPOSE

A. *Defining "Statute of Repose"*

The term "statute of repose" can create analytical difficulties because it lacks a precise definition and often is confused with "statute of limitations."[5] Although both prescribe the time period

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tional Attacks on Medical Malpractice Laws, 38 OKLA. L. REV. ____ (1985); Abraham, *Medical Malpractice Reform: A Preliminary Analysis*, 36 MD. L. REV. 489 (1977).

3. McGovern, *The Variety, Policy and Constitutionality of Product Liability Statutes of Repose*, 30 AM. U.L. REV. 579, 579 (1981).

4. Professor McGovern lists some of the many articles that have commented on statutes of repose. *See* McGovern, *supra* note 3, at 584 n.27. Professor McGovern's article stands out as a very thorough study of the pre-1981 law of statutes of repose. The flood of litigation on the subject has continued since then, however, and this Note examines the many state and federal court rulings that have come down since Professor McGovern's article.

5. In a general sense, a statute of repose and a statute of limitations are one in the same. Indeed, Black's Law Dictionary defines them as such: "Statutes of limitation are stat-

within which plaintiffs must bring suit, important differences exist between statutes of limitations and statutes of repose. Statutes of limitations limit the time in which a plaintiff may bring suit *after* the cause of action accrues, whereas statutes of repose potentially bar the plaintiff's suit *before* the cause of action arises.[6] For example, a products liability statute may provide that an action must be brought within six years of injury but in no event may a plaintiff commence an action more than ten years after the date on which the product was first purchased.[7] The six year period is a statute of limitations; the ten year period is a statute of repose. The effect of the statute of repose is clear in a situation in which a plaintiff is injured in the eleventh year after purchasing a product. Because the ten year statute of repose has expired, a cause of action cannot accrue, and the plaintiff is barred from bringing suit, even though the six year statute of limitations would not have barred the action.

Not all statutes of repose operate identically. In some statutes of repose, the statutory period begins to run at a different time from traditional statutes of limitations.[8] Other statutes of repose set an outer limit on the length of a statute of limitations that has a discovery provision.[9] Still others combine these concepts.[10] Generally, for the purpose of this Note, the term "statute of repose" refers to a statute that places an additional prescriptive period upon the time in which a plaintiff may bring an action under a traditional statute of limitations.

This Note considers products liability, medical malpractice, and construction statutes of repose[11] and illustrates that not all statutes operate identically.[12] Products liability statutes of repose[13]

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utes of repose, and . . . prescribe the periods within which actions may be brought . . . ." BLACK'S LAW DICTIONARY 835 (5th ed. 1979).

6. *See, e.g.*, Hartford Fire Ins. Co. v. Lawrence, Dykes, Goodenberger, Bower & Clancy, 740 F.2d 1362, 1367 (6th Cir. 1984).

7. *See, e.g.*, TENN. CODE ANN. § 29-28-103 (1980).

8. *See infra* notes 14-16, 22-23, 30-31, and accompanying text.

9. *See, e.g.*, N.C. GEN. STAT. § 1-52(16) (1983) (providing that a two year statute of limitations begins to run when a plaintiff reasonably should have discovered the injury, but in no event may an action commence more than 10 years after the elements of the action have accrued).

10. *See, e.g.*, CAL. CIV. PROC. CODE § 340.5 (West 1982) ("[T]he time for the commencement of action shall be three years from the date of injury or one year after the plaintiff discovers, or through the use of reasonable diligence should have discovered, the injury, whichever occurs first. In no event shall the time . . . exceed three years unless . . . .").

11. "Construction statutes of repose" refers to statutes limiting actions arising out of defects in improvements to real property.

12. *See infra* notes 14-34 and accompanying text.

typically begin running on the date of purchase,[14] the date of first use,[15] or when the product leaves the manufacturer's control.[16] Products liability statutes of repose protect varying groups of defendants, but most of the statutes include manufacturers and sellers.[17] Many of these statutes provide exceptions in cases of intentional concealment or misrepresentation,[18] express warranty,[19] or products such as asbestos that pose unique discovery problems.[20]

Medical malpractice statutes of repose[21] generally begin to run from the date of injury,[22] or the date of the act or omission that constitutes the alleged malpractice.[23] Defendants protected by these statutes may include all licensed health care providers,[24] or only a specific group, such as physicians, surgeons, registered nurses, dentists, optometrists, hospitals, nursing homes, and clinics.[25] Many of these statutes provide exceptions in cases of inten-

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13. *See generally* Comment, *Statutes of Repose in Products Liability: Death Before Conception?* 37 SW. L.J. 665, 680-84 (1983).

14. *See, e.g.*, GA. CODE ANN. §§ 105-106(b)(2) (1984); TENN. CODE ANN. § 29-28-103 (1980).

15. *See* ALA. CODE § 6-5-502(c) (Supp. 1984).

16. *See, e.g.*, KY. REV. STAT. ANN. § 411.310(1) (Bobbs-Merrill Supp. 1984); UTAH CODE ANN. § 78-15-3 (1977) (providing a limitation of six years after first purchase or 10 years after the manufacture date).

17. *See, e.g.*, COLO. REV. STAT. § 13-21-403(3) (Supp. 1984); S.D. CODIFIED LAWS ANN. § 15-2-12.1 (1984).

18. *See, e.g.*, IDAHO CODE § 6-1403(2)(b)(2) (Supp. 1984); WASH. REV. CODE ANN. § 7.72.060(b)(ii) (Supp. 1985).

19. *See, e.g.*, ARIZ. REV. STAT. ANN. § 12-551 (1982); IDAHO CODE § 6-1403(2)(b)(1) (Supp. 1984).

20. *See, e.g.*, ALA. CODE § 6-5-502(b) (Supp. 1984); IDAHO CODE § 6-1403(2)(b)(4) (Supp. 1984); OR. REV. STAT. § 30.905(3) (1983).

21. *See generally* D. LOUISELL & H. WILLIAMS, 1 MEDICAL MALPRACTICE ¶¶ 13.14-.64 (1984 & Supp. 1984).

22. *See, e.g.*, ARIZ. REV. STAT. ANN. § 12-564(A) (1982) (The Arizona Supreme Court has distinguished the "date of the injury" from the date on which the negligent act occurred and has held that "date of the injury" means the date on which the injury manifests itself. *See* Kenyon v. Hammer, 142 Ariz 69, ___ 688 P.2d 961, 967 (1984) (en banc)); CAL. CIV. PROC. CODE § 340.5 (West 1982).

23. *See, e.g.*, FLA. STAT. ANN. § 95.11(4)(b) (West 1982); OHIO REV. CODE ANN. § 2305.11(B) (Page 1981).

24. *See, e.g.*, CAL. CIV. PROC. CODE § 340.5 (West 1982); FLA. STAT. ANN. § 95.11(4)(b) (West 1982). Most statutes define "health care provider" for the purposes of the statute, and these definitions vary. *See generally* D. HARNEY, MEDICAL MALPRACTICE §§ 8.1-.5 (1973 & Supp. 1977).

25. *See* D. HARNEY, *supra* note 24, at 250-51. *E.g.*, ALA. CODE § 6-5-482 (1975) (covering anyone licensed to practice medicine or dentistry, any licensed hospital or physician's or dentist's office or clinic, any medical or dental professional corporation, association or partnership, and any employee who is directly involved in delivering health care services); COLO. REV. STAT. § 13-80-105 (Supp. 1984) (covering any person licensed to practice medicine, chiropratic medicine, nursing, physical therapy, podiatry, veterinary medicine, dentistry,

tional concealment or misrepresentation,[26] foreign objects left in the body,[27] or minors under a given age.[28]

Construction statutes of repose[29] usually begin to run on the date of substantial completion,[30] acceptance, or first use of the improvement.[31] These statutes cover varying classes of defendants. Some statutes are relatively exclusive, primarily protecting professional architects, contractors, and engineers,[32] while other statutes have a broader reach, protecting materialmen, laborers, and other workers participating in the construction.[33] The broadest statutes include everyone involved in the construction and owners or persons in possession of the improvement.[34] In response to decisions holding that some statutes of repose violate equal protection guarantees, legislatures have included an increasingly broad group of potential defendants when fashioning recent construction statutes of repose.[35]

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pharmacy, optometry, or other healing arts, and any licensed or certified hospital, health care facility or other institution for treating the sick or injured); IOWA CODE ANN. § 614.1(9) (West Supp. 1984) (covering any licensed physician, surgeon, osteopath, dentist, podiatrist, optometrist, pharmacist, chiropractor, nurse, or licensed hospital).

26. *See, e.g.*, CAL. CIV. PROC. CODE § 340.5 (West 1982); OR. REV. STAT. § 12-110(4) (1983).

27. *See, e.g.*, CAL. CIV. PROC. CODE § 340.5 (West 1982); GA. CODE ANN. § 3-1103 (Supp. 1984).

28. *See, e.g.*, CAL. CIV. PROC. CODE § 340.5 (West 1982); OHIO REV. CODE ANN. § 2305.11(B) (Page 1981).

29. *See generally* Sisson & Kelley, *Statutes of Limitations for the Design and Building Professions - Will They Survive Constitutional Attack?*, 49 INS. COUNS. J. 243 (1982).

30. *See, e.g.*, CAL. CIV. PROC. CODE § 337.1(a) (West 1982); IND. CODE ANN. § 34-4-20-2 (Burns Supp. 1984); S.C. CODE ANN. § 15-3-640 (Law. Co-op 1977).

31. *See, e.g.*, FLA. STAT. ANN. § 95.11(3)(c) (West 1982) (providing that the time will begin to run on the date of acceptance if that date is later than the date of substantial completion); MICH. COMP. LAWS ANN. § 600.5839(1) (West 1968). The term "improvement" refers to improvements of real property. Houses, factories, and other buildings clearly are "improvements." *See* Sisson & Kelley, *supra* note 29, at 244. Courts also have held that the installation of component parts of these structures are improvements. *See id.* In addition, highways and bridges may be improvements. *See id.*

32. *See, e.g.*, CONN. GEN. STAT. ANN. § 52-584a(a) (West Supp. 1984); FLA. STAT. ANN. § 95.11(3)(c) (West 1982).

33. *See, e.g.*, N.C. GEN. STAT. § 1-50(5)(b)(9) (1983); WIS. STAT. ANN. § 893.155 (West 1983).

34. *See, e.g.*, HAWAII REV. STAT. § 657-8 (Supp. 1982); MINN. STAT. ANN. § 541-051 (West Supp. 1984).

35. *See* Shibuya v. Architects Hawaii Ltd., 65 Hawaii 26, 647 P.2d 276 (1982) (tracing a series of amendments to Hawaii's construction statute of repose).

B. *Arguments For and Against Statutes of Repose*

Statutes of repose have created controversy in the legal community, generating a great deal of litigation and commentary. This section outlines some of the principal arguments in favor of and against statutes of repose. Justifications that proponents cite for limiting causes of action include avoiding stale or frivolous claims[36] and promoting judicial economy.[37] These concerns are especially relevant in products liability, medical malpractice, and construction liability cases because accurately tracing defects or injuries to particular defendants in these situations can be very difficult. As time passes, records are lost, memories fade, technology advances, and intervening circumstances arise, creating problems for a defendant attempting to present a proper defense in court.[38]

Perhaps the most noted justification for statutes of repose is the desire to alleviate the insurance problem facing manufacturers, the medical profession, and the construction industry.[39] Responsibility for older products, latent medical problems, and "permanent" or durable improvements expose these groups to abnormally long periods of potential liability and unusually large numbers of potential plaintiffs.[40] Proponents contend that this "long-tail" problem is the principal culprit in the alleged "insurance crisis."[41] Theoretically, by cutting off a defendant's liability after a given number of years, statutes of repose lead to more certain liability

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36. *See* Klein v. Catalano, 386 Mass. 701, ____, 437 N.E.2d 514, 520 (1982) (quoting Rosenberg v. Town of North Bergen, 61 N.J. 190, 201, 293 A.2d 662, 667-68 (1972) ("There comes a time when a [defendant] ought to be secure in his reasonable expectation that the slate has been wiped clean of ancient obligations, and he ought not to be called on to resist a claim 'when evidence has been lost, memories have faded, and witnesses have disappeared.' ").

37. McGovern, *supra* note 3, at 594.

38. *See* Sisson & Kelley, *supra* note 29, at 250 (discussing architects' defense problems).

39. *See* Turner, *supra* note 1, at 449 (discussing the problem of skyrocketing products liability insurance costs); Kenyon v. Hammer, 142 Ariz. 69, ____, 688 P.2d 961, 976-77 (1984) (en banc) (examining the social costs of rising medical malpractice insurance premiums); Note, *People Who Live in Glass Houses Should Not Build in Vermont: The Need for a Statute of Limitations for Architects*, 9 VT. L. REV. 101, 130 (1984) (addressing the insurance problems facing architects who are subject to indefinite liability).

40. *See* Turner, *supra* note 1, at 450 (citing THE RESEARCH GROUP, INC., INTERAGENCY TASK FORCE ON PRODUCT LIABILITY, 5 PRODUCT LIABILITY: LEGAL STUDY 2, at VII-21 (1977)) (discussing the products liability "long-tail" problem); Yarbro v. Hilton Hotels Corp., ____ Colo. ____, 655 P.2d 822 (1982) (discussing "long-tail" problems in the construction industry).

41. Turner, *supra* note 1, at 449-50 ("The most significant factor alleged to be the cause of the nationwide products liability insurance problem is the responsibility of manufacturers and sellers for older products—the 'long tail' problem.").

and thus provide greater actuarial precision in setting insurance rates.[42] More certain liability and stabilized insurance rates in turn facilitate efficient business planning and ultimately benefit businessmen, professionals, consumers, and the economy.[43]

In addition to these general arguments, proponents often assert reasons why statutes of repose are particularly apt for specific groups of defendants. For example, in products liability cases, proponents of statutes of repose argue that without the statutes, manufacturers could be held to current design standards for products manufactured long ago.[44] Furthermore, the threat of a plaintiff offering evidence of the manufacturer's design changes against him at trial could discourage the manufacturer from making safer and more efficient products.[45] In the construction area, the architect faces particular problems in maintaining quality control over his designs before construction and safety standards after construction.[46] Similarly, in the medical malpractice area, the physician must cope with the uncertainties inherent in any medical situation, even though he cannot maintain control over a patient who no longer is under his care.[47]

Opponents of statutes of repose counter these justifications with equally persuasive arguments. One court recently noted that it is illogical to bar a claim as "stale" before the claim ever accrues.[48] Critics also argue that the "passage of time" problem[49] is not unique to products liability, medical malpractice, or construction liability cases. Almost every type of litigation poses the same problems.[50] Furthermore, plaintiffs face the same evidentiary

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42. *See* MODEL UNIFORM PRODUCT LIABILITY ACT § 110, Analysis, 44 Fed. Reg. 62,714, 62,733 (1979).

43. *See* Kenyon v. Hammer, 142 Ariz. 69, ____, 688 P.2d 961, 976 (1984) (en banc) ("[T]he compelling interest of the state in reducing malpractice premiums must be found, if at all, in the state's interest in making quality medical care available to the public at a reasonable cost.").

44. *See* Thornton v. Mono Mfg., 99 Ill. App. 3d 722, 725, 425 N.E.2d 522, 524 (1981).

45. For a more thorough discussion of manufacturers' particular problems, see McGovern, *supra* note 3, at 588-95, and Turner, *supra* note 1.

46. *See infra* notes 80, 83. For a more thorough discussion of architects' particular problems, see Note, *supra* note 39.

47. For a more thorough discussion of physicians' particular problems, see D. HARNEY, *supra* note 24.

48. Clark v. Singer, 250 Ga. 470, 472, 298 S.E.2d 484, 486 (1983); *see also* Phillips, *An Analysis of Proposed Reform of Products Liability Statutes of Limitations*, 56 N.C. L. REV. 663, 676 (1978) (rejecting the assertion that a claim is frivolous merely because it concerns a latent defect).

49. *See supra* note 38 and accompanying text.

50. *See* McGovern, *supra* note 3, at 590 (discussing the "passage of time" problem in

problems as time passes and ultimately must carry the burden of proof.[51] Thus, opponents of statutes of repose argue that the passage of time and these evidentiary problems actually may work in the defendant's favor. For example, in a products liability case, the longer the plaintiff uses a product without the product showing any defects, the greater the inference that there was no defect.[52] Critics also maintain that if a defendant's negligence caused damage, then the mere passage of time should not excuse the defendant from liability.[53]

Opponents of statutes of repose also attack the validity of the insurance crisis argument, citing studies that have shown that the "long-tail" problem is relatively insignificant. For example, an Insurance Services Office survey found that ninety-seven percent of all products liability claims arose within six years of purchase.[54] Thus, a statute of repose actually may not reduce insurance rates.[55] Indeed, one legal study has concluded that "none of the [doctrines] existing in tort law appears significant enough individually or in combination to be directly responsible for the alleged products liability insurance problem."[56] More recent studies have strengthened these contentions.[57] These studies show that the insurance problem never reached "crisis" proportions[58] and that the stabilization of insurance rates has solved the problem.[59]

Finally, critics counter some of the arguments in favor of protecting particular groups of defendants with statutes of repose. For

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products liability).

51. *See* Johnson, *Products Liability "Reform": A Hazard to Consumers*, 56 N.C. L. REV. 677, 691 (1978).

52. Note, *The Utah Product Liability Limitation of Action: An Unfair Resolution of Competing Concerns*, 1979 UTAH L. REV. 149, 152 (1979).

53. Turner, *supra* note 1, at 459 n.69 (quoting Mickle v. Blackmon, 252 S.C. 202, 166 S.E.2d 173 (1969)).

54. Turner, *supra* note 1, at 450 n.11 (citing INSURANCE SERVICES OFFICE, PRODUCT LIABILITY CLOSED CLAIM SURVEY: A TECHNICAL ANALYSIS OF SURVEY RESULTS 81-83 (1977)); *cf.* Kenyon v. Hammer, 142 Ariz. 69, ____, 688 P.2d 961, 978 (1984) (en banc) (noting that surveys indicate that over 88% of all medical malpractice claims are reported within the first two years following the injury and 97% are reported within four years).

55. Turner, *supra* note 1, at 459 (citing INTERAGENCY TASK FORCE ON PRODUCT LIABILITY: INSURANCE STUDY 4-92 to -94 (1977)).

56. Johnson, *supra* note 51, at 679 (citing INTERAGENCY TASK FORCE ON PRODUCT LIABILITY, 3 THE RESEARCH GROUP, INC., FINAL REPORT OF THE LEGAL STUDY 99-100 (1977)).

57. *See generally* Page & Stephens, *The Product Liability Insurance "Crisis": Causes, Nostrums and Cures*, 13 CAP. U.L. REV. 387 (1984).

58. *Id.*

59. *See* Dworkin, *Federal Reform of Product Liability Law*, 57 TUL. L. REV. 602, 618-19 (1983).

example, in the area of products liability, opponents note that one fixed limitation period is inappropriate because the safe, useful lives of products vary considerably.[60] Furthermore, experience has shown that safety problems often are disregarded until social and economic pressures force designers and manufacturers to design and produce safer products.[61] An absolute liability cut off after a certain number of years would reduce those incentives to achieve long-term product safety.[62]

III. CONSTITUTIONAL ISSUES

Plaintiffs attack statutes of repose on a number of constitutional grounds, frequently alleging equal protection, due process, and open courts violations. Plaintiffs often raise more than one of these challenges in the same case. Although courts do not always give each issue thorough or distinct treatment, the present analysis treats these three constitutional claims separately. This part of the Note examines the major constitutional arguments, analyses, and conclusions asserted in recent cases and identifies continuing trends and recent developments.[63]

A. Equal Protection

Plaintiffs often challenge statutes of repose on the ground that they violate the equal protection clause by creating arbitrary and unreasonable distinctions between classes of defendants or classes of plaintiffs. Discrimination between groups of defendants is the most frequent equal protection challenge asserted.[64] Distinctions between defendants are readily apparent on the face of most statutes of repose,[65] but the distinctions between classes of plaintiffs are less readily apparent. One challenged distinction is between plaintiffs injured before and after the expiration of the statutory period.[66] A second distinction that these statutes make is in favor-

60. Phillips, *supra* note 48, at 676.

61. McGovern, *supra* note 3, at 590.

62. Johnson, *supra* note 51, at 691.

63. For a discussion of earlier cases treating these constitutional issues, see McGovern, *supra* note 3, at 600-20.

64. *See, e.g.*, Van Den Hul v. Baltic Farmers Elevator Co., 716 F.2d 504 (8th Cir. 1983). For a discussion of the standing issue that challenge raises, see McGovern, *supra* note 3, at 618-20. The equal protection clause provides: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

65. *See supra* text accompanying notes 17, 24-25, 32-34.

66. *See, e.g.*, Van Den Hul v. Baltic Farmers Elevator Co., 716 F.2d 504 (8th Cir. 1983); Shessel v. Stroup, 253 Ga. 56, 316 S.E.2d 155 (1984); Clark v. Singer, 250 Ga. 470, 298

ing plaintiffs injured by newer products over plaintiffs injured by older products.[67] A third challenged distinction is between plaintiffs whose injuries fall within a statutory exception and plaintiffs whose injuries are not excepted.[68] A fourth distinction arises between plaintiffs with injuries caused by negligence that is protected by the statute, such as defective products or professional malpractice, and plaintiffs with injuries that are similar but unrelated to defective products or malpractice.[69]

Regardless of whether plaintiffs base these challenges on state or federal equal protection grounds, state courts usually follow the United States Supreme Court's equal protection standards of review.[70] Most recent opinions have applied the "rational basis" test after finding that statutes of repose do not implicate "fundamental rights" or "suspect classes."[71] Under the rational basis standard, courts uphold legislation if the statutory classification is reasonably related to a legitimate legislative objective.[72] Courts have had

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S.E.2d 484 (1983).

67. *See, e.g.*, Pitts v. Unarco Indus., 712 F.2d 276 (7th Cir. 1983); Scalf v. Berkel, ___ Ind. App. ___, 448 N.E.2d 1201 (1983); Davis v. Whiting Corp., 66 Or. App. 541, 674 P.2d 1194 (1984).

68. *See, e.g.*, Wayne v. Tennessee Valley Auth., 730 F.2d 392 (5th Cir. 1984); Austin v. Litvak, ___ Colo. ___, 682 P.2d 41 (1984); Allrid v. Emory Univ., 249 Ga. 35, 285 S.E.2d 521 (1982).

69. *See, e.g.*, Shessel v. Stroup, 253 Ga. 56, 316 S.E.2d 155 (1984); Heath v. Sears, Roebuck, Inc., ___ N.H. ___, 464 A.2d 288 (1983); Armijo v. Tandyish, 98 N.M. 181, 646 P.2d 1245 (N.M. Ct. App. 1981).

70. *See* McGovern, *supra* note 3, at 607. *But see infra* text accompanying notes 170-73 (discussing cases in which state courts have refused to follow federal guidelines).

71. *See, e.g.*, Barwick v. Celotex Corp., 736 F.2d 946 (4th Cir. 1984); Wayne v. Tennessee Valley Auth., 730 F.2d 392, 404 (5th Cir. 1984); Davis v. Whiting Corp., 66 Or. App. 541, 543, 674 P.2d 1194, 1196 (1984); *see also* San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 17 (1972) (asserting that if the legislation does not affect a suspect class or fundamental right, the appropriate standard of review is a rational basis test); McGovern, *supra* note 3, at 607. If a "fundamental right" or "suspect class" is concerned, then the appropriate standard of review is strict scrutiny. *See infra* text accompanying note 106.

72. *See, e.g.*, *Rodriguez*, 411 U.S. at 17 (The court must determine whether the legislation "rationally furthers some legitimate, articulated state purpose."); Schwan v. Riverside Methodist Hosp., 6 Ohio St. 3d 300, 301, 452 N.E.2d 1337, 1338 (1983) ("[A] classification is valid if it 'rationally further[s] a legitimate legislative objective.' "). Unfortunately for analytical purposes, courts have been inconsistent in their formulations of the "rational basis" or "reasonable relation" test. Some courts state that the rational basis test requires that the statutory classification have a "fair and substantial" relation to the object of the legislation. *See, e.g.*, Clark v. Singer, 250 Ga. 470, 472, 298 S.E.2d 484, 486 (1983) (citing Reed v. Reed, 404 U.S. 71, 76 (1971)); Barnhouse v. City of Pinole, 133 Cal. App. 3d 171, 182, 18 Cal. Rptr. 881, 887 (1982). The New Hampshire Supreme Court uses the same "fair and substantial" language to describe a higher level of scrutiny. *See, e.g.*, Carson v. Maurer, 120 N.H. 925, 933, 424 A.2d 825, 831 (1980). The key element seems to be the label "rational basis," rather than the description of what the test requires. Courts that use the "fair and substantial

little difficulty concluding that a statute of repose serves legitimate legislative objectives.[73] Perhaps the most frequently cited legislative purpose is the desire to prevent the assertion of stale claims.[74] Another well-established objective is the interest in protecting defendants from uncertain and protracted liability, particularly in light of the erosion of common-law tort defenses.[75] Many courts also note the need to stabilize defendants' insurance rates and, consequently, to keep consumer prices down.[76]

The next step in the rational basis analysis requires that the court find a reasonable basis for the statute's classification.[77] Most courts find a reasonable basis for the defendant- or plaintiff-based classifications that statutes of repose establish.[78] The grounds of classification courts most frequently cite as acceptable fall into the following general categories:[79] (1) feasibility of quality control;[80] (2) alternative applicable theories of liability and defenses;[81] (3) number of potential plaintiffs;[82] (4) the defendant's continuing involve-

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relation" language to describe the rational basis test do not apply any stricter scrutiny than is applied under the traditional formulation of the rational basis test.

73. See *supra* text accompanying notes 36-47 for a discussion of the legislative objectives of statutes of repose.

74. *See, e.g.*, Jewson v. Mayo Clinic, 691 F.2d 405 (8th Cir. 1982); Yarbro v. Hilton Hotels Corp., ___ Colo. ___, 655 P.2d 822 (1983); Beecher v. White, ___ Ind. App. ___, 447 N.E.2d 622 (1983).

75. *See, e.g.*, Barnhouse v. City of Pinole, 133 Cal. App. 3d 171, 183 Cal. Rptr. 881 (1982); *Yarbro*, ___ Colo. ___, 655 P.2d 822; Klein v. Catalano, 386 Mass. 701, 437 N.E.2d 514 (1972).

76. *See, e.g.*, Mathis v. Eli Lilly & Co., 719 F.2d 134 (6th Cir. 1983); Davis v. Whiting Corp., 66 Or. App. 541, 674 P.2d 1194 (1984).

77. *See* Hartford Fire Ins. Co. v. Lawrence, Dykes, Goodenberger, Bower & Clancy, 740 F.2d 1362, 1371 (6th Cir. 1984).

78. For a discussion of the distinctions typically created by statutes of repose, see *supra* text accompanying notes 14-35.

79. *See* McGovern, *supra* note 3, at 609.

80. For example, a supplier of materials for a construction job can maintain high quality control standards in the controlled environment of the factory, while an architect's design can be tested and controlled only to a limited extent before actual use. *See, e.g., Hartford Fire Ins. Co.*, 740 F.2d at 1372; Burmaster v. Gravity Drainage Dist. No. 2, 366 So. 2d 1381, 1386 (La. Ct. App. 1978).

81. For instance, an owner of a building is only liable in tort and only for events occurring while he is in possession of the premises, but a builder may be liable under various legal theories, including contract and tort liability. *See, e.g.*, Cheswold Volunteer Fire Co. v. Lambertson Constr. Co., 462 A.2d 416, 426 n.15 (Del. Super. Ct. 1982); Freezer Storage, Inc. v. Armstrong Cork Co., 476 Pa. 270, 382 A.2d 715 (1978).

82. The owner of a building, for example, may be liable only to persons who come onto the premises while he is in possession and, in many jurisdictions, to a lesser degree if the persons who enter are not invitees. A builder, on the other hand, may be liable to owners, tenants, and any others who may use the premises at any time. *See* Barnhouse v. City of Pinole, 133 Cal. App. 3d 171, 182, 183 Cal. Rptr. 881, 887 (1982).

ment with the product, building, or patient;[83] and (5) insurance coverage and costs.[84] Some courts are not persuaded that these reasons justify classifying groups of potential defendants or plaintiffs.[85] For example, one court has maintained that if there is a structural defect in a building, all who participated in the construction should be held accountable, rather than allowing the timing of the defect's manifestation to determine who will be held liable.[86]

The third and final step in the rational basis test is to find a reasonable relationship between the classification and the legislative purpose.[87] Generally, courts that have found both a reasonable basis for the classification and a legitimate state purpose also have found a rational relation between the two.[88] For example, if protecting defendants from protracted liability is a permissible goal, the legislature may conclude that a reasonable point at which to cut off claims is ten years after substantial completion.[89] Con-

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83. For example, the owner or person in possession of a huilding can maintain adequate safety conditions and is in control at the time of any incidents giving rise to litigation, whereas the architect has no control over the condition of the building after construction has been completed. *See* Yarbro v. Hilton Hotels Corp., ___ Colo. ___, 655 P.2d 822 (1983).

84. The owner of a building, for instance, is more likely to have insurance coverage available at reasonable rates for accidents in the building, than the contractor, who would have to pay exorbitant rates to cover the potential liability from the numerous buildings he constructs. *See Barnhouse*, 133 Cal. App. 3d at 182, 183 Cal. Rptr. at 887 (1982).

85. *See* cases cited *infra* notes 90-91.

86. *See* Henderson Clay Prods., Inc. v. Edgar Wood & Assocs., Inc., 122 N.H. 800, ___, 451 A.2d 174, 175 (1982). Other courts consider it unreasonable to hold an owner liable for an injury that resulted from an architect's negligence. *See, e.g.*, State Farm Fire & Casualty v. All Elec., Inc., 99 Nev. 222, 228-29, 660 P.2d 995, 999 (1983); Skinner v. Anderson, 38 Ill. 2d 455, 460, 231 N.E.2d 588, 590-91 (1967).

87. *See* Hartford Fire Ins. Co. v. Lawrence, Dykes, Goodenberger, Bower & Clancy, 740 F.2d 1362, 1368-69 (6th Cir. 1984).

88. *See, e.g.*, Van Den Hul v. Baltic Farmers Elevator Co., 716 F.2d 504, 511 (8th Cir. 1983) ("[T]he six-year period is rationally related to the legislature's legitimate objective of barring stale claims . . . ."); Yarbro v. Hilton Hotels Corp., ___ Colo. ___, ___, 655 P.2d 822, 827 (1983) ("[T]he statute bears a reasonable relationship to the legislative objective of limiting liability for architects, contractors, engineers, and inspectors whose work . . . generally ends at the time of substantial completion of a project."); Allrid v. Emory Univ., 249 Ga. 35, ___, 285 S.E.2d 521, 525 (1982) (finding the exception for medical malpractice cases involving foreign objects left in the body to be reasonably related to the legitimate purpose of avoiding stale or frivolous claims).

89. *Hartford Fire Ins. Co.* 740 F.2d at 1368-69. To support this argument, the *Hartford* court noted studies that have shown that 99% of claims brought against architects are brought within 10 years. *See id.* Interestingly, similar statistics can be cited for the opposite proposition—there is no significant "long-tail" problem, and thus a statute of repose may not be a justifiable means of protecting defendants. *See* Kenyon v. Hammer, 142 Ariz. 69, ___, 688 P.2d 961, 978 (1984) (en banc).

versely, courts that find no rational basis for the statutory classification also tend to find no reasonable relation to the legislative objective.[90] One court, for example, held that the special treatment of minors under age ten in a medical malpractice statute of repose was an unreasonable distinction, unrelated to the purpose of alleviating the malpractice "crisis."[91]

Thus, the majority of courts applying the rational basis test to an equal protection challenge have upheld the statutes of repose.[92] Some recent courts have relied on this weight of authority alone as evidence that statutes of repose must have a reasonable basis.[93] An Indiana court recently noted that the debate among the states in itself indicated that reasonable men differ and that, therefore, statutes of repose are not manifestly unreasonable.[94] Some courts, however, are unwilling to accept the reasoning of previous cases

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90. *See, e.g.*, Austin v. Litvak, ___ Colo. ___, ___, 682 P.2d 41, 50 (1984) (en banc) (finding the exceptions for "foreign objects" and "knowing concealment" in a medical malpractice statute of repose to be "without reasonable basis in fact" and unrelated to the purpose of avoiding stale and frivolous claims); Shessel v. Stroup, 253 Ga. 56, ___, 316 S.E.2d 155, 158 (1984) (finding the "three-way classification" between plaintiffs with medical malpractice claims who are injured before and those injured after the statutory period expires and plaintiffs with no medical malpractice claims not reasonably related to the objective of avoiding stale claims); Clark v. Singer, 250 Ga. 470, 472, 298 S.E.2d 484, 486 (1983) (finding "no rational basis for a limitation scheme which permits a medical malpractice wrongful death action if the patient dies within two years of the defendant's negligent act but which bars a wrongful death action if the patient lives for two years after defendant's negligent act where the defendant is a doctor but not in other wrongful death cases." The court also found this classification unrelated to the purpose of avoiding stale claims because "a claim which has not arisen . . . is not stale."); Shibuya v. Architects Hawaii Ltd., 65 Hawaii 26, 43, 647 P.2d 276, 288 (1982) (finding the distinctive treatment of the construction industry not reasonably related to the objective of avoiding stale claims); State Farm Fire & Casualty v. All Elec., Inc., 99 Nev. 222, 228, 660 P.2d 995, 1000 (1983) (finding the distinction between architects, owners, and materialmen unreasonable and unrelated to the concerns of defendants' difficulties in defending suits).

91. *See* Schwan v. Riverside Methodist Hosp., 6 Ohio St. 3d 300, 452 N.E.2d 1337 (1983). One commentator has noted that the typical rationale for infant tolling provisions is that minors are "disabled" and should be protected from losing their causes of action. Minors should not be penalized if their parents fail to bring suit. *See* Comment, *Infant Tolling Statutes in Medical Malpractice Cases*, 5 J. LEGAL MED. 469 (1984). The Ohio court's argument remains valid, however, because the court asserted that 10 years of age is an irrational cut off point, not that there is no rational basis for an infant tolling provision.

92. In 33 cases since 1981, only six decisions have held statutes of repose invalid under a rational basis equal protection analysis. *See* Appendix; *see also* Lamb v. Wedgewood South Corp., 308 N.C. 419, ___, 302 S.E.2d 868, 878-79 (1983) ("[T]he overwhelming majority of the most recent cases . . . which considered the constitutional equal protection challenge to statutes [of repose] have sustained the statutes.").

93. *See, e.g.*, Beecher v. White, ___ Ind. App. ___, 447 N.E.2d 622 (1983).

94. *See id.*.

and find no rational basis to uphold statutes of repose.[95]

At least one state has applied a "mid-tier" or "heightened scrutiny" analysis to an equal protection challenge to a statute of repose.[96] In the leading case of *Carson v Maurer*, the New Hampshire Supreme Court found that "[a]lthough the right to recover for personal injuries is not a 'fundamental right', . . . [it is] sufficiently important to require that the restrictions imposed on [it] be subjected to a more rigorous judicial scrutiny than allowed under the rational basis test."[97] The court's test requires that the challenged classification be reasonable and have a "fair and substantial relation to the object of the legislation."[98] In *Carson*, the court found a medical malpractice statute unreasonable because it made an exception for cases involving foreign objects left in the body.[99] New Hampshire has not limited its "mid-tier" analysis to medical malpractice cases. In *Henderson Clay Products, Inc. v. Edgar Wood and Associates* the court held it unreasonable for a construction statute of repose to provide one rule for actions against architects and a different rule for actions against materialmen and laborers.[100] In *Heath v. Sears, Roebuck* the New Hampshire court found a products liability statute of repose unreasonable because it barred claims for injuries caused by defective products but allowed claims for similar injuries unrelated to defective products.[101]

The heightened scrutiny analysis seems to have determined the outcome of these New Hampshire cases. Adopting the mid-tier analysis gave the court license to scrutinize more carefully the relationship between the statute and its purpose. For example, in *Heath* the court noted that one purpose of the products liability statute of repose was to ameliorate the products liability "insur-

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95. *See* cases cited *supra* notes 90-91.

96. New Hampshire is apparently the only state to have adopted expressly a mid-tier analysis for statutes of repose. *See* McGovern, *supra* note 3, at 608. Although other courts have used the same "fair and substantial" language, they actually have applied a rational basis test. *See supra* note 72. For a discussion of the reason why the New Hampshire court felt free to diverge from federal court guidelines in adopting this standard, see *infra* text accompanying note 171.

97. 120 N.H. 925, 931-32, 424 A.2d 825, 830 (1980).

98. *Id.* at 932-33, 424 A.2d at 831.

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

100. 122 N.H. 800, 451 A.2d 174 (1982) (The statute provided for a six year period of repose. For actions against architects, the period began to run on completion of performance, but for actions against materialmen and laborers, the period began to run upon discovery of the cause of action.). *See* N.H. REV. STAT. ANN. § 508:4-b (1983).

101. 123 N.H. 512, 464 A.2d 288 (1983).

ance crises."[102] The court then discussed studies that indicated that the "crisis" had abated nationwide, independent of the New Hampshire legislation. Thus, because the New Hampshire statute had little or no effect on the national insurance situation, the statute had become divorced from its purpose.[103] If the court had applied a rational basis test, the court would have been more deferential to the legislature and probably would have upheld that statute.[104]

The third and final standard applied in equal protection cases is the "strict scrutiny" analysis, which requires that the statutory classification be "necessary" to serve a "compelling state interest."[105] To invoke the strict scrutiny analysis, a statute must affect a "fundamental right" or a "suspect class."[106] In 1984, the Arizona Supreme Court in *Kenyon v. Hammer* applied the strict scrutiny test to a medical malpractice statute of repose.[107] The Arizona court noted that "fundamental rights" are rights "explicitly or implicitly guaranteed by the constitution,"[108] and that because the Arizona Constitution clearly guaranteed the right to bring a cause of action,[109] the statute affected a "fundamental right"[110] and war-

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102. *Id.* at ____, 464 A.2d at 293-94.

103. *Id.* at ____, 464 A.2d at 296.

104. Courts applying the rational basis test are generally reluctant to consider the facts available to the legislature if some rational basis for the legislature's decision exists. These courts usually find that, when enacting the legislation, the legislature reasonably could have concluded that a statute of repose would help ease the insurance "crisis." *See, e.g.*, Scalf v. Berkel, ____ Ind. App. ____, ____, ____, 448 N.E.2d 1201, 1204, 1206 (1983). Davis v. Whiting Corp., 66 Or. App. 541, ____, 674 P.2d 1194, 1196 (1984).

105. Dunn v. Blumstein, 405 U.S. 330, 342 (1971).

106. *See generally* San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 17 (1973).

107. *See* Kenyon v. Hammer, 142 Ariz. 69, 688 P.2d 961 (1984) (en banc). While the Arizona court is the only court to have applied strict scrutiny to statutes of repose, one commentator has argued that strict scrutiny is appropriate in medical malpractice cases because the statutes affect the fundamental human interests of protection of life and limb. *See* Witherspoon, *Constitutionality of the Texas Statute Limiting Liability for Medical Malpractice*, 10 TEX. TECH L. REV. 419, 462 (1979).

108. 142 Ariz. at ____, 688 P.2d at 975 (quoting San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 33-34 (1973)).

109. The Arizona Constitution reads in pertinent part: "The right of action to recover damages for injuries shall never be abrogated . . ." ARIZ. CONST. art. 18, § 6. In an opinion following *Kenyon*, the Arizona Supreme Court held that the Arizona medical malpractice statute violated this constitutional provision. *See* Barrio v. San Manuel Div. Hosp. for Magna Copper Co. (Ariz. Dec. 10, 1984) (available on LEXIS, State library, Ariz. file).

110. The Arizona court asserted that any statute that bars a cause of action before it can be brought "abrogates rather than limits" the cause of action, and, therefore, offends the Arizona Constitution. Thus the court distinguished statutes of repose from statutes of limitations. 142 Ariz. at ____, 688 P.2d at 967.

ranted the high standards of strict scrutiny. Applying the strict scrutiny test, the Arizona court found that the only "compelling state interest" a statute of repose could serve would be to make quality medical care available to the public at a reasonable cost.[111] In determining whether this statute was "necessary" to reach that objective, the court noted that malpractice insurance premiums had not declined and health care costs actually had increased since the legislature enacted the statute. The court also found little evidence that health care cost increases were attributable to malpractice premiums.[112] The court concluded that a statute of repose was not necessary to achieve the state's interest and, therefore, the statute violated the state constitution's equal protection clause.[113] *Kenyon* provides another example of a court that engaged in close scrutiny of legislative action and found that the insurance crisis rationale was unfounded.

B. Due Process

Plaintiffs often challenge statutes of repose on the ground that denying or encroaching upon an individual's right to sue violates due process guarantees.[114] As in equal protection cases, many state courts rely on United States Supreme Court guidelines in due process cases, regardless of whether the state courts are applying state or federal constitutional provisions.[115] The majority of recent due process cases has followed historical practice and applied a "rational basis" test to statutes of repose.[116] Many courts that have adopted this standard rely on Supreme Court dicta from *Silver v.*

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111. *Id.* at ____, 688 P.2d at 976. The court rejected the argument that the limitation of actions was necessary to protect health care providers from the economic hardship caused by high insurance premiums. The court found 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 . . . the judicial system." *Id.* at ____, 688 P.2d at 976.

112. *Id.* at ____, 688 P.2d at 977.

113. *Id.* at ____, 688 P.2d at 977-79.

114. McGovern, *supra* note 3, at 613. For more recent cases concerning due process challenges see Appendix. The due process clause provides: ". . .nor shall any State deprive any person of life, liberty, or property, without due process of law. . . ." U.S. CONST. amend. XIV, § 1.

115. McGovern, *supra* note 3, at 613.

116. *Id.* Some courts do not rule expressly on the appropriate standard of review in statutes of repose cases, but proceed to apply the rational basis test. *See, e.g.*, Jewson v. Mayo Clinic, 691 F.2d 405 (8th Cir. 1982); Armijo v. Tandyish, 98 N.M. 181, 646 P.2d 1245 (N.M. Ct. App. 1981). Among cases decided since 1981, 18 of 24 applied a rational basis test to a due process claim. For a discussion of cases applying different tests, see *infra* notes 125-31 and accompanying text.

Silver:[117] "[T]he Constitution does not forbid . . . the abolition of old [rights] recognized by the common law, to attain a permissible legislative objective."[118] Courts also find support in *Duke Power Co. v. Carolina Environmental Study Groups, Inc.*, in which the Supreme Court ruled that liability limitations with an economic purpose are constitutional unless the legislature acted in an arbitary and irrational way.[119] Under the rational basis test, therefore, courts will uphold a statute if it is rationally related to a permissible objective[120] or if it is not arbitary and irrational.[121] Courts find the "permissible legislative objectives" found in equal protection analysis[122] also permissible in due process cases. Statutes generally pass this highly deferential rational basis standard.[123] No court has invalidated a statute of repose solely on the basis of this "rational basis" due process analysis.[124]

A second line of cases asserts that due process protects only vested rights and that the legislature is free to abrogate nonvested rights.[125] These courts reason that statutes of repose do not prevent a plaintiff from bringing a cause of action; rather, they prevent a cause of action from ever arising. Thus, the plaintiff's alleged right to a common-law cause of action is a nonvested right.[126] Consequently, the abrogation of that nonvested right does not

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117. 280 U.S. 117 (1929). Several recent cases have relied on *Silver v. Silver*. *See, e.g.*, Hartford Fire Ins. Co. v. Lawrence, Dykes, Goodenherger, Bower & Clancy, 740 F.2d 1362, 1367 (6th Cir. 1984); Mathis v. Eli Lilly & Co., 719 F.2d 134, 138 (6th Cir. 1983); Klein v. Catalano, 386 Mass. 701, ___, 437 N.E.2d 514, 522 (1982); *see also* McGovern, *supra* note 3, at 614.

118. 280 U.S. at 122.

119. 438 U.S. 59, 84-85 (1978); *see Hartford Fire Ins. Co.*, 740 F.2d at 1368 (citing *Duke Power*).

120. *See, e.g.*, Klein v. Catalano, 386 Mass. 701, ___, 437 N.E.2d 514, 519 (1982); Thornton v. Mono Mfg., 99 Ill. App. 3d 722, 725, 425 N.E.2d 522, 524 (1981).

121. Some courts apply an "arbitrary and irrational" standard instead of the "permissible legislative objectives" standard found in *Silver*. *See, e.g.*, Wayne v. Tennessee Valley Auth., 730 F.2d 392, 403 (5th Cir. 1984); Mathis v. Eli Lilly & Co., 719 F.2d 134, 138 (6th Cir. 1983).

122. *See supra* text accompanying notes 73-76.

123. *See* McGovern, *supra* note 3, at 613.

124. *See id.* Although some courts recently have found that statutes of repose violate due process, *see* Appendix, no court applying the deferential rational basis test has invalidated a statute *solely* on due process grounds.

125. *See, e.g.*, State Farm Fire & Casualty Co. v. All Elec., Inc., ___ Nev. ___, 660 P.2d 995 (1983); Sowders v. M.W. Kellogg, 663 S.W.2d 644, 648 (Tex. Ct. App. 1983); *see also* McGovern, *supra* note 3, at 613.

126. *See, e.g.*, Mathis v. Eli Lilly & Co., 719 F.2d 134, 138 (6th Cir. 1983) (quoting *Duke Power*, 438 U.S. at 88 n.32); *Sowders*, 663 S.W.2d at 648. *But cf.* Daugaard v. Baltic Coop. Bldg. Supply Ass'n, 349 N.W.2d 419, 427 (S.D. 1984) (finding under an open courts analysis that appellants had a vested right in a common-law negligence cause of action).

deny the plaintiff his due process rights.

A third line of decisions maintains that due process only requires a statute of repose to allow a reasonable time to sue.[127] These courts, however, disagree on whether a statute of repose, by its nature, can allow a reasonable period. Some courts find the statutes valid on the ground that the statutory period does allow a reasonable time to sue.[128] This result is especially frequent in cases concerning statutes that allow persons injured near the end of the statutory period an extra grace period within which to bring suit.[129] Other courts find that a statute of repose potentially allows no time to sue because it bars the cause of action before it accrues.[130] Under this rationale, statutes of repose clearly violate due process requirements.[131]

C. *Open Courts, Access to Courts, and Remedy*

A notable provision found in most state constitutions is the "open courts," "access to courts," or "remedy" clause.[132] These provisions guarantee that courts of justice will be open to every person for the redress of injury without denial or delay.[133] Open courts provisions are not worded identically in every state consti-

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127. *See, e.g.*, Calder v. City of Crystal, 318 N.W.2d 838, 844 (Minn. 1982); Terry v. New Mexico Highway Comm'n, 98 N.M. 119, 645 P.2d 1375 (1982).

128. *See, e.g.*, Wayne v. Tennessee Valley Auth., 730 F.2d 392, 404 (5th Cir. 1983); Davis v. Whiting Corp., 66 Or. App. 541, ____, 674 P.2d 1194, 1196 (1984).

129. *See, e.g.*, CALIF. CIV. PROC. CODE § 337.1(b) (West 1982); OR. REV. STAT. § 30.905(2) (1983).

130. *See, e.g.*, Terry v. New Mexico State Highway Comm'n, 98 N.M. 119, ____, 645 P.2d 1375, 1378 (1982); O'Connor v. Altus, 67 N.J. 106, 117, 335 A.2d 545, 553 (1975).

131. *See Terry*, 98 N.M. at 119, 645 P.2d at 1375 (finding that the statute of repose violated due process because it did not allow a grace period for plaintiffs injured near the end of the statutory period).

132. This provision is by no means the only state constitutional provision asserted against statutes of repose. Of course, state due process and equal protection clauses often are asserted. Another frequently raised provision is the prohibition against special legislation. *See, e.g.*, COLO. CONST. art. V, § 25 ("The general assembly shall not pass . . . special laws granting . . . any special or exclusive privilege . . . ."). Special legislation challenges generally are subsumed within an equal protection analysis. *See generally* McGovern, *supra* note 3, at 610-12. Another provision sometimes applied to statutes of repose requires legislation to encompass only one subject. *See, e.g.*, S.D. CONST. art. III, § 21. *See generally* McGovern, *supra* note 3, at 618. Litigants have raised other distinctive state constitutional provisions, but these provisions are so many and varied as to render any generalizations meaningless.

133. *See, e.g.*, N.C. CONST. art. I, § 18 ("All courts shall be open; every person for an injury done him in his lands, goods, person or reputation shall have remedy by due course of law; and right and justice shall be administered without favor, denial or delay."). Thirty-seven state constitutions have similar provisions. *See* McGovern, *supra* note 3, at 615 n.218.

tution, and variations among the states can lead to different interpretations and different results.[134] This section focuses on cases addressing similar provisions.

Relying on three principal arguments,[135] most courts have found that statutes of repose do not violate open courts provisions.[136] First, these courts reason that the right to bring a cause of action is not a vested right and that legislatures have the power to abrogate a nonvested right.[137] Second, open courts provisions guarantee access to the courts only for "legal injuries," and plaintiffs injured after the expiration of the statutory period have no legally cognizable injuries.[138] Third, these courts argue that open courts provisions are mandates to the judiciary, not the legislatures.[139] These arguments[140] are similar to the arguments relied on in a due process analysis. Indeed, some courts refer to open courts provisions as state due process clauses.[141] Because of this similarity, some courts go beyond relying solely on this reasoning and apply a basic due process analysis to open courts challenges, looking for a reasonable relation between the statute and a legitimate legislative purpose.[142] These decisions, therefore, generally parallel due process decisions.

The Kentucky Supreme Court recently enunciated another basis for upholding a statute of repose under an open courts challenge. In a 1973 opinion, *Saylor v. Hall*, the Kentucky court held that a construction statute of repose violated the state open courts provision.[143] Subsequent Kentucky cases have clarified that ruling.

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134. *See infra* text accompanying notes 179-82.

135. *See* McGovern, *supra* note 3, at 616.

136. *See* Appendix.

137. *See, e.g.*, Yarbro v. Hilton Hotels Corp., ___ Colo. ___, ___, 655 P.2d 822, 827 (1982); Sowders v. M.W. Kellogg, 663 S.W.2d 644, 648 (Tex. Ct. App. 1983).

138. *See, e.g.*, Van Den Hul v. Baltic Farmers Elevator Co., 716 F.2d 504, 512 (8th Cir. 1983); Lamb v. Wedgewood South Corp., 308 N.C. 419, 433, 302 So. 2d 868, 882 (1983).

139. *See* Hartford Fire Ins. Co. v. Lawrence, Dykes, Goodenberger, Bower & Clancy, 740 F.2d 1362, 1369 (6th Cir. 1984). *But see* Saylor v. Hall, 497 S.W.2d 218, 222 (Ky. 1973).

140. Some courts limit the open court analysis to these three arguments. *See, e.g.*, *Lamb*, 308 N.C. at ___, 302 S.E.2d at 880-83.

141. *See, e.g.*, Scalf v. Berkel, ___ Ind. App. ___, ___, 448 N.E.2d 1201, 1205 (1983) (referring to the Alabama open courts decision, Lankford v. Sullivan, Long & Hagerty, 416 So. 2d 996 (Ala. 1982), as a state due process case); *cf. Hartford Fire Ins. Co.*, 740 F.2d 1362 (describing the Ohio open courts provisions as "equivalent to the due process clause of the Fourteenth Amendment").

142. *See, e.g.*, Davis v. Whiting Corp., 66 Or. App. 541, 674 P.2d 1194 (1984); Klein v. Catalano, 386 Mass. 701, ___, 437 N.E.2d 514, 519 (1982).

143. 497 S.W.2d 218 (Ky. 1973).

In *Carney v. Moody*[144] and *Ball Homes, Inc. v. Volpert*[145] the court emphasized that the open courts provision protects causes of action that existed not only when the challenged statute was enacted, but also when the state constitution was adopted.[146] *Ball Homes* upheld a construction statute of repose because no cause of action based on an implied warranty against a vendor existed when the legislature enacted the statute.[147] *Carney* upheld the same statute because the law existing in 1891, the year the state constitution was adopted, did not afford a remedy against negligent builders.[148]

A growing number of courts has found that statutes of repose violate open courts provisions.[149] These courts have followed various approaches.[150] One line of cases maintains that the open courts provision prohibits the legislature from abolishing certain common-law rights without providing an alternative remedy, unless there is an overriding public necessity. A leading Florida case[151] enunciated this principal, and the Alabama Supreme Court recently refined the principal into a two-tiered analysis.[152] Under the Alabama court's analysis, if the legislation abolishes or alters a common-law cause of action, then the court applies a relatively strict level of scrutiny. Courts will uphold such legislation only if it provides a *quid pro quo*. The *quid pro quo* may be offered to the individual in the form of equivalent benefits or protection. Alternately, it may be offered to society in the form of eradicating a perceived social evil. If the legislation does not affect a common-law cause of action, the court will be highly deferential to the legislature, upholding the statute unless it is arbitrary or capricious.[153]

In *Lankford v. Sullivan, Long & Hagerty*[154] the Alabama Supreme Court found a products liability statute of repose invalid under both tiers of analysis. Applying the stricter level of scrutiny, the court identified consumer price and insurance premium infla-

144. 646 S.W.2d 40 (Ky. 1982).
145. 633 S.W.2d 63 (Ky. 1982).
146. 646 S.W.2d at 41.
147. 633 S.W.2d at 64.
148. 646 S.W.2d at 41.
149. *See* Appendix.
150. *See generally* McGovern, *supra* note 3, at 616-18.
151. *See* Overland Constr. Co. v. Sirmons, 369 So. 2d 572 (Fla. 1979).
152. *See* Lankford v. Sullivan, Long & Hagerty, 416 So. 2d 996, 1000 (Ala. 1982); Fireman's Fund Am. Ins. Co. v. Coleman, 394 So. 2d 334, 350-54 (Ala. 1980) (Shores, J., concurring).
153. *Lankford*, 416 So. 2d at 999-1000; *Coleman*, 394 So. 2d at 341-44 (Jones, J., concurring).
154. 416 So. 2d 996 (Ala. 1982).

tion as the "social evil," but held that no "substantial relationship" existed between a statute of repose limiting products liability claims and lower consumer costs.[155] *Lankford* is yet another example of a court engaging in closer scrutiny of statutes of repose and rejecting the insurance crisis rationale. Under the second tier of analysis, the court found that the statute of repose was arbitrary in two respects. First, it barred the claim of a person injured by a defective product ten years and one month after first using the product, while allowing the claim of a person injured by the same product nine years and eleven months after first use. Second, the statute did not provide for an extension of the limitation period for a person injured just before the period expired. For these two reasons the court found that the statute failed to pass even the highly deferential "arbitrary and capricious" standard.[156] This second aspect of the *Lankford* ruling is significant because holding that a statute of repose is arbitrary renders it invalid under the rational basis test in either a due process or equal protection context.[157]

Another line of cases simply holds that an absolute denial of access to courts before the claim even arises is antithetical to the purpose of open courts provisions.[158] One court stated, "Death cannot occur without there first being conception . . . . Neither can a cause of action expire before it accrues."[159] These courts refute the arguments that traditionally have been used to uphold statutes of repose.[160] For example, the South Dakota Supreme Court recently ruled that plaintiffs possess a vested right in a common-law negligence cause of action and, therefore, a statute of repose, which abolished that vested right, was unconstitutional.[161] In another recent decision[162] concerning legislative power over common-law causes of action, the Rhode Island Supreme Court distinguished between the power to alter the substance of the common law and the power to deny completely a plaintiff's day in court. The court

155. The court based its conclusion that no "substantial relationship" existed on findings from task force reports and other commentaries. *Id.* at 1001-03.

156. *Id.* at 1003.

157. *See supra* notes 72, 121, and accompanying text.

158. *See, e.g.*, Kennedy v. Cumberland Eng'g. Co., ___ R.I. ___, 471 A.2d 195 (1984); Daugaard v. Baltic Corp. Bldg. Supply Ass'n, 349 N.W.2d 419 (S.D. 1984). Rigorous dissents in these cases assert many of the same arguments traditionally used to uphold statutes under open courts provisions. *See, e.g., Kennedy*, ___ R.I. at ___, 471 A.2d at 201-06.

159. *Daugaard*, 349 N.W.2d at 425 (quoting McMacken v. State, 320 N.W.2d 131, 141 (S.D. 1982) (Henderson, J., dissenting)).

160. *See supra* text accompanying notes 137-39.

161. *Daugaard*, 349 N.W.2d at 427.

162. *Kennedy*, ___ R.I. ___, 471 A.2d 195.

maintained that the legislature clearly had the power to alter substantive rights but the open courts provision prohibits the legislature from completely denying those rights to any plaintiff.[163]

A fundamental concern underlying both due process and open courts issues is the proper degree of deference to be given to legislatures.[164] One group of courts has expressed the concern that invalidating legislation, simply because that legislation rejects some cause of action preferred by the courts, would encroach unduly upon the legislature's role in developing the law. "Such a result would offend our notions of checks and balances between the various branches of government, and the flexibility required for the healthy growth of the law."[165] These courts are reluctant to interpret due process or open courts provisions as imposing strict restraints on the legislature.[166] Consequently, courts espousing this view maintain a relatively high degree of deference to the legislature when reviewing statutes of repose. Conversely, another group of courts acknowledges that while a great number of issues should be left to the legislature's discretion, the courts have a duty to ensure that the legislature has not violated constitutional restraints.[167] A number of courts imposes a stricter level of scrutiny in these cases on the theory that statutes of repose affect constitutionally protected rights.[168]

IV. ANALYSIS

A. *Effect of State Constitutional Law*

State constitutional law has played a significant role in a number of recent rulings on statutes of repose. Although many courts simply rely on federal constitutional guidelines when applying a state constitutions' equal protection or due process clause,[169] some

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163. *Id.* at ___, 471 A.2d at 199.

164. McGovern, *supra* note 3, at 581.

165. Hartford Fire Ins. Co. v. Lawrence, Dykes, Goodenberger, Bower & Clancy, 740 F.2d 1362, 1369-70 (6tb Cir. 1984) (quoting Freezer Storage, Inc. v. Armstrong Cork Co., 476 Pa. 270, 281, 382 A.2d 715, 721 (1978)).

166. *See supra* text accompanying notes 118-19, 125, 137-39.

167. *See, e.g.*, Kenyon v. Hammer, 142 Ariz. 69, 688 P.2d 961 (1984) (finding that the right action to recover for injuries bad been "taken from its status as . . . subject to tbe will of the legislature and embedded in the Constitution," *id.* at 974 (quoting Alabama's Freigbt Co. v. Hunt, 29 Ariz. 419, 443-44, 242 P. 658, 665-66 (1926)); Kennedy v. Cumberland Eng'g. Co., ___ R.I. ___, ___, 471 A.2d 195, 201 (1984).

168. *See, e.g.*, Daugaard v. Baltic Coop. Bldg. Suppy Ass'n, 349 N.W.2d 419 (S.D. 1984).

169. *See supra* text accompanying notes 70, 115.

state courts are beginning to break from this tradition. A leader in this development is the New Hampshire Supreme Court. In *Carson v. Maurer* the court set a precedent by applying a heightened scrutiny equal protection analysis to a statute of repose.[170] The court acknowledged that the United States Supreme Court had restricted the heightened scrutiny test to cases concerning classifications based on gender or illegitimacy. Nevertheless, the court asserted, "[i]n interpreting our State Constitution . . . we are not confined to federal constitutional standards and are free to grant individuals more rights that [sic] the Federal Constitution requires."[171] Similarly, the Arizona Supreme Court in *Kenyon v. Hammer* applied a strict scrutiny equal protection analysis to a statute of repose.[172] The court based its holding solely on state constitutional law, stating, "[F]ederal authority is cited only for the purpose of guidance and not because it compels the result which we reach."[173] Thus, in the equal protection area, one effect of state constitutional law has been to give state courts a license to scrutinize legislative decisions more closely than the Supreme Court has been willing to do at the federal level.

State constitutional provisions also can affect an equal protection analysis indirectly. For example, the *Kenyon* court adopted a strict scrutiny standard because the statute of repose affected a "fundamental right" protected by the state constitution.[174] The statute of repose challenged in *Kenyon* offended an Arizona constitutional provision that prohibited abrogation of the right of recovery. It is less clear whether statutes of repose violate other state constitutional provisions, such as open courts clauses. If state courts endorse the United State Supreme Court's definition of "fundamental right,"[175] however, they may consider the open courts provision a constitutional guarantee of the right to bring a cause of action. Furthermore, these courts may conclude that statutes of repose affect this "fundamental right," a conclusion that necessitates a strict scrutiny analysis. A state court's willingness to apply a higher standard of review to a constitutional claim may alter the outcome of a case. Thus, a state constitutional provision could be the determinative factor in a federal constitutional

170. *See supra* text accompanying notes 96-98.
171. 120 N.H. 925, 932, 424 A.2d 825, 831 (1980).
172. *See* Kenyon v. Hammer, 142 Ariz. 69, 688 P.2d 961 (1984).
173. 142 Ariz. at ___, 688 P.2d at 963.
174. *See supra* text accompanying notes 106-10.
175. *See supra* text accompanying note 108.

challenge.

The effect of state constitutional law is most readily apparent in cases that address open courts challenges. Some courts maintain that the open courts provision has no counterpart in the federal constitution[176] and that state constitutions are free to provide greater protections than are required under the federal constitution.[177] Thus, the open courts provision goes beyond basic due process guarantees and demands a different standard of analysis. Courts adhering to this interpretation of state constitutional law apply a more rigorous test to statutes of repose than do other state courts. For example, the Florida and Alabama courts have held that the open courts provision prohibits a legislature from abolishing a common-law right without providing an alternative cause of action, unless there is a compelling necessity to do so.[178] Not all state courts, however, interpret the open courts provision as imposing such a stringent restraint on the legislature. An Indiana court specifically rejected the Alabama court's approach and held that an open courts provision does not create a "fundamental right."[179] Courts that follow the Indiana court's rationale believe that showing deference to the legislature is essential to the constitutional scheme of separation of powers.[180] These courts generally apply a rational basis type of analysis to statutes of repose.[181] Other courts refuse to put the label "open courts provision" on clauses in their states' constitutions and thereby avoid following other states' open courts analyses.[182]

In large part, the fact that the open courts question is a state constitutional issue causes this diversity of opinion among state courts. As the Florida court has stated, this open courts provision

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176. *See* Overland Constr. Co. v. Sirmons, 369 So. 2d 572, 573 (Fla. 1979).

177. *See* Daugaard v. Baltic Coop. Bldg. Supply Ass'n, 349 N.W.2d 419, 425 (S.D. 1984).

178. *See supra* text preceding and accompanying notes 151-52.

179. *See* Scalf v. Berkel, Inc., ___ Ind. App. ___, 448 N.E.2d 1201 (1983); *cf.* Thornton v. Mono Mfg., 99 Ill. App. 3d 722, 727, 425 N.E.2d 522, 526 (1981) (asserting that the remedy provision of the Illinois constitution "has not been given such a broad sweep as that afforded by the Florida courts").

180. *See supra* text accompanying notes 165-66.

181. *See supra* text accompanying note 142.

182. *Compare* Nelms v. Georgian Manor Condominium Ass'n, 253 Ga. 410, 321 S.E.2d 330 (1984) (finding that the Georgia constitutional provision at issue should not be interpreted expansively to provide the same guarantees as the Alabama and Florida provisions) *with* Kenyon v. Hammer, 142 Ariz. 69, 688 P.2d 961 (1984) (finding the Arizona constitutional provision at issue to provide greater protection than the typical open courts provision).

"derives its scope and meaning solely from Florida . . . law."[183] In interpreting state constitutional law, a court may consider other states' rulings, but ultimately must base its decision on its own laws and traditions, because they reflect that state's peculiar needs and concerns. As a result, when state courts review open courts challenges to statutes of repose, disparity in results is inevitable and appropriate because the states should be free to interpret their constitutional provisions as they see fit.

The assertion of state constitutional law over less restrictive federal law on the issue of statutes of repose illustrates a general resurgence of state constitutional law.[184] This movement, which commentators have labelled the "new federalism," reflects a growing willingness among state courts to apply state law when determining a question of individual rights.[185] New federalism is based on the premise that the federal constitution establishes minimum, rather than maximum, guarantees of individual rights.[186] State courts, therefore, should look to their own constitutions to determine the degree of protection that courts should afford individual rights.[187] Some commentators contend that renewed emphasis on state constitutional law is a result of the Burger Court's retreat from its predecessor's activist approach to individual liberties.[188] Indeed, the Burger Court has taken a "states' rights" stance and has urged state courts to apply their own constitutional doctrines.[189]

Some state courts have incorporated this new federalism concept into a systematic approach to questions concerning individual rights. For example, the Oregon rule is that courts first must analyze state law, including state constitutional law, before reaching a federal constitutional claim.[190] This "state law first" approach is manifest in a number of recent rulings on statutes of repose[191] and

183. Overland Constr. Co. v. Sirmons, 369 So. 2d 572, 573 (Fla. 1979).

184. *See* Abrahamson, *Reincarnation of State Courts*, 36 Sw. L.J. 951 (1982); *see generally Rebirth of Reliance on State Charters*, NAT'L L.J., Mar. 12, 1984, at 25-32.

185. Abrahamson, *supra* note 184, at 952.

186. *See id.*

187. *See id.*

188. *Id.* at 957-58.

189. *See id.* at 961.

190. *See* Sterling v. Cupp, 290 Or. 611, 614, 625 P.2d 123, 126 (1981); *see also* Linde, *First Things First: Rediscovering the States' Bills of Rights*, 9 U. BALT. L. REV. 379 (1980). Other states have followed Oregon's lead in adopting a "state-law-first" approach. *See, e.g.*, People v. Pettingill, 21 Cal. 3d 231, 578 P.2d 108, 145 Cal. Rptr. 861 (1978); State v. Ball, 124 N.H. 226, 471 A.2d 347 (1983).

191. *See supra* text accompanying notes 171, 173, 177.

is appropriate for constitutional issues. Consider, for example, due process guarantees. One scholar has noted that the term "due" suggests a dynamic concept[192] and that each state's determination of what is due process depends upon that state's own legal, historical, and social traditions.[193] The state court, therefore, is the proper forum for determining the degree of protection to afford its citizenry.

B. Future Direction

If a greater number of states adopt the new federalism approach, they probably will continue to disagree when ruling on the constitutionality of statutes of repose. Arguably, a new federalism approach would lead more courts to strike down these statutes because many courts that rely on state constitutional law apply rigorous standards of review and occasionally review the entire circumstances surrounding the passage of the statutes.[194] In these cases courts are beginning to question and reject some of the traditional justifications for statutes of repose. For example, a number of courts have found that statutes of repose actually do not help alleviate high insurance rates or high consumer prices.[195] If more courts begin to follow the lead of Alabama, Arizona, and New Hampshire and reject traditional justifications for statutes of repose, more state courts are likely to declare their statutes of repose unconstitutional. Nonetheless, the ultimate result of renewed emphasis on state constitutional law undoubtedly would be continued divergence among the states. The variety of state constitutional provisions and the diversity of philosophies concerning the degree of protection that should be afforded the right to bring a cause of action inevitably will lead to different conclusions on the validity of statutes of repose.

Whether additional states will place greater emphasis on state constitutional law in future decisions remains to be seen. The majority of state courts may continue to rely on federal standards to resolve constitutional issues because it is easier to operate within well-established guidelines than to venture into uncharted areas. Furthermore, state judges may not be willing to take the responsibility for resolving the potentially volatile political issues of indi-

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192. A. HOWARD, THE ROAD FROM RUNNEYMEADE: MAGNA CARTA AND CONSTITUTIONALISM IN AMERICA 345 (1968).

193. *Id.*

194. *See supra* text accompanying notes 97, 102-04, 112, 155.

195. *See supra* text accompanying notes 103, 112, 155.

vidual rights.[196] For these reasons, states may continue to follow traditional approaches in analyzing statutes of repose. This scheme is likely to lead to continued divergence, however, because state courts disagree just as much when applying federal guidelines as when they adopt state standards.

Another noticeable trend in recent cases is the tendency to place heavy emphasis on prior rulings. The "analysis" in a great number of recent cases construing statutes of repose has consisted primarily of quotations and citations of authority supporting a particular position.[197] This simplistic reliance on precedent perpetuates the divergent findings of the leading cases of the 1970s. Thus, continued disparity among the states over the issues of the constitutionality of statutes of repose seems inevitable.

C. Arguments For and Against National Legislation

Given the disparity among state courts in their constitutional analyses of statutes of repose, many commentators recommend imposing a uniform standard through national legislation.[198] Proponents of a federal statute view professional malpractice and products liability as national issues. Insurance rates are set on a nationwide basis.[199] In the products liability area, many manufacturers market their products on a regional or national scale and often base their marketing decisions on national data.[200] The diversity among state liability laws, therefore, is a burden on interstate commerce.[201] Advocates of a federal statute argue that federal legislation would promote consistency, which would at least provide a more accurate basis for insurance rates, if not actually reduce premiums.[202] Moreover, uniform products liability laws would facilitate the flow of interstate commerce and allow manufacturers to

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196. *See* Abrahamson, *supra* note 184, at 962. This notion may be especially true of publicly elected state court judges who do not enjoy the immunization from popular pressure and sentiment that accompanies lifetime tenure. *Id.*

197. *See, e.g.*, Twin Falls Clinic & Hosp. Bldg. Corp. v. Hammill, 103 Idaho 19, 644 P.2d 341 (1982).

198. *See, e.g.*, Schwartz & Means, *The Need For Federal Product Liability and Toxic Tort Legislation: A Current Assessment*, 28 VILL. L. REV. 1088 (1983); Twerski, *National Product Liability Legislation: In Search for the Best of All Possible Worlds*, 18 IDAHO L. REV. 411 (1982).

199. Schwartz & Means, *supra* note 198, at 1091-92.

200. Dworkin, *supra* note 59, at 616.

201. Schwartz & Bares, *Federal Reform of Product Liability Law: A Solution That Will Work*, 13 CAP. U.L. REV. 351, 358 (1984).

202. Dworkin, *supra* note 59, at 618 (citing Schwartz, 9 PROD. SAFETY & LIAB. REP. (BNA) 951 (Dec. 18, 1981)).

base marketing decisions on economic principles rather than individual state liability laws.[203] Consumers would benefit from lower insurance rates and increased efficiency. Finally, a federal statute would be much less vulnerable to constitutional attack,[204] thereby enhancing the prospects of uniformity.

Not everyone agrees that national legislation is appropriate. One argument against a uniform act is based on the centuries-old tradition that tort law belongs to the states. This argument reflects the fundamental federalist concepts underpinning our judicial system. According to one commentator, "[t]he strength of our legal system has through trial and error evolved bodies of law . . . which meet the particular social and economic needs of each of the states. As states we are different, and our specific requirements have been developed and decided where they are best understood."[205] One of the great advantages of our federal system is this practice of experimentation among the states.[206] Each state can serve as a laboratory of sorts, experimenting with various social and economic policies without having to gain a national consensus and without threatening any other state's interests.[207] This system allows for flexibility and growth, which could be impaired if Congress enacted national legislation.[208] For these reasons, as one court has stated, "[T]he state's interest in fashioning its own rules of tort law is par-

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203. *See generally* Reed & Watkins, *Product Liability Tort Reform: The Case for Federal Action*, 63 NEB. L. REV. 387, 438-43 (1984) (discussing the effect of diverse laws on product development and marketing).

204. Federal legislation is less likely to fall under constitutional attack for two reasons. First, the supremacy clause of the federal constitution effectively precludes state constitutional law challenges. As long as the federal legislation does not offend the federal constitution, the legislation will supersede state law. Smith, *supra* note 2, at ____. Second, a federal statute of repose is most likely to be considered a valid exercise of Congress' commerce clause powers. Reed & Watkins, *supra* note 203, at 468. Furthermore, federal constitutional guidelines suggest that federal courts would apply lenient rationality tests to statutes of repose, *see supra* text accompanying notes 118-19 and text following note 170, thereby making these statutes more likely to withstand constitutional attack.

205. Comment, *Nationalizing Torts*, 68 A.B.A. J. 772 (1982) (quoting Ernest Y. Sevier).

206. Newman, *The 'Old Federalism': Protection of Individual Rights by State Constitutions in an Era of Federal Court Passivity*, 15 CONN. L. REV. 21, 23 (1982).

207. *See, e.g.*, New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.").

208. Dworkin, *supra* note 59, at 642 n.235 (quoting National Legal Center for the Public Interest, Pre-Conference Working Paper for the Fifth Nat'l Conference on Product Liability Law & Tort Reform of John W. Wade, *An Overview of Differing Perspectives on Tort Law Reform*, 2-3 (Apr. 1982)).

amount to any discernable federal interest . . . ."[209]

Critics of national legislation also point out that a federal statute may not achieve its avowed purpose of uniformity. Any statute is subject to judicial interpretation and thus may take on different meanings in different contexts. Varying judicial interpretations and choice of law problems could create more uncertainty than currently exists.[210] Finally, critics argue that a statute of repose is not necessary to reduce insurance rates.[211] One of the primary justifications for adopting a federal statute of repose, therefore, is fatally flawed.

V. CONCLUSION

The dispute over whether to adopt a federal statute of repose can best be resolved by considering the fundamental interests at issue. One interest is based on economic concerns. Proponents of statutes of repose primarily seek to promote the economic interests of certain industries and the economy in general by limiting the time period within which plaintiffs can sue.[212] Opponents of statutes of repose respond to this economic justification with two arguments. First, critics simply contend that as a practical matter statutes of repose do not achieve these economic goals.[213] Second, critics argue that it is an inappropriate social policy to give greater weight to defendants' economic interest in avoiding liability than to plaintiffs' economic interest in recovering damages.[214]

Economic concerns, however, constitute only one of the fundamental interests at issue in the dispute over whether to enact a national statute of repose. Statutes of repose also limit a plaintiff's right to redress a grievance through our judicial system. This right is essential to any democratic form of government. Our constitutional history illustrates that an opportunity to be heard is "such a fundamental expectation that no court has paused to wonder seriously whether it is a good idea or not."[215] Correlative to the inter-

209. Kenyon v. Hammer, 142 Ariz. 69, ____, 688 P.2d 961, 971 (1984).

210. Comment, *supra* note 205. *But see* Reed & Watkins, *supra* note 203, at 470-71 (arguing that clear drafting and potential stete court deference to federal courts' interpretations could eliminate uncertainties).

211. Studies have shown that the insurance problem was not the "crisis" that it was portrayed to be. Insurance rates have now stabilized and the problem largely has been solved. *See* Dworkin, *supra* note 59, at 618-19; Page & Stepbens, *supra* note 57, at 396-97.

212. *See supra* text accompanying notes 2, 39-43.

213. *See supra* text accompanying notes 54-59, 210-11.

214. *See supra* text accompanying note 53.

215. A. HOWARD, *supra* note 192, at 346.

est in giving plaintiffs their "day in court" is the interest in holding wrongdoers responsible for their actions,[216] which is clearly one of the primary functions of our legal system. Statutes of repose potentially bar suits before an injury occurs and, therefore, clearly abrogate both the interest in redressing grievances and holding tortfeasors liable for their actions.

When statutes of repose are properly viewed as implicating these fundamental rights, in addition to economic concerns, the dispute takes on an entirely different light. In this light the arguments favoring a national response pale in comparison to the interest in leaving the issue to the states. Tort law always has been a matter of state law and this system has worked quite well.[217] When no consensus exists on whose economic interests the legislature should serve, or to what degree or through what means those interests should be served, it is best to leave the unresolved questions to the states. Each state can experiment with ways to achieve the proper balance of the competing concerns and can determine what is most expedient for its own jurisdiction. Furthermore, state courts have a compelling interest in determining the extent to which their citizens' individual rights are protected.[218] This interest may be even stronger in the 1980s because of the federal courts' passive approach to individual liberties.[219] Therefore, because the value and import of a federal statute of repose are highly debatable, and the benefits of allowing the states to resolve these issues are manifest, a federal statute hardly seems justifiable.

This Note's examination of the constitutionality of statutes of repose has revealed a great disparity among the states and every indication of continued disparity. This disparity is highly appropriate, for it reflects the continuing vitality of one of the essential attributes of the American legal system. It is indeed refreshing to learn that federalism reigns.

JOSEPHINE HERRING HICKS

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216. *See supra* text accompanying note 53.
217. *See supra* text preceeding and accompanying notes 205-09.
218. *See supra* text accompanying notes 186-93.
219. *See supra* text accompanying notes 184, 188-89.

APPENDIX

The primary purpose of this Appendix is to list the most recent cases on each type of statute, but the list also includes some of the older cases that still represent prevailing law. For a list of other pre-1981 cases, see McGovern, *supra* note 3, at 622-24.

Alabama

Jackson v. Mannesman Demag Corp., 435 So. 2d 725 (Ala. 1983) (holding construction statute violates state open courts provision); Lankford v. Sullivan, Long & Hagerty, 416 So. 2d 966 (Ala. 1982) (holding products liability statute violates state open courts provision). *But see* Tucker v. Nichols, 431 So. 2d 1263 (Ala. 1983) (holding medical malpractice statute does not violate state open courts provision because, unlike the statute in *Lankford*, it has a "savings clause"); Bowlin Horn v. Citizen's Hosp., 425 So. 2d 1065 (Ala. 1983) (holding medical malpractice statute does not violate equal protection).

Arizona

Kenyon v. Hammer, 142 Ariz. 69, 688 P.2d 961 (1984) (holding medical malpractice statute violates state equal protection provision).

Arkansas

Owen v. Wilson, 260 Ark. 21, 537 S.W.2d 543 (1976) (holding medical malpractice statute does not violate federal due process provision); Carter v. Hartenstein, 248 Ark. 1172, 455 S.W.2d 918 (1970), *appeal dismissed*, 401 U.S. 901 (1971) (holding construction statute does not violate federal due process or equal protection provisions).

California

Barnhouse v. City of Pinole, 133 Cal. App. 3d 171, 183 Cal. Rptr. 881 (1982) (holding construction statute does not violate equal protection or due process).

Colorado

Austin v. Litvak, ___ Colo. ___, 682 P.2d 41 (1984) (holding medical malpractice statute violates equal protection). *But see* Criswell v. M. J. Brock & Sons, Inc., ___ Colo. ___, 681 P.2d 495

(1984) (holding construction statute does not violate equal protection); Yarbro v. Hilton Hotels Corp., ____ Colo. ____, 655 P.2d 822 (1983) (holding construction statute does not violate due process, equal protection, or state open courts provisions).

Delaware

Cheswold Volunteer Fire Co. v. Lambertson Constr. Co., _____A.2d _____, 53 U.S.L.W. 2296 (Del. 1984) (holding construction statute does not violate federal due process or equal protection provisions); Dunn v. St. Francis Hosp., 401 A.2d 77 (Del. 1979) (holding medical malpractice statute does not violate state open courts provision).

Florida

Cates v. Graham, 427 So. 2d 290 (Fla. Dist. Ct. App. 1983) (holding medical malpractice statute is constitutional in case in which plaintiff discovered injury before the statutory period lapsed). *But see* Perez v. Univ. Eng'g Corp., 413 So. 2d 75 (Fla. Dist. Ct. App. 1982) (holding construction statute is unconstitutional in case in which plaintiff's injury occurred after statutory period lapsed); Diamond v. E. R. Squibb & Sons, Inc., 397 So. 2d 671 (Fla. Dist. Ct. App. 1981) (holding products liability statute violates state open courts provision).

Georgia

Sliessel v. Stroup, 253 Ga. 56, 316 S.E.2d 155 (1984) (holding medical malpractice statute violates equal protection). *But see* Allrid v. Emory Univ., 249 Ga. 35, 285 S.E.2d 521 (1982) (holding medical malpractice statute's exception for cases involving foreign objects left in body does not violate equal protection or due process).

Hawaii

Shibuya v. Architects Hawaii, Ltd., 65 Hawaii 26, 647 P.2d 276 (1982) (holding amended version of construction statute violates equal protection).

Idaho

Holmes v. Iwasa, 104 Idaho 179, 657 P.2d 476 (1983) (holding medical malpractice statute does not violate equal protection or due process); Twin Falls Clinic & Hosp. Bldg. Corp. v. Hammill,

103 Idaho 19, 644 P.2d 341 (1982) (holding construction statute does not violate federal equal protection or state open courts provisions).

Illinois

Matayka v. Melia, 119 Ill. App. 3d 221, 456 N.E.2d 353 (1983) (holding amended version of construction statute, which had been declared unconstitutional in Skinner v. Anderson, 38 Ill. 2d 455, 231 N.E.2d 588 (1967), does not violate state "special legislation" provision or federal or state due process provisions); Real v. Kim, 112 Ill. App. 3d 427, 445 N.E.2d 783 (1983) (holding medical malpractice statute does not violate state "special legislation" provision); Thornton v. Mono Mfg., 99 Ill. App. 3d 722, 425 N.E.2d 522 (1981) (holding products liability statute does not violate due process).

Indiana

Scalf v. Berkel, Inc., _____ Ind. App. _____, 448 N.E.2d 1201 (1983) (holding products liability statute does not violate federal equal protection or due process provisions); Beecher v. White, _____ Ind. App. _____, 447 N.E.2d 622 (1983) (holding construction statute does not violate state or federal equal protection or due process provisions or state "special legislation" or open courts provisions); *accord* Braswell v. Flintkote Mines, Ltd., 723 F.2d 527 (7th Cir. 1983); Pitts v. Unarco Indus. Inc., 712 F.2d 276 (7th Cir. 1983) (applying Indiana law to uphold products liability statute on due process and equal protection grounds).

Iowa

Fitz v. Dolyak, 712 F.2d 330 (8th Cir. 1983) (holding Iowa medical malpractice statute does not violate due process or equal protection).

Kansas

Stephens v. Snyder Clinic Ass'n, 230 Kan. 115, 631 P.2d 222 (1981) (holding medical malpractice statute does not violate state equal protection or special legislation provisions).

Kentucky

Carney v. Moody, 646 S.W.2d 40 (Ky. 1982) (holding construction statute does not violate state open courts provision); *accord*

Ball Homes, Inc. v. Volpert, 633 S.W.2d 63 (Ky. 1982).

Louisiana

Crier v. Whitecloud, 455 So. 2d 1279 (La. Ct. App. 1984) (holding medical malpractice statute does not violate state equal protection, due process, or open courts provisions); *accord*, Valentine v. Thomas, 433 So. 2d 289 (La. Ct. App. 1983).

Massachusetts

Klein v. Catalano, 386 Mass. 701, 437 N.E.2d 514 (1982) (holding construction statute does not violate federal or state due process or equal protection provisions or state remedies provision).

Michigan

O'Brien v. Hazelet & Erdal, 410 Mich. 1, 299 N.W.2d 336 (1980) (holding construction statute does not violate federal or state equal protection or due process provisions).

Minnesota

Jewson v. Mayo Clinic, 691 F.2d 405 (8th Cir. 1982) (holding medical malpractice statute does not violate federal equal protection or due process provisions); Calder v. City of Crystal, 318 N.W.2d 838 (Minn. 1982) (holding construction statute does not violate federal or state equal protection or due process provisions).

Mississippi

Anderson v. Fred Wagner & Roy Anderson Jr., Inc., 402 So. 2d 320 (Miss. 1981) (holding construction statute does not violate state open courts provision).

Missouri

Ross v. Kansas City Gen. Hosp. and Medical Center, 608 S.W.2d 397 (Mo. 1980) (holding medical malpractice statute does not violate federal or state due process or equal protection provisions or state special legislation provision).

Montana

Reeves v. Ille Elec. Co., 170 Mont. 104, 551 P.2d 647 (1976) (holding construction statute does not violate federal equal protection or state open courts provisions).

Nebraska

Colton v. Dewey, 212 Neb. 126, 321 N.W.2d 913 (1982) (holding malpractice statute does not violate federal equal protection, state due process, access to courts, or special legislation provisions).

Nevada

State Farm Fire and Casualty Co. v. All Elec., Inc., 99 Nev. 222, 660 P.2d 995 (1983) (holding construction statute violates federal and state equal protection provisions).

New Hampshire

Heath v. Sears, Roebuck, Inc., 123 N.H. 512, 464 A.2d 288 (1983) (holding products liability statute violates federal and state equal protection provisions); Henderson Clay Prods., Inc. v. Edgar Woods & Assocs., Inc., 122 N.H. 800, 451 A.2d 174 (1982) (holding construction statute violates federal and state equal protection provisions).

New Jersey

Rosenberg v. Town of North Bergen, 61 N.J. 190, 293 A.2d 662 (1972) (holding construction statute does not violate federal equal protection or due process provisions or state special legislation provision).

New Mexico

Terry v. New Mexico Highway Comm'n, 98 N.M. 119, 645 P.2d 1375 (1982) (holding construction statute does not violate federal equal protection or state special legislation provisions, *but* does violate due process); Armijo v. Tandyish, 98 N.M. 181, 646 P.2d 1245 (N.M. Ct. App. 1981) (holding medical malpractice statute does not violate federal equal protection or due process provisions).

North Carolina

Barwick v. Celotex Corp., 736 F.2d 946 (4th Cir. 1984) (holding North Carolina medical malpractice statute does not violate equal protection or state open courts provision); Hines v. Tenneco Chems., Inc., 728 F.2d 729 (5th Cir. 1984) (holding North Carolina products liability statute does not violate state open courts provi-

sion); Lamb v. Wedgewood South Corp., 308 N.C. 419, 302 S.E.2d 868 (1983) (holding construction statute does not violate federal or state equal protection provisions or state open courts provision).

Ohio

Hartford Fire Ins. Co. v. Lawrence, Dykes, Goodenberger, Bower & Clancy, 740 F.2d 1362 (6th Cir. 1984) (holding Ohio construction statute does not violate federal or state due process or equal protection provisions or state open courts provision). *But see* Schwan v. Riverside Methodist Hosp., 6 Ohio St. 3d 300, 452 N.E.2d 1337 (1983) (holding medical malpractice statute violates state equal protection provision).

Oklahoma

Loyal Order of Moose, Lodge 1785 v. Cavaness, 563 P.2d 143 (Okla. 1977) (holding construction statute violates federal equal protection provision). The Oklahoma Legislature has since passed a new statute, the constitutionality of which has not been decided.

Oregon

Davis v. Whiting Corp., 66 Or. App. 541, 674 P.2d 1194, *petition for review denied*, 297 Or. 82, 679 P.2d 1367 (1984) (holding products liability statute does not violate federal due process or equal protection provisions or state open courts provision); Joseph v. Burns, 260 Or. 493, 491 P.2d 203 (1971) (holding construction statute does not violate state remedy provision).

Pennsylvania

Freezer Storage, Inc. v. Armstrong Cork Co., 476 Pa. 270, 382 A.2d 715 (1978) (holding construction statute does not violate state remedy or special legislation provisions).

Rhode Island

Kennedy v. Cumberland Eng'g Co., ____ R.I. ____, 471 A.2d 195 (1984) (holding products liability statute violates state open courts provision).

South Carolina

Broome v. Truluck, 270 S.C. 227, 241 S.E.2d 739 (1978) (holding construction statute violates federal and state equal protection provisions).

South Dakota

Daugaard v. Baltic Coop. Bldg. Supply Ass'n, 349 N.W.2d 419 (S.D. 1984) (holding construction and products liability statutes violate state open courts provision).

Tennessee

Wayne v. Tennessee Valley Auth., 730 F.2d 392 (5th Cir. 1984) (holding Tennessee products liability statute does not violate federal equal protection or due process provisions); Mathis v. Eli Lilly & Co., 719 F.2d 134 (6th Cir. 1983) (holding Tennessee products liability statute does not violate federal due process provision); Harman v. Angus R. Jessup Assocs. Inc., 619 S.W.2d 522 (Tenn. 1981) (holding construction statute does not violate federal equal protection or state open courts provisions); Harrison v. Schrader, 569 S.W.2d 822 (Tenn. 1978) (holding medical malpractice statute does not violate federal or state equal protection provisions or state open courts provision).

Texas

Neagle v. Nelson, No. C-2576 (Tex. 1985) (available on LEXIS, State library, Tex. file) (holding medical malpractice statute violates state open courts provision); *accord* Sax v. Votteler, 648 S.W.2d 661 (Tex. 1983); Sowders v. M. W. Kellogg Co., 663 S.W.2d 644 (Tex. Ct. App. 1983) (holding construction statute does not violate due process, equal protection, or state access to courts provisions); *accord*, Ellerbe v. Otis Elevator Co., 618 S.W.2d 870 (Tex. Civ. App. 1981).

Utah

Vealey v. Clegg, 579 P.2d 919 (Utah 1978) (holding medical malpractice statute does not violate due process); Good v. Christensen, ____ Utah ____, 527 P.2d 223 (1974) (holding construction statute is not unconstitutional).

Washington

Duffy v. King Chiropractic Clinic, 17 Wash. App. 693, 565 P.2d 435 (1977) (holding medical malpractice statute does not violate federal or state equal protection provisions or state special legislation provision); Yakima Fruit & Cold Storage Co. v. Central Heating & Plumbing Co., 81 Wash. 2d 528, 503 P.2d 108 (1972) (holding construction statute does not violate federal equal protec-

tion provision or state special legislation provision).

Wisconsin

United States Fire Ins. Co. v. E. D. Wesley Co., 100 Wis. 2d 59, 301 N.W.2d 271 (1980) (holding amended version of construction statute, which had been held violative of equal protection in Kallas Millwork Corp. v. Square D. Co., 66 Wis. 2d 382, 225 N.W.2d 454 (1975), does not violate state or federal due process provisions).

Wyoming

Phillips v. ABC Builders, Inc., 611 P.2d 821 (Wyo. 1980) (holding construction statute violates state special legislation provision).