

NOTES

MEDICAL MALPRACTICE ACTS' STATUTES OF LIMITATION AS THEY APPLY TO MINORS: ARE THEY PROPER?

SCOTT A. DEVRIES*

INTRODUCTION

Kimberley Kay Rohrabough was separately treated and diagnosed by G. W. Wagoner, M.D., and J. Like, D.O., for a growth at her waistline. Rosa Rohrabough Cross brought suit as next friend for medical malpractice.¹ The health care providers pleaded a statute of limitation defense pursuant to Indiana's Medical Malpractice Act of 1975.² The specific provisions required children between six and twenty-one years of age³ to comply with a two-year statute of limitation on medical malpractice claims.⁴ Children under six years of age had until their eighth birthday to bring a medical malpractice claim.⁵ In *Rohrabough v. Wagoner*, the Indiana Supreme Court held that the statutes violated neither Indiana's Due Course of Law Provision⁶ nor the Equal Protection Provisions of the State and the Federal Constitutions.⁷

* J.D. Candidate, 1995, Indiana University School of Law—Indianapolis; B.B.A., 1981, Western Michigan University. The author wishes to thank Henry Karlson, Professor of Law, Indiana University School of Law—Indianapolis, for his invaluable assistance and insight in developing this Note's topic and themes. This Note reflects one of Professor Karlson's primary concerns and goals—the improvement of children's mental, physical and spiritual well-being.

1. *Rohrabough v. Wagoner*, 413 N.E.2d 891 (Ind. 1980).

2. *Id.* at 892; Act of Apr. 17, 1975, Pub. L. No. 146-1975, 1975 Ind. Acts 854 (codified as amended at IND. CODE §§ 16-9.5-1-1 to -10-5 (1988) (repealed 1993); current versions of §§ 16-9.5-3-1, 16-9.5-3-2 at IND. CODE ANN. §§ 27-12-7-1, 27-12-7-2 (West Supp. 1994).

3. *Rohrabough*, 413 N.E.2d at 894. At that time the age of majority in Indiana was twenty-one years of age.

4. IND. CODE ANN. §§ 27-12-7-1, 27-12-7-2 (West Supp. 1994); IND. CODE § 34-4-19-1 (1988).

5. IND. CODE ANN. § 27-12-7-1.

6. IND. CONST. art. I, § 12. "All courts shall be open; and every person, for injury done to him in his person, property, or reputation, shall have remedy by due course of law. Justice shall be administered freely, and without purchase; completely, and without denial; speedily, and without delay." *Id.*

7. U.S. CONST. amend. XIV, § 1; IND. CONST. art. 1, § 23; *Rohrabough*, 413 N.E.2d at 895. U.S. CONST. amend. XIV, § 1 provides:

No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Id. IND. CONST. art. I, § 23 provides: "The General Assembly shall not grant to any citizen, or class of citizens, privileges or immunities, which, upon the same terms, shall not equally belong to all citizens." *Id.*

Part I of this Note discusses the perceived medical malpractice insurance crisis of the mid-1970s, including various viewpoints concerning whether a crisis actually existed. It also covers the various enactments by state legislatures and examines whether those laws had any effect on the perceived crisis, and focuses particularly on the statutes of limitation that apply to minors. Part I also explores the types of approaches that courts utilize to resolve constitutional challenges to the statutes. Part II analyzes decisions of the Indiana Supreme Court in the area of limitations of actions as applied to minors. Part III examines federal as well as various states' supreme court rulings on constitutional challenges to statutes of limitation for minors. Part IV analyzes a relatively new federal statute, heretofore unapplied to this subject matter. This Note concludes with observations and recommendations for possible changes to Indiana's medical malpractice statute of limitation for minors.

I. BACKGROUND INFORMATION

A. *Limitations of Actions*

Indiana's medical malpractice limitation of action is, in effect, a statute of limitation, rather than a different type of limitation of action. A statute of limitation bars a claim unless it is brought within a specified period after the claim or right arises.⁸ A statute of limitation is intended to:

[P]romote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared. The theory is that even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation and that the right to be free of stale claims in time comes to prevail over the right to prosecute them.⁹

The defense of laches is different from a statute of limitation defense. A statute of limitation, unless otherwise provided by law, applies only to legal actions whereas the doctrine of laches applies only to suits in equity.¹⁰ A statute of limitation defense requires merely the passing of the prescribed time period. In contrast, the laches defense requires an additional showing that the lapse of time may prejudice the defendant or some other person.¹¹

A statute of limitation also differs from a statute of repose, which "terminates any right of action after a specific time has elapsed, regardless of whether there has as yet

8. BLACK'S LAW DICTIONARY 639 (6th ed. 1991) [hereinafter BLACK'S].

9. *Order of R.R. Telegraphers v. Railway Express Agency*, 321 U.S. 342, 348-49 (1944). See *U.S. v. Kubrick*, 444 U.S. 111, 117 (1979) (The general purpose of a statute of limitation is "to encourage prompt presentation of claims."); see also *The Act of Limitation of a Proviso*, 32 Hen. 8, c.2 (1540) ("Forasmuch as the Time of Limitation appointed for suing . . . extend, and be of so far and Long Time past, that it is above the Remembrance of any living Man, truly to try and know the perfect Certainty of such things, as hath or shall come in Trial . . . to the great Danger of Men's Consciences that have or shall be impanelled in any Jury for the Trial of the same . . .").

10. 51 AM. JUR. 2d *Limitation of Actions* § 6 (1970).

11. *Id.*

been an injury."¹² A statute of limitation controls the time within which a claim must be filed after the cause of action arises. A statute of repose limits the time within which a claim can be filed and is not related to when the cause of action arose, nor whether the injury was even discovered.¹³

Indiana's medical malpractice limitation of action for minors is a statute of limitation.¹⁴ The Indiana Supreme Court has stated that the Medical Malpractice Act's statute of limitations is "an 'occurrence' statute," which means that the period of limitations "begins to run on the date of the alleged malpractice."¹⁵ However, according to the doctrine of continuing wrong, if the entire course of medical conduct combines to produce injury, the time period does not begin to run until after the wrongful course of conduct ceases.¹⁶ In addition, "[t]he doctrine of fraudulent concealment estops a defendant from asserting a statute of limitations defense when that person, by deception or violation of a duty, conceals material facts from the [patient] to prevent discovery of the wrong."¹⁷

A national study of 48,550 medical malpractice claims resolved between 1985 and 1989 revealed that twenty months was the average time that elapsed between an incident's occurrence and its being reported to the malpractice insurance company.¹⁸ However, in ten percent of the claims the time lapse was three years.¹⁹ Thus, these claims would be barred by "occurrence statutes."

12. BLACK'S, *supra* note 8, at 639.

13. 54 C.J.S. *Limitations of Actions* § 4 (1987).

14. See *Jones v. Cloyd*, 534 N.E.2d 257, 259 (Ind. Ct. App. 1989) (stating that the "discovery rule" did not apply to medical malpractice statute of limitations, and that the limitation period began to run from the date of the alleged act, omission or neglect).

15. *Havens v. Ritchey*, 582 N.E.2d 792, 794 (Ind. 1991); see *Hepp v. Pierce*, 460 N.E.2d 186, 190 (Ind. Ct. App. 1984).

16. *O'Neal v. Throop*, 596 N.E.2d 984, 987 (Ind. Ct. App. 1992). The doctrine of continuing wrong works more to the detriment of a patient's family doctor than to the detriment of a patient's surgeon because family doctors maintain long term relationships with their patients. In contrast, surgeons usually perform medical services on a patient in isolated instances. Thus, family doctors' length of exposure to liability is longer than that for surgeons.

17. *Id.* at 988. Furthermore, the court stated that:

When the physician-patient relationship terminates, the constructive fraud terminates and the statute of limitations begins to run. The statute of limitations also begins to run when the patient learns of the malpractice or discovers information that would lead to discovery of the malpractice with the exercise of reasonable diligence.

Id. (citations omitted).

18. DATA SHARING COMMITTEE, PHYSICIAN INSURERS ASS'N OF AMERICA, DATA SHARING REPORTS, CUMULATIVE REPORTS, JANUARY 1, 1985-JUNE 30, 1989 (1989), as cited in, OFFICE TECHNOLOGY ASSESSMENT, IMPACT OF LEGAL REFORMS ON MEDICAL MALPRACTICE COSTS 25 (1993) [hereinafter "Assessment"].

19. *Id.*

B. Medical Malpractice Statutes

1. *The Perceived Crisis*.—In the 1970s, many persons perceived a “crisis in the cost and availability of medical malpractice insurance for health care providers.”²⁰ The number of claims filed, the average amount awarded, and malpractice insurance premiums rose significantly between 1970 and 1975.²¹ Medical malpractice statutes were passed based upon assumptions that: (1) increased insurance premiums created a lack of available affordable liability insurance; (2) there is a close nexus between substantive tort law, the tort litigation process and the insurance industry’s decisions regarding the availability and the price of such insurance; and (3) placing restrictions on the tort liability system will effectuate a reduction in insurance premiums resulting in an increase in reasonably priced insurance.²²

These assumptions are highly debated.²³ For instance, the insurance crisis of 1974 to 1976 is not supported by well-documented insurance statistics because very few existed.²⁴ Also, many of the medical malpractice statutes have very limited legislative history with no clear documentation to support these assumptions.²⁵ Some states were not even experiencing significant health care insurance problems.²⁶ Ralph Nader charges that the tort reform movement was an “unprincipled public relations scam” engineered by the

20. Eleanor D. Kinney et al., *Indiana’s Medical Malpractice Act: Results of a Three-Year Study*, 24 IND. L. REV. 1275, 1276 (1991). See generally Richard C. Turkington, *Constitutional Limitations on Tort Reform: Have the State Courts Placed Insurmountable Obstacles in the Path of Legislative Responses to the Perceived Liability Insurance Crisis?*, 32 VILL. L. REV. 1299 (1987). During the course of a December 15, 1976, round table discussion established to gather information on the causes and cures of the medical malpractice dilemma, Otis R. Bowen, M.D., Governor of Indiana, stated:

It has become a crisis issue simply because of the number of suits brought against health care providers. . . . The crisis itself is caused by two facts relating to malpractice insurance: the premium cost to the physician has gone way up, and many companies have quit writing malpractice insurance. The cost of the insurance may be a lesser factor than availability, which has forced many physicians to give up their practice.

THE MEDICAL MALPRACTICE CRISIS 2 (American Enterprise Institute for Public Policy Research, Washington D.C. ed., 1977) [hereinafter “Round Table”].

21. See generally Kinney, *supra* note 20 (discussing the pertinent numerical data and associated problems); IND. MED. MALPRACTICE STUDY COMM’N, FINAL REPORT OF THE MEDICAL MALPRACTICE STUDY COMM’N 5-6 (1976); FRANK A. SLOAN ET AL., INSURING MEDICAL MALPRACTICE 4-6 (1991).

22. Symposium, *Tort Reform: Will it Advance Justice in the Civil System?* 32 VILL. L. REV. 1211, 1212-13 (1987) [hereinafter “Symposium”].

23. Gail Eiesland, Miller v. Gilmore, *The Constitutionality of South Dakota’s Medical Malpractice Statute of Limitations*, 38 S.D. L. REV. 672, 687 & n.128 (1993) (The author stated that “[t]he validity and severity of the medical malpractice insurance crisis of the 1970’s has been seriously questioned by some, and solid explanations for the varying rates of medical malpractice insurance claim frequency over the last twenty-five years are not available.”).

24. SLOAN, *supra* note 21, at 4.

25. SLOAN, *supra* note 21, at 4.

26. SLOAN, *supra* note 21, at 4.

insurance industry to recoup losses resulting from cyclical downturns in interest rates.²⁷ Some critics state that the major causes of the perceived crisis included a poor economy which caused insurance company investment losses, unexpected increases in the frequency and award size of malpractice claims, and increases in physician error, as well as increases in the possibility of mistakes from using advanced medical technology.²⁸

Other analysts, claiming that the crisis was real, blame the increased insurance costs and lack of insurance availability on: (1) tort law and its broadened concepts of liability; (2) an increase in litigation; and (3) large damage awards which caused unpredictable and unmanageable award payments.²⁹

In an article about the cause of the medical malpractice crisis, one author commented that "[m]any of the insurance companies' problems [could] be traced to the long-tail of medical malpractice."³⁰ The term "long-tail liability" refers to the long term exposure to liability of certain groups.³¹ Extended statute of limitations periods, the discovery rule and the doctrine of continuing wrong create long-tail liability because they allow for an extended length of time between the medical treatment or care and the final disposition of all claims resulting from that treatment or care.³² Thus, insurance companies increase premiums to compensate for the additional risk created by long-tail liability.³³ Another author asserts that "[a]s a result of the discovery rule and the [doctrine of continuing wrong], the number of medical malpractice plaintiffs expanded substantially."³⁴ This author further states that both the insurance industry and the medical profession blame the insurance crisis in large part on this expansion.³⁵ However, as noted in *Kenyon v. Hammer*,³⁶ eighty-eight percent of all medical malpractice claims are reported within two years of the injury; thus, long-tail liability caused by the discovery rule is not a significant factor in determining medical malpractice insurance rates.³⁷

Changes in medical malpractice insurance policies have alleviated long-tail liability problems. Medical malpractice policies are unique because they provide two types of

27. Ralph Nader, *The Corporate Drive to Restrict Victims' Rights*, 22 GONZ. L. REV. 15, 18 (1987). See Turkington, *supra* note 20, at 1299-1300; see, e.g., *Boucher v. Sayeed*, 459 A.2d 87 (R.I. 1983) (The court took judicial notice that a medical malpractice insurance crisis did not exist.).

28. See Eiesland, *supra* note 23, at 685-86 & nn.121-22.

29. Symposium, *supra* note 22, at 1214.

30. Milton S. Blaut, *The Medical Malpractice Crisis—Its Causes and Future*, 44 INS. COUNS. J. 114, 119 (1977) (This article also includes information about the process used by actuaries to compute insurance rates.).

31. See Eiesland, *supra* note 23, at 686 & n.124 (discussing the affect of occurrence policies and claims-made policies on long-tail liability and actuarial uncertainty).

32. Nancy E. Leibowitz, *Statute of Limitations—Medical Malpractice—Constitutional Law—Five Year Statute of Repose on Medical Malpractice Claims That Commences When an Injury Occurs Is Constitutional*; *Hill v. Fitzgerald*, 304 Md. 689, 501 A.2d 27 (1985); 16 U. BALT. L. REV. 571, 574 (1987). See Eiesland, *supra* note 23, at 686.

33. See Leibowitz, *supra* note 32, at 574-75.

34. Leibowitz, *supra* note 32, at 574-75.

35. Leibowitz, *supra* note 32, at 574-75.

36. 688 P.2d 961 (Ariz. 1984).

37. *Id.* at 978; see *supra* text accompanying note 18.

“coverage forms: occurrence policies and claims-made policies. Occurrence policies provide coverage for all claims that arise from a given accident year, regardless of when the claim is reported. Claims-made policies . . . provide coverage only for claims reported during the policy year.”³⁸ Occurrence policies transfer risks to the insurer from the physician at the time of the occurrence of the alleged negligent act, but claims-made policies transfer the risk at the time the insurer receives the report or claim of the alleged negligent act.³⁹ Actuarial uncertainty is lessened because claims-made policies only cover those claims that are reported during the time that the medical malpractice insurance policy is in effect.⁴⁰ Thus, the switch that occurred during the 1970s from occurrence policies to claims-made policies helped to mitigate the long-tail problems.⁴¹

2. *The Legislative Responses.*—The states have authority to regulate medical malpractice because tort law traditionally falls under state domain,⁴² and regulation of both insurance, per the McCarran-Ferguson Act,⁴³ and medical practice are primarily state responsibilities.⁴⁴

The typical state statutes enacted to meet the perceived crisis included:

- (1) pretrial screening panels;
- (2) caps or other restrictions on non-economic and punitive damages;
- (3) regulation of attorneys' fees;
- (4) alternatives to lump-sum payment of damage judgments such as periodic payments;
- (5) abolition or restriction of the collateral source rule;
- (6) selective restriction on statutes of limitation and alterations of related concepts such as the discovery rule and
- (7) restriction on joint and several tort liability.⁴⁵

38. Curt W. Fochtman et al., *Insurance Tax Policy and Health Care Reform: Back to the Future*, 50 WASH. & LEE L. REV. 565, 583 (1993) (As indicated by the language, claims-made policies also cover acts occurring prior to the stated policy year, but are reported during the policy year.). “Claims-made policies cover only claims actually filed in the policy year . . . so long as they arose at an earlier time when a policy from the same company was in force.” SLOAN, *supra* note 21, at 6.

39. MICHAEL A. HATCH, COMM’R, MINN. DEP’T OF COMMERCE, MEDICAL MALPRACTICE CLAIM STUDY: 1982-1987, at 14 (1988).

40. *Id.*

41. *Id.*

42. Eleanor D. Kinney, U.S. Congress, Office of Technology Assessment. Study on Defensive Medicine and the Use of Medical Technology. Background Paper on: The Impact of Current and Proposed Tort Reform on the Medical Malpractice System and Physician Behavior, 3 (Sept. 1993) (unpublished manuscript, on file with The Center for Law and Health, Indiana University School of Law—Indianapolis) [hereinafter “Tort Reform”].

43. 15 U.S.C. §§ 1011-1015 (1988).

44. Tort Reform, *supra* note 42, at 3.

45. Symposium, *supra* note 22, at 1212. See generally Randall R. Bovbjerg, *Legislation on Medical Malpractice Further Developments and a Preliminary Report Card*, 22 U.C. DAVIS L. REV. 499 (1989) (discussing the background of the perceived crisis and the various approaches taken to reach solutions).

The goal of these medical malpractice statutes was to reduce the potential liability of health care providers, thereby lowering medical malpractice insurance costs, assuring availability of such insurance, reducing the necessary period of time for keeping medical records in anticipation of possible litigation, and assuring medical care availability in perceived high risk care areas and voluntary health care services.⁴⁶

To resolve the problems credited to the perceived crisis, Indiana passed the Medical Malpractice Act of 1975.⁴⁷ In 1975, a total of forty-one states formally authorized commissions to study the perceived medical malpractice problem.⁴⁸ Also in 1975, nineteen states made changes to their statutes of limitation. Most states merely shortened the time period, but a few states, like Indiana, amended the applicability of their statute to include minors.⁴⁹ The purpose of these statutes of limitation is to cut off the long-tail liability of insurance companies, thus reducing medical malpractice insurance costs.⁵⁰

The problems that result from extended periods of potential liability, such as faded memories and unavailability of documents and witnesses, are increased when children's cases are brought under traditional tolling statutes, which allow minors to bring suit after reaching the age of majority.⁵¹ Statutory medical malpractice limitations of actions were enacted to limit these problems. Yet, in the majority of states that shortened the limitation period for minors a minimal tolling period for young minors was allowed.⁵²

Combining the debate concerning the validity of the perceived crisis with the relative lack of legislative history concerning the effect on minors' rights resulting from legislative changes to the medical malpractice statute of limitation adds to the question of whether a state's legislature, possessing the qualified power to pass a statute of limitation, violated any rights belonging to minors.

C. Levels of Judicial Scrutiny

The resolution of a claim that a statute is unconstitutional as violative of equal protection depends in part on the level of judicial scrutiny used by a court. Faced with constitutional equal protection challenges, federal courts use a low level "rational basis"

46. See sources cited *supra* note 21; sources cited *infra* notes 48, 52.

47. See sources cited *supra* note 2.

48. Steven A. Grossman, An Analysis of 1975 Legislation Relating to Medical Malpractice (unpublished manuscript, on file with Health Policy Center, Georgetown University).

49. *Id.* (States making a change: Alabama, California, Florida, Hawaii, Illinois, Indiana, Iowa, Louisiana, Maryland, Massachusetts, Michigan, Nevada, New York, North Dakota, Ohio, Oregon, South Dakota, Tennessee, Texas).

50. See Eiesland, *supra* note 23, at 685; Leibowitz, *supra* note 32, at 575.

51. Jane M. Draper, Annotation, *Medical Malpractice Statutes of Limitation Minority Provisions*, 62 A.L.R. 4th 758, 763 (1988) [hereinafter "Draper"].

52. Rob B. Alston, *Utah's Statute of Limitation Barring Minors from Bringing Medical Malpractice Actions: Riding Roughshod over the Rights of Minors?*, 1992 UTAH L. REV. 929, 970-71 nn.188-91 (1990) (providing a list of states with changes to their medical malpractice statute of limitation for minors). The reasons for the tolling are varied, yet include the inability of young minors to effectively communicate their problems and the inability to detect some defects at an early age. *Id.* at 939 nn.46-47.

test, which requires that the state's statute rationally promote a legitimate governmental objective.⁵³

The intermediate level of judicial scrutiny is usually applied only to gender-based classifications and categories based on legitimacy.⁵⁴ This intermediate level of judicial scrutiny requires a classification to be reasonable and to be based on "some ground of difference having a fair and substantial relationship to the object of the legislation, so that all persons similarly circumstances [are] treated alike."⁵⁵ The proponent of the statute, which classifies individuals based on their gender, must show that the classification serves "'important governmental objectives and that the discriminatory means employed' are 'substantially related to the achievement of those objectives.'"⁵⁶

When analyzing a charge that a state's law is unconstitutional, the highest level of judicial scrutiny is the strict scrutiny test. This test requires a legislative scheme to advance a compelling state interest by the least restrictive means possible.⁵⁷ The courts use strict scrutiny for fundamental rights and for suspect classifications such as race, religion, nationality and alienage.⁵⁸ Fundamental rights are those that are "explicitly or implicitly guaranteed by the Constitution."⁵⁹ "Only rarely are statutes sustained in the face of strict scrutiny."⁶⁰

53. *Id.* at 943.

54. David R. Smith, *Battling a Receding Tort Frontier: Constitutional Attacks on Medical Malpractice Laws*, 38 OKLA. L. REV. 195, 204 & n.43 (1985). *See, e.g.*, *Kadmas v. Dickinson Public Schools*, 487 U.S. 450 (1988), in which the Supreme Court noted that the intermediate level of judicial scrutiny "has generally been applied only in cases that involved discriminatory classifications based on sex or illegitimacy." *Id.* at 451 (citing *Plyler v. Doe*, 457 U.S. 202 (1981)).

55. *See* Smith, *supra* note 54, at 204 & n.44 (citing *Reed v. Reed*, 404 U.S. 71, 76 (1971) (quoting *F.S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920))).

56. *Heckler v. Mathews*, 465 U.S. 728, 744 (1984) (quoting *Mississippi University for Women v. Hogan*, 458 U.S. 718, 724-25 (1982)).

57. *See* Smith, *supra* note 54, at 202.

58. Smith, *supra* note 54, at 202.

59. Smith, *supra* note 54, at 202 n.30. *See, e.g.*, *Bowers v. Hardwick*, 478 U.S. 186 (1986), where the Supreme Court stated that "the nature of the rights qualifying for heightened judicial protection . . . includes those fundamental liberties that are 'implicit in the concept of ordered liberty,' such that 'neither liberty nor justice would exist if [they] were sacrificed'" and "those liberties that are 'deeply rooted in this Nation's history and tradition.'" *Id.* at 191 (citing *Palko v. Connecticut*, 302 U.S. 319, 325-26 (1937), and *Moore v. East Cleveland*, 431 U.S. 494, 503 (1977)).

60. *Bernal v. Fainter*, 467 U.S. 216, 219 & n.6 (1984). *See, e.g.*, *Goldman v. Weinberger*, 475 U.S. 503 (1986). In *Goldman*, Justice O'Connor reviewed the scrutiny tests previously employed by the Supreme Court in the context of a free exercise of religion claim and stated:

First, when the government attempts to deny a free exercise claim, it must show that an unusually important interest is at stake, whether that interest is denominated 'compelling,' 'of the highest order,' or 'overriding.' Second, the government must show that granting the requested exemption will do substantial harm to that interest, whether by showing that the means adopted is the 'least restrictive' or 'essential,' or that the interest will not 'otherwise be served.'

Id. at 530 (O'Connor, J., dissenting).

The differentiation between due process and equal protection is that “[d]ue process emphasizes fairness between the state and the individual” versus “[e]qual protection . . . [which] emphasizes disparity in treatment by a state between classes of individuals whose situations are arguably indistinguishable.”⁶¹ The Constitution’s guarantee of due process of law requires that the government shall not deprive individuals of “life, liberty, or property, without due process of law.”⁶² A tortious cause of action, the right to sue, is a type of property that cannot be taken without due process of law.⁶³

Federal courts use essentially the same tests to evaluate due process challenges as they use for equal protection challenges. Under the rational basis test, economic and social regulations are sustained if not completely arbitrary or unfounded.⁶⁴ However, to withstand strict scrutiny, a state must prove that legislation involving fundamental rights or restrictions on political processes is justified by a compelling interest.⁶⁵

Most state courts use these same three tests. The Supreme Court of South Dakota, in *Lyons v. Lederle Laboratories*,⁶⁶ stated:

In traditional equal protection analysis, on both the federal and state levels, there exists three tests to be applied depending upon the nature of the interest involved. Strict scrutiny applies only to fundamental rights or suspect classes. The intermediate or substantial relation test applies to legitimacy, and gender. Lastly, the rational basis test applies to all other classes.⁶⁷

Thus, an important factor in determining whether a medical malpractice statute of limitation for minors is constitutional is the level of scrutiny to be used. Because the level of scrutiny employed varies in the state courts, the results of lawsuits questioning the constitutionality of such statutes vary as well.⁶⁸

61. Smith, *supra* note 54, at 210 (quoting *Ross v. Moffitt*, 417 U.S. 600, 609 (1974)).

62. U.S. CONST. amend. V; U.S. CONST. amend. XIV, § 1 (Both the Fifth and the Fourteenth Amendments use identical language, as quoted.). See *Whitney v. California*, 274 U.S. 357 (1927). In *Whitney*, Justice Brandeis stated that “it is settled that the due process clause of the Fourteenth Amendment applies to matters of substantive law as well as to matters of procedure. Thus all fundamental rights comprised within the term liberty are protected by the Federal Constitution from invasion by the States.” *Id.* at 373.

63. Smith, *supra* note 54, at 210 & n.87.

64. See, e.g., *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976).

65. See, e.g., *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Foucha v. Louisiana*, 112 S. Ct. 1780 (1992). “Certain substantive rights we have recognized as ‘fundamental’; legislation trenching upon these is subjected to ‘strict scrutiny,’ and generally will be invalidated unless the State demonstrates a compelling interest and narrow tailoring. Such searching judicial review of state legislation, however, is the exception, not the rule, in our democratic and federal system . . .” *Id.* at 1804 (Kennedy, J., dissenting).

66. 440 N.W.2d 769 (S.D. 1989).

67. *Id.* at 771 (citations omitted).

68. Alston, *supra* note 52, at 943-44 nn.65-66.

II. INDIANA

A. *Indiana's Medical Malpractice Statutes*

Indiana's medical malpractice statute of limitation requires children under the age of six to file their suit by their eighth birthday; children six years of age or older have two years in which to file.⁶⁹ Indiana is rather unique because state law allows minors to bring a suit "(1) in their own name; (2) in their own name by a guardian ad litem or a next friend; [or] (3) in the name of his representative, if the representative is a court appointed general guardian, committee, conservator, guardian of the estate or other like fiduciary."⁷⁰ Thus, a child almost eight years old, with a viable medical malpractice cause of action which arose before he or she was six years old, can file suit. If the suit is not filed, it is lost.

The medical malpractice statute of limitation for minors is a bad social policy for several reasons. First, it is a long standing rule that a minor is not bound by contracts into which the minor enters. Such contracts are voidable.⁷¹ Thus, the possibility exists that a contract between a minor and an attorney could be voided by the minor after a judicial recovery. Yet, the minor may be bound if the contract is for necessities, including items for the basic support, use or comfort of the minor.⁷² Arguably, necessities could include attorney fees for a medical malpractice claim. However, attorneys would be assuming some additional risk by contracting with the minor. Therefore, a minor could have difficulty in acquiring competent representation.

Second, allowing and requiring a minor to bring suit before the child's eighth birthday is impractical and unfair. At age eight, a child is in the second grade of elementary school and realistically cannot be expected to know that such a thing as a lawsuit even exists nor how to pursue it. Due to these inherent limitations, a minor could lose valuable and necessary compensation for injuries suffered. Society should not impose this type of responsibility on children.

Third, the fact that a representative or guardian ad litem⁷³ can represent a minor assumes that one was previously appointed or that the minor's cause of action actually reached the litigation stage. This assumption provides relatively little protection for the minor. Many viable claims will never be pursued because no one is appointed to protect the minor's interests.

69. IND. CODE ANN. §§ 27-12-7-1, 27-12-7-2; IND. CODE § 34-4-19-1. Governor Bowen has stated: "For children, . . . the suit can be brought up to eight years [after the occurrence of the malpractice], so that any brain damage as a result of a birth injury can be assessed." Round Table, *supra* note 20, at 9-10.

70. IND. R. TRIAL P. 17. See *infra* subpart III.B. (discussing that other states do not allow minors to file suit in their own name).

71. *Rice v. Boyer*, 9 N.E. 420 (Ind. 1886). See also WEST'S IND. LAW ENCYCLOPEDIA *Minors* § 51 (1959) [hereinafter ENCYCLOPEDIA]; IND. CODE § 34-1-2-5.5 (1988) (stating that contracts cannot be voided by a person after reaching the age of eighteen). This age limitation is affected by § 34-1-67-5 (requiring "a liberal construction for provisions in this article").

72. *Grossman v. Lauber*, 29 Ind. 618 (Ind. 1868). See also ENCYCLOPEDIA, *supra* note 71, at § 53.

73. BLACK'S, *supra* note 8, at 489 (stating that a guardian ad litem is appointed by a court for a pending litigation to represent an infant, ward or unborn person).

Fourth, a minor's claim can be filed by "a next friend,"⁷⁴ who could be a parent. But a parent has no legal obligation to file a claim for a minor child. If a parent fails to file the minor's claim and the statute of limitation extinguishes it, then the minor has no legal recourse against the parent. Because of the importance of the parent-child relationship, the Indiana Supreme Court recognized the doctrine of parental tort immunity in *Barnes v. Barnes*.⁷⁵ The *Barnes* court found a narrow exception to this parental immunity for intentional felonious conduct by parents toward their children when there is no issue of parental privilege.⁷⁶ In general, however, should a parent decide to not file a claim for the child, parental immunity deprives the minor of any legal recourse.

Parents may fail to file a claim for their child for many reasons. First, as stated by the Texas Supreme Court in *Sax v. Votteler*: "It is neither reasonable nor realistic to rely upon parents, who may themselves be minors, or who may be ignorant, lethargic, or lack concern, to bring a malpractice lawsuit action within the time provided by [the statute]."⁷⁷ Second, the parents may be filing their own claim against the minor's health care provider who has limited liability insurance. If the parents decide to sue for the maximum amount of the available insurance coverage, nothing will be left for the minor to pursue. Third, the parents may accept an out of court settlement as compensation for the child's injuries, but the child has no assurance that this settlement money will be kept for the child's sole use. In these latter two cases, the parents may be making their decision with the intention of providing for their child. However, the parents' action still deprives their minor child of the right to pursue his or her own legal interest. To allow minors to lose the right to pursue their claims for needed damages due to their parents' action or inaction is unfair and poor public policy.

As discussed, a minor may have a viable claim meriting compensation yet for many reasons would lose the opportunity to pursue his or her legal interest. Although the number of lost opportunities is unknown, "empirical research in New York and California found that one per cent of hospital medical records showed negligent medical injury . . . [and] there are eight to ten times more negligent injuries than claims or lawsuits."⁷⁸ These injuries result in significant economic loss to the victim patients.⁷⁹ Thus, many negligent injuries are not pursued through the legal system. Although the number of these potential claims belonging to minors is unknown, for any minor to lose his or her right of action due to his or her inherent limitations is unfair.

B. Indiana's Constitutional Challenges

Legislatures are allowed to enact statutes on limitation of actions,⁸⁰ but this power is not unqualified. "The legislature has the sole duty and responsibility to determine what

74. IND. R. TRIAL P. 17; BLACK'S, *supra* note 8, at 724 (stating that a "next friend" is one who acts for an infant's benefit, and is an officer of the court, but is not a regularly appointed guardian).

75. 603 N.E.2d 1337 (Ind. 1992).

76. *Id.* at 1342.

77. *Sax v. Votteler*, 648 S.W.2d 661, 667 (Tex. 1983).

78. Tort Reform, *supra* note 42, at 34.

79. Tort Reform, *supra* note 42, at 34.

80. *Bunker v. National Gypsum Co.*, 441 N.E.2d 8, 12 (Ind. 1982), *appeal dismissed*, 460 U.S. 1076 (1983).

constitutes a reasonable time for bringing of an action unless the period allowed is so manifestly insufficient that it represents a denial of justice."⁸¹ The question raised by the medical malpractice statute of limitation period is whether it constitutes a denial of justice to minors.

1. *Johnson v. St. Vincent Hospital*.—Although gaps in the medical malpractice statute of limitation may adversely affect minors, the Indiana Supreme Court upheld Indiana's medical malpractice statutes in *Johnson v. St. Vincent Hospital*.⁸² The court considered four separate appeals that were consolidated for this hearing in order to determine whether the special controls and limitations of the statutes were consistent with various guarantees of the Indiana and Federal Constitutions. More specifically, the statute of limitation provision as it applied to minors was challenged as violative of Indiana's Open Court and Due Course/Process of Law Provision⁸³ and Privileges and Immunities Provision.⁸⁴ The court used a lower level rational basis test and concluded that the statutes were constitutional.⁸⁵

In applying the lower level of judicial scrutiny the court accorded the legislature considerable deference.⁸⁶ Although the Indiana legislature did not enunciate a clear purpose for the Medical Malpractice Act, the *Johnson* court did find a purpose after analyzing a "great deal of proof"⁸⁷ that presumably brought about the conditions prompting the Act. The court found that the Act's limitations were designed to allow insurers to better anticipate their expenses and to guarantee insurance to all health care providers.⁸⁸ The court discussed the purpose of the statute of limitation and the problems associated with delays in filing suit.⁸⁹ Unfortunately, the court did not consider the fact that minors also face the problem of collecting relevant evidence after a long delay in filing suit, which makes proof of their claims more difficult. Other courts have similarly failed to do so. When considering the feasibility of an extension to the statute of limitation, the minors' problems partially offset the insureds' problems of collecting relevant evidence.

81. *Id.* (citing *Wilson v. Iseminger*, 185 U.S. 55, 63 (1902)).

82. 404 N.E.2d 585 (Ind. 1980).

83. *See supra* note 6.

84. *See supra* note 7.

85. *Cf. Collins v. Day*, 644 N.E.2d 72 (Ind. 1994). In *Collins*, the Indiana Supreme Court drew a distinction between the requirements of Indiana's Privileges and Immunities Clause and the Federal Constitution's Equal Protection Clause. Also, the court dispensed with the various levels of judicial scrutiny, and settled on a single degree of scrutiny for analysis of claims arising under the Privileges and Immunities Clause. *See infra* subpart II.B.6. Although a privileges and immunities challenge in a case such as *Johnson v. St. Vincent Hospital* would currently be analyzed differently by the Indiana Supreme Court, arguably the resulting decision would still be the same.

86. *Johnson*, 404 N.E.2d at 604. *See also* Draper, *supra* note 51, at 777.

87. *Johnson*, 404 N.E.2d at 589.

88. *Id.* at 590. *See, e.g., Rohrabough*, 413 N.E.2d at 894 (finding that the Act was intended to prevent the loss of insurance availability to health care providers). *See generally*, Catherine Schick Hurlbut, Note, *Constitutionality of the Indiana Medical Malpractice Act: Re-evaluated*, 19 VAL. U. L. REV. 493 (1985).

89. *Johnson*, 404 N.E.2d at 604.

In reaching its decision, the *Johnson* court assumed that the legislature considered all possible ramifications of the Act, yet no record exists of the legislature discussing the effect of the statute of limitation on minors. In striving to find a legislative purpose, the court stated that "the legislature may well have given consideration to the fact that most children by the time they reach the age of six years are in a position to verbally communicate their physical complaints to parents or other adults."⁹⁰ This point is moot, given the limitations on children's ability to protect their legal interests, discussed *supra*.⁹¹ The fact that children will be adversely affected by the statute of limitation did not influence the court, which stated that a "statute is not unconstitutional simply because the court might consider it born of unwise, undesirable or ineffectual policies."⁹²

2. *Rohrbaugh v. Wagoner*.—Later in 1980, the Indiana Supreme Court rejected a claim that the medical malpractice statute of limitation denied "minors equal protection of law guaranteed by the Fourteenth Amendment and Art. I, § 23, of the Indiana Constitution and their remedy by due course of law guaranteed by Art. I, § 12, of the Indiana Constitution."⁹³

Using a low level scrutiny test, the *Rohrbaugh* court stated that the statutory classification "must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike."⁹⁴ This lower standard "is whether the legislative classification is based upon substantial distinctions with reference to the subject matter, or is manifestly unjust or unreasonable."⁹⁵

Reviewing the background of the Medical Malpractice Act, the court noted that it was enacted as "a legislative response to the reduction of health care services available to the public in the state."⁹⁶ One provision of the Act was to withdraw the disability protection from minors and subject them to the same statute of limitation as persons over the age of twenty-one. Although the legislature was silent on the purpose, the court stated that the provision could have been enacted to reduce the potential unfairness of extended liability exposure to health care providers and to reduce the problems of the perceived insurance crisis.⁹⁷ Additionally, reference was made to the *Johnson* court's reasoning that six year old children are able to communicate their complaints.⁹⁸

Using the lower level of judicial scrutiny, the *Rohrbaugh* court found that the statute of limitation did not affect a fundamental right, but rather it cut off the availability of a

90. *Id.*

91. *See supra* subpart II.A.

92. *Johnson*, 404 N.E.2d at 591. *See, e.g., Douglas v. Stallings*, 870 F.2d 1242 (7th Cir. 1989) (The federal court upheld the constitutionality of the Indiana Medical Malpractice Act's Statute of Limitation as it applied to minors.).

93. *Rohrbaugh v. Wagoner*, 413 N.E.2d 891, 892 (Ind. 1980). The court's analysis of Article I, Section 23 of the Indiana Constitution is altered by the single judicial scrutiny test established in *Collins v. Day*, 644 N.E.2d 72 (Ind. 1994); *see infra* subpart II.B.6.

94. *Rohrbaugh*, 413 N.E.2d at 894 (quoting *Royster Guano Co. v. Virginia*, 253 U.S. 412 (1920)).

95. *Id.*

96. *Id.*

97. *Id.* at 895.

98. *Id.*

remedy or limited the substantive right giving rise to the claim.⁹⁹ The court also found that the statute did not operate to the peculiar disadvantage of a suspect class. The court defined a suspect class as one, "saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process."¹⁰⁰ Appellant Rohrbaugh argued that the group of children from six to eighteen years of age constituted a suspect class because this group was newly subjected to this two year statute of limitation. Rejecting this assertion, the court stated that "[u]nlike illegitimacy, childhood is a stage out of which millions of persons inevitably pass in an unending flow, day after day. Children become adults and are empowered."¹⁰¹

The *Rohrbaugh* court reviewed the mixed historical treatment of children, considering early child labor laws, mandatory school attendance laws and child abuse protection laws. All of these laws are designed to protect children, who are inherently vulnerable. The court noted that children are "limited in their right to operate motor vehicles, to vote, and to marry."¹⁰² These limitations are designed to restrict children's activities due to their inherent level of maturity and physical skills, and such laws serve to protect children and the rest of the public. "The laws respecting children have in the main in recent years been based upon the premise that children are undergoing physical and psychological growth and during this process they are limited in their capacity for making those evaluations thought necessary [for] full participation in the political, economic, and social life of the community."¹⁰³ The court acknowledged that historically children have been discriminated against due to this growth and development factor. Because children typically are unable to effectively assert their own claims, the court's reasoning appeared to be a sound basis for protecting children from the two year statute of limitation. But the court inexplicably contradicted its own reasoning. The court stated:

[T]he disparate treatment accorded children has been based in recent times upon knowledge of the process of growth, a process to which all human beings are subject. Consequently, we conclude that the class newly subject to this two year statute of limitation, children between the ages of six and twenty-one, is not suspect.¹⁰⁴

The court found that children as a class are not per se discriminated against and thus are not a per se suspect class. Although the court reviewed laws designed to protect children due to their natural limitations, and such limitations adversely affect children under the medical malpractice statute of limitation, the court declined to afford them any protection.

The *Rohrbaugh* court then determined that there was a reasonable basis for the Act and for the conclusion "that [such minors] and adults are similarly circumstanced with regard to their ability to bring malpractice actions."¹⁰⁵ The court held that the statute was

99. *Rohrbaugh*, 413 N.E.2d at 893.

100. *Id.* (quoting *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 46 (1973)).

101. *Id.* at 894.

102. *Id.*

103. *Id.*

104. *Rohrbaugh*, 413 N.E.2d at 894.

105. *Id.* at 895.

consistent with the State and Federal Constitutions' guarantees of equal protection of the laws.¹⁰⁶ Although the court recognized that this is a stern statute with harsh results, it stated that a court is without "authority to annul a statute because of that fact."¹⁰⁷

The question is whether the medical malpractice statute of limitation is reasonable or is manifestly unjust or unreasonable. First, by the court's own admission, the measure is stern and some could consider it unjust. The limitations on children's ability to protect their legal rights, discussed *supra*,¹⁰⁸ illustrates the unreasonableness of concluding that both minors of this class and adults are equally able to pursue medical malpractice actions. Second, the court stated that prolonged exposure to potential liability is unfair to health care providers but failed to discuss the potential unfairness of the statute of limitation's effect on children less than six years old who must bring suit before their eighth birthday. Third, the *Rohrbaugh* ruling seems unfair as the court ruled contrary to its line of reasoning regarding the historical treatment of children. The court discussed the forms of protection that were provided for children due to their inherent vulnerabilities and limitations, yet declined to protect them from the harshness of the medical malpractice statute of limitation.

The *Rohrbaugh* court strove to find a justification for its decision. *Rohrbaugh's* reasoning would have been more honest if the court had simply stated that it was going to support the statute of limitation even though it was in conflict with historical social policies for minors.

3. *Sherfey v. City of Brazil*.—Both *Johnson* and *Rohrbaugh* relied on *Sherfey v. City of Brazil*¹⁰⁹ when they held that the statutes did not violate Indiana's due course of law guarantee because the legislature is not constitutionally required to suspend the statute of limitation obligations for infancy or incompetency.¹¹⁰

Sherfey involved an action to recover for injuries sustained by a nine year old child in the City of Brazil's park. An Indiana statute required that notice be given to the city within sixty days of such an accident.¹¹¹ When *Sherfey* failed to meet this requirement, he challenged the statute as violating the Indiana Constitution's Due Course of Law Provision. The court first noted that the claim stated a good cause of action based on a common law duty.¹¹² As the United States Supreme Court stated in *Munn v. Illinois*,¹¹³ common law rights cannot be taken away without due process, but the legislature can change them unless constitutional limitations prevent it from doing so.¹¹⁴ Accordingly, the *Sherfey* court found that the remedy for breach of a common law right could be restricted through either statutes of limitation or notice requirements. The court also stated "that neither infancy nor incapacity can suspend the obligation to comply with the

106. *Id.*

107. *Id.*

108. *See supra* subpart II.A.

109. 13 N.E.2d 568 (Ind. 1938).

110. *Johnson v. St. Vincent Hosp.*, 404 N.E.2d 585, 594 (Ind. 1980) (*see supra* subpart II.B.1); *Rohrbaugh*, 413 N.E.2d at 893 (*See supra* subpart II.B.2).

111. *Sherfey*, 13 N.E.2d at 569.

112. *Id.* at 572.

113. 94 U.S. 113 (1877).

114. *Id.* at 134.

statutory notice."¹¹⁵ Thus, the court rejected Sherfey's assertion that the notice requirement should not apply to the child because the requirement violates due process of law which "guarantees him recourse to the courts for enforcement of his common-law rights."¹¹⁶

Sherfey, a 1938 case, relied upon *Touhey v. City of Decatur*,¹¹⁷ a 1911 case, to dismiss the charge that the notice requirement should not apply to an infant claimant who was physically unable to care for himself and unable to protect his legal interests.¹¹⁸ According to the *Sherfey* court, *Touhey* held that "the fact that a claimant is an infant or a person under mental or physical disabilities will not relieve him of [the] obligation" of giving notice to a municipality.¹¹⁹ The *Sherfey* court stated that "notice requirements may be enacted when the action is statutory is not open to question. When one seeks the benefit of a statute, he must" comply with its terms.¹²⁰ Because *Touhey* concerned a statutory action and the statutory notice requirement, *Sherfey* was Indiana's first case to consider the question of the application of notice statutes to common law actions.

Appellant Sherfey referred the court to the laws of Missouri and Illinois, which have constitutional guarantees similar to Indiana's open court and due course of law guarantees. In both the Missouri case of *Randolph v. City of Springfield*¹²¹ and the Illinois case of *McDonald v. City of Spring Valley*,¹²² the courts held that a disability tolls the notice statute.¹²³ But, relying upon *Touhey*, the *Sherfey* court rejected these positions.¹²⁴ Thus, despite contrary persuasive authority and based upon a decision rendered twenty-seven years earlier, Indiana extended to minors the application of the notice requirement for statutory and common-law causes of action.

Since *Sherfey* concerned notice requirements, the court's mention of the statute of limitation was dicta. Yet the *Johnson* court relied on *Sherfey* to make its decision. In addition, the decision was made after only a brief discussion of whether the medical malpractice statute of limitation complies with Indiana's due course of law and open court guarantees.¹²⁵ Similarly, the *Rohrbaugh* court dismissed the due course of law and open

115. *Sherfey*, 13 N.E.2d at 574 (citing *Touhey v. City of Decatur*, 93 N.E. 540 (Ind. 1911)).

116. *Id.*

117. 93 N.E. 540 (Ind. 1911).

118. *Sherfey*, 13 N.E.2d at 574.

119. *Id.* at 572 (citing *Touhey v. City of Decatur*, 93 N.E. 540, 541 (Ind. 1911)).

120. *Id.* at 572-73. *See, e.g.*, *Cook v. Violent Crime Compensation Fund*, 557 N.E.2d 1093 (Ind. Ct. App. 1990). *Cook*, a minor, was stabbed and subsequently applied for benefits from the Violent Crime Compensation Fund. The application was filed more than two years after the crime was committed, but less than two years after *Cook* reached the age of majority. The court stated that the right to benefits was purely statutory; thus, the two year requirement to file the claim after the incident is a statutory condition precedent to the creation of an enforceable right of action. Also, the court stated that because the statute was silent concerning minority or legal disabilities, such disabilities did not toll the time requirement. *Id.*

121. 257 S.W. 449 (Mo. 1923).

122. 120 N.E. 476 (Ill. 1918).

123. *Randolph*, 257 S.W. at 452; *McDonald*, 120 N.E. at 477.

124. *Sherfey*, 13 N.E.2d at 574.

125. *Johnson v. St. Vincent Hosp.*, 404 N.E.2d 585, 593-94 (Ind. 1980). *See supra* subpart II.B.1.

court challenge with very little discussion.¹²⁶ Thus in 1980, the Indiana Supreme Court rejected open court and due course of law challenges to the medical malpractice statute of limitation as it applied to minors based upon dicta contained in *Sherfey*, which relied upon criticized reasoning established in *Touhey*, which in turn dealt with only a notice requirement and was decided sixty-nine years before *Johnson* and *Rohrbaugh*. The 1980 Indiana Supreme Court made these decisions without considering whether *Touhey*, the 1911 case, was good policy and without asking if the 1911 and 1938 reasoning should apply to the 1980 statute of limitation cases. Constitutional law develops over time, but only by asking appropriate questions and considering appropriate policy. Now is the time to ask whether the criticized policy for notice requirements of 1911 should apply to the medical malpractice statute of limitation requirements of today.

4. *City of Ft. Wayne v. Cameron*.—The *Johnson* and *Rohrbaugh* courts overlooked *City of Ft. Wayne v. Cameron*.¹²⁷ The *Cameron* court reviewed a tort action against the city that arose out of the shooting of a minor by a city policeman. The minor, Cameron, who was paralyzed as a result of the shooting, notified the city less than one month after attaining majority but later than the statutory sixty-day notice requirement. The court stated that because Cameron was mentally and physically incapacitated to give notice, a strict application of the statute would deprive Cameron of his constitutional right to a remedy by due course of law.¹²⁸ Also, permitting strict application of the statute “would create a situation whereby a city could escape liability if the injuries suffered by an individual were so great that he was unable to comply with the terms of the statute within the sixty-day period.”¹²⁹ The court held that if Cameron had such an incapacity then he had a reasonable time after the removal of the disabilities in which to file the notice.¹³⁰ The shooting occurred while Cameron was a minor and he gave notice only after “he attained his majority.”¹³¹ Curiously, the court did not mention Cameron’s disability as being one of age, although it may have been a factor in the decision. By 1977, the year *Cameron* was decided, the legislature had codified the essence of this ruling by allowing incompetents to file the required notice within 180 days after incompetency was removed.¹³²

The *Touhey* and *Sherfey* courts’ strict application of the notice requirements to minors was not observed by *Cameron*. The *Cameron* court stated that such strict application violated the due course of law guarantee.¹³³ Yet *Johnson* and *Rohrbaugh* dismissed the charge that the medical malpractice statute of limitation violated Indiana’s due course of law guarantee by relying on *Sherfey* and, ultimately, *Touhey*. *Cameron* presents precedent for reevaluation of such strict application of statutes of limitation to minors.

126. *Rohrbaugh v. Wagoner*, 413 N.E.2d 891, 893 (Ind. 1980). See *supra* subpart II.B.2.

127. 370 N.E.2d 338 (Ind. 1977).

128. *Id.* at 341.

129. *Id.*

130. *Id.*

131. *Id.* at 339.

132. *Cameron*, 370 N.E.2d at 340 n.*.

133. *Id.* at 341.

5. *South Bend Community Schools Corp. v. Widawski*.—In October, 1993, the Indiana Supreme Court decided *South Bend Community Schools Corp. v. Widawski*.¹³⁴ The minor, Widawski, was injured during gym class and brought an action against the school and the teacher. The court held in a four to one decision that under the Indiana Tort Claims Act,¹³⁵ minority status qualifies the person as incapacitated and postpones the deadline for giving the required notice of the tort claim until 180 days after minority ends.¹³⁶

The *Widawski* court stated that “children are inherently limited in their capacity for self-sufficiency. Persons under eighteen years of age are additionally under a legal disability.”¹³⁷ Also, minors have a limited “ability to provide self-care or to fully manage their own property.”¹³⁸ Thus, the court recognized the need for special protection for minors. The court noted that Indiana common law has long recognized minors to be under a legal disability and that changes to the common law must be by expressed terms or by unmistakable implication.¹³⁹ Therefore, such a statute as the Tort Claims Act, which is in derogation of the common law, must be strictly construed. Using this rule, and dealing with a statutory construction issue,¹⁴⁰ the court found that the statutory phrase “other incapacity” included minors.¹⁴¹

Widawski presents several especially interesting points. First, the court strove to find an exception for minors despite the new statute’s failure to expressly include minors in the term “incompetent.” As Chief Justice Shepard pointed out in his dissent, such exclusion of reference by the legislature was intentional to exclude minors from any extended time period.¹⁴² Second, the majority’s attitude toward minors is in line with the *Cameron* court’s attitude toward persons with disabilities. Both attitudes are contrary to *Touhey* and *Sherfey* and their protegés *Johnson* and *Rohrbaugh*. Third, the majority stated that its “construction is also in harmony with Article I, Section 12, of the Indiana Constitution which provides that ‘every person, for injury done to him in his person, property, or reputation, shall have remedy by due course of law.’”¹⁴³ With the construction issue already decided, the court’s statement is curious. It may solely have been intended to lend validity to the court’s holding. Or, taking the three points together, the majority may be sending a message to the legislature that the court is concerned for

134. 622 N.E.2d 160 (Ind. 1993).

135. IND. CODE ANN. §§ 34-4-16.5-1 to -16.5-20 (Burns 1986 & Supp. 1993). IND. CODE ANN. § 34-4-16.5-7 (Burns 1986) requires notice of a claim against a political subdivision to be filed within 180 days after the loss occurs. See *Widawski*, 622 N.E.2d at 161.

136. *Widawski*, 622 N.E.2d at 162.

137. *Id.*

138. *Id.*

139. *Id.*

140. IND. CODE ANN. § 34-4-16.5-8 (West Supp. 1993). This statute allows notice to be given 180 days after incapacity is removed. IND. CODE ANN. § 34-4-16.5-2 (West Supp. 1993) defines “incapacitated” as set forth in IND. CODE ANN. § 29-3-1-7.5 (Burns 1989), which defines the term and includes the category “other incapacity.” See *Widawski*, 622 N.E.2d at 161.

141. *Widawski*, 622 N.E.2d at 162.

142. *Id.*

143. *Id.*

minors' constitutional rights under the due course of law guarantee as it relates to notice statutes. Consequently, because the *Touhey* notice case ultimately served as the basis for the *Johnson* and *Rohrbaugh* rulings concerning due course of law guarantee challenges to the medical malpractice statute of limitation as it applied to minors, the Indiana Supreme Court also may be putting the legislature on notice that the court will be less resistant to such constitutional challenges to the statute of limitation in the future.

6. *Collins v. Day*.—In November, 1994, the Indiana Supreme Court decided *Collins v. Day*.¹⁴⁴ In *Collins*, the court addressed the question of whether the requirements of the Indiana Constitution's Privileges and Immunities Clause¹⁴⁵ were distinct from the requirements of the Federal Constitution's Equal Protection Clause.¹⁴⁶ The court noted the textual differences between the two clauses, specifically that "[t]he Fourteenth Amendment prohibits laws which 'abridge' privileges or immunities, whereas Section 23 prohibits laws which 'grant' unequal privileges or immunities."¹⁴⁷ The court noted that, in the past, it has "assumed various postures with respect to "the applicability of federal Fourteenth Amendment standards to Section 23 questions."¹⁴⁸ Although previous cases had applied federal standards to Section 23 claims, the court "conclude[d] that there is no settled body of Indiana law that compels application of a federal equal protection analytical methodology to claims alleging special privileges or immunities under Indiana Section 23 and that Section 23 should be given independent interpretation and application."¹⁴⁹

After reviewing the historical development and application of the Privileges and Immunities Clause, the court determined that such review "distill[ed] into two general factors."¹⁵⁰ The court stated that "[f]irst, the disparate treatment accorded by the legislation must be reasonably related to inherent characteristics which distinguish the unequally treated classes."¹⁵¹ The second factor is the need for all persons similarly situated to have "uniformity and equal availability of the preferential treatment."¹⁵²

144. 644 N.E.2d 72 (Ind. 1994).

145. IND. CONST. art. I, § 23; see *supra* note 6.

146. U.S. CONST. amend. XIV, § 1.

147. *Collins*, 644 N.E.2d at 74.

148. *Id.* at 74-75. The court noted that it had "considered the two provisions essentially synonymous" in *Johnson v. St. Vincent Hospital*, 404 N.E.2d 585, 600 (Ind. 1980). *Collins*, 644 N.E.2d at 75. See *supra* subpart II.B.1.; see *infra* notes 186-88 and accompanying text.

149. *Collins*, 644 N.E.2d at 75.

150. *Id.* at 78.

151. *Id.* at 80. The court also stated:

[W]here the legislature singles out one person or class of persons to receive a privilege or immunity not equally provided to others, such classification must be based upon distinctive, inherent characteristics which rationally distinguish the unequally treated class, and the disparate treatment accorded by the legislation must be reasonably related to such distinguishing characteristics.

Id. at 78-79.

152. *Id.* at 79. The court restated the second requirement for compliance with the Privileges and Immunities Clause:

[A]ny privileged classification must be open to any and all persons who share the inherent characteristics which distinguish and justify the classification, with the special treatment accorded

The court in *Collins* noted that this two-part standard is to be applied with "considerable deference to the manner in which the legislature has balanced the competing interests involved."¹⁵³ Also, the issue of classification is primarily determined by the legislature.¹⁵⁴ And, to overcome the judicial presumption of constitutionality, the burden is on "the challenger 'to negative every conceivable basis which might have supported the classification.'"¹⁵⁵ Significantly, the Indiana Supreme Court stated that claims arising under the Privileges and Immunities Clause will be analyzed with the same degree of scrutiny for different protected classes "to prohibit any and all improper grants of unequal privileges or immunities."¹⁵⁶

Collins involved a state Equal Protection Clause challenge to the Indiana Worker's Compensation Statute, which excludes agricultural workers from coverage. Eugene Collins suffered a broken leg during the course of his employment as an agricultural worker, and was denied coverage under Indiana's statute.¹⁵⁷ The court found that agricultural employers are inherently distinct from the general class of employers, and that the distinctions "are reasonably related to the exemption."¹⁵⁸ The court also found that the agricultural exemption was "uniformly applicable and equally available to all" agricultural employers.¹⁵⁹ Key to the court's decision was the finding that the plaintiff Eugene Collins failed to negate "every reasonable basis for the classification."¹⁶⁰

The Indiana Supreme Court's equal protection analysis is significant because it seemingly condenses and clarifies the rules pertaining to Indiana's Privileges and Immunities Clause. Although the *Collins* equal protection analysis differs from that used in *Johnson v. St. Vincent Hospital* and *Rohrbaugh v. Wagoner*,¹⁶¹ the similarities lead to the conclusion that *Collins* would not change the result in those cases. In particular, the *Collins* court placed great importance on its finding that the plaintiff failed to negate "every reasonable basis for the [legislative] classification."¹⁶² In *Johnson*, the court assumed the existence of an acceptable legislative purpose, which by implication had not been negated by the plaintiff.¹⁶³ Likewise in *Rohrbaugh*, the court noted that the legislature was silent regarding the purpose of the medical malpractice statute of limitation for minors, yet went on to propose an acceptable possible purpose, which by

to any particular classification extended equally to all such persons.

Id.

153. *Collins*, 644 N.E.2d at 80 (citing *Johnson v. St. Vincent Hosp.*, 404 N.E.2d 585, 604 (Ind. 1980)).

154. *Id.*

155. *Id.* (quoting *Johnson*, 404 N.E.2d at 597).

156. *Id.* See *supra* subpart I.C. In sharp contrast to Indiana's single degree of judicial scrutiny, the Federal Equal Protection Clause and many states' equal protection clauses are analyzed using three levels of judicial scrutiny.

157. *Id.* at 73.

158. *Collins*, 644 N.E.2d at 81.

159. *Id.*

160. *Id.*

161. 404 N.E.2d 585 (Ind. 1980); 413 N.E.2d 891 (Ind. 1980). See *supra* subparts II.B.1-2.

162. *Collins*, 644 N.E.2d at 81.

163. See *supra* text accompanying note 90.

implication was not negated by the plaintiff.¹⁶⁴ Also, in *Johnson*, the court found that health care providers for children face problems from extended statutes of limitation that are unique to their profession.¹⁶⁵ The Indiana Medical Malpractice Act's statute of limitation for minors was enacted to help alleviate some of these perceived problems, thus complying with the first factor in *Collins*.¹⁶⁶ The second factor is also satisfied because the special protection from this statute of limitation is equally available to all health care providers for minors. Thus, this most recent constitutional analysis would neither alter nor lend any validity to the decisions in *Johnson* or *Rohrbaugh*.

C. Results of Indiana's Medical Malpractice Act

Although some believe that the ends justify the means, in Indiana, few, if any, positive results justify the harshness of imposing such a statute of limitation on minors. First, theoretically, state legislation favorable to insurers would encourage physicians to locate or relocate to that state.¹⁶⁷ "Indiana has been touted as a paradise for physicians and anecdotal reports abound of physicians moving to Indiana to enjoy its favorable malpractice climate."¹⁶⁸ Although Indiana is known for having the strongest insurance reforms in the nation since 1975, it has not attracted more physicians than neighboring states.¹⁶⁹ Actually, Indiana has fewer physicians per capita than Michigan, Ohio, or the national average, a statistic which remains unchanged since before 1975.¹⁷⁰

Second, it appears that medical malpractice reforms have not had and will not have a significant impact on physician response to medical liability. One criteria for evaluating insurance reforms is the extent to which the reforms deter negligent medical practice. Empirical evidence shows that the reforms have not caused changes in physician practice resulting in the deterrence of medical malpractice.¹⁷¹ This lack of change is due to the fact that the "deterrent effect of malpractice on physicians operates from a psychological perception by physicians of attack on their competence rather than [on] economic concerns."¹⁷² Also, physician concern with malpractice is not all bad. As Dr. Patricia Danzon, an expert on malpractice, stated: "[S]ome physician behavior that is correctly ascribed to the liability threat is not pure waste. Spending more time with patients, referring difficult cases—these are precisely the types of increased care which the malpractice system is intended to encourage."¹⁷³

164. See *supra* text accompanying notes 97-98.

165. *Johnson*, 404 N.E.2d at 603-04.

166. See *supra* subpart I.B.

167. Tort Reform, *supra* note 42, at 38 (discussing more detailed background information).

168. Tort Reform, *supra* note 42, at 38 (referring to Andrew Slomski, *How Long Can Indiana Remain a Malpractice Paradise?*, MED. ECON., February 4, 1991, at 122-35.). This legislation was enacted during the term of Governor Otis R. "Doc" Bowen, M.D., who was clearly sensitive to the needs of doctors and the medical profession.

169. Tort Reform, *supra* note 42, at 38.

170. Tort Reform, *supra* note 42, at 38.

171. Tort Reform, *supra* note 42, at 39.

172. Tort Reform, *supra* note 42, at 39.

173. Tort Reform, *supra* note 42, at 37 (quoting Senate Hearings 1984:10 (statement of Patricia Danzon, Ph.D.)).

The federal government recently published the results of its study concerning the impact of the states' legal reforms on medical malpractice insurance costs.¹⁷⁴ This report stated that "limiting the statute of limitations show[s] conflicting results."¹⁷⁵ One study indicates that shortening the statute of limitation period for minors had no significant effect on claim frequency.¹⁷⁶ Two studies reached conflicting results concerning whether shorter statutes of limitation lower insurance premiums.¹⁷⁷ Also, another government survey reports that "a steady increase in the number of claims per [one hundred] physicians over the period 1980-84" occurred in Indiana.¹⁷⁸

Even if some persons do subscribe to the notion that the end justifies the means, which is the notion that Indiana's General Assembly and Supreme Court appear to support, the ends do not appear to actually justify the means.

III. OTHER JURISDICTIONS' CONSTITUTIONAL CHALLENGES

A. Federal Constitutional Challenges

The federal courts have rejected challenges that a state's medical malpractice legislation is unconstitutional under either the Equal Protection Clause or the Due Process Clause.¹⁷⁹ The Supreme Court views a statute of limitation as both affecting a remedy and not destroying fundamental rights.¹⁸⁰ Federal courts dismiss equal protection challenges by finding that malpractice legislation does not interfere with any fundamental right and that the differentiation between medical malpractice claimants and tort claimants¹⁸¹ does

174. See Assessment, *supra* note 18.

175. See Assessment, *supra* note 18, at 2, 65. The report stated:

The one reform consistently shown to reduce malpractice cost indicators is caps on damages. Requiring collateral source payments to be deducted from the plaintiff's malpractice award has also been shown to reduce certain malpractice cost indicators. Pretrial screening panels and limiting the statute of limitations show conflicting results. Finally, statutes that restrict attorney fees, require periodic payment of awards, and codify the standard of care have not been shown to have the intended result of reducing malpractice cost indicators.

Assessment, *supra* note 18, at 2 (emphasis omitted).

176. See Assessment, *supra* note 18, at 65 (citing Stephen Zuckerman et al., *Effects of Tort Reforms and Other Factors on Medical Malpractice Insurance Premiums*, 27 INQUIRY 167 (1990)).

177. See Assessment, *supra* note 18, at 65 (citing Zuckerman, *supra* note 176, and Glenn Blackmon & Richard Zeckhauser, *State Tort Reform Legislation: Assessing Our Control of Risks*, TORT LAW AND THE PUBLIC INTEREST (1991)).

178. See Assessment, *supra* note 18, at 15 (citing GENERAL ACCT. OFF., MEDICAL MALPRACTICE: SIX STATE CASE STUDIES SHOW CLAIMS AND INSURANCE COSTS STILL RISE DESPITE REFORMS (1986)). This GAO report reflected no impact on claim frequency, payment per paid claim or insurance premiums due to shortened statutes of limitation for minors. Assessment, *supra* note 18, at 66.

179. PAUL C. WEILER, MEDICAL MALPRACTICE ON TRIAL 39 (1991). See Turkington, *supra* note 20, at 1308-17; see, e.g., Douglas v. Stallings, M.D., Inc., 870 F.2d 1242 (7th Cir. 1989).

180. 51 AM. JUR. 2d *Limitation of Actions* § 27 (1970). See, e.g., Chase Securities Corp. v. Donaldson, 325 U.S. 304 (1945).

181. See IND. CODE § 34-1-2-2 (1988) (providing for a two-year statute of limitation for personal injury claims); IND. CODE § 34-1-2-5 (1988) (providing a tolling period: a person "under legal disabilities when the

not use suspect or quasi-suspect classifications.¹⁸² Similarly, federal due process objections have been rejected.¹⁸³

The United States Supreme Court has stated that "the [C]onstitution of the United States . . . gives to minors no special rights beyond others, and it [is] within the legislative competency of the state . . . to make exception in their favor or not."¹⁸⁴

B. State Constitutional Challenges

State constitutional challenges to shortened medical malpractice statutes of limitation as they apply to minors have met with success in various states.¹⁸⁵ Several states have found such statutes to be unconstitutional.¹⁸⁶ State courts have greater discretion and authority than federal courts to declare a state's law unconstitutional.¹⁸⁷ When interpreting individual rights, state courts may interpret their own state constitutions more expansively than the federal courts have interpreted the United States Constitution. This expansiveness is because the Supremacy Clause of the Constitution establishes a minimum, not a maximum, level for interpretation by a state court of those individual rights.¹⁸⁸ State constitutions typically expand upon the rights enumerated in the Constitution.

cause of action accrues may bring his action within two (2) years after the disability is removed"); IND. CODE § 34-1-67-1 (1988) (defining the phrase "under legal disabilities" to include persons less than eighteen years old). Section 34-1-67-1 was replaced by IND. CODE ANN. § 34-1-67-5 (West 1993) (stating that "the provisions of this article shall be liberally construed and shall not be limited by any rules of strict construction"). Thus, for personal injury claims, a disabled person has two years in which to bring suit after the disability, as defined by court, is removed. There was a potential conflict with § 16-9.5-3-1 as originally enacted because a person had two years after his or her eighteenth birthday in which to bring a tort claim, but was limited for medical malpractice claims. However, the Indiana Supreme Court, in *Johnson v. St. Vincent Hospital*, 404 N.E.2d 585 (Ind. 1980), stated that due to the irreconcilable conflict between § 34-1-2-2 and § 16-9.5-3-1, the latter statute controls. *Johnson*, 404 N.E.2d at 603. Thus, now § 27-12-7-1 (replacing § 16-9.5-3-1) controls.

182. WEILER, *supra* note 179, at 39 & n.100.

183. WEILER, *supra* note 179, at 39 & nn.101-05.

184. *Vance v. Vance*, 108 U.S. 514, 521 (1883). See *Robbins v. United States*, 624 F.2d 971 (10th Cir. 1980) (rejecting a complaint that the Federal Tort Claims Act's statute of limitation, treating minors the same as adults, violated the Constitution).

185. Tort Reform, *supra* note 42, at 29. See *Turkington*, *supra* note 20, at 1317-22; *Alston*, *supra* note 52.

186. See, e.g., *Barrio v. San Manuel Div. Hosp.*, 692 P.2d 280 (Ariz. 1984) (holding a statute unconstitutional under state's constitutional guarantee of right to recover for injury); *Austin v. Litvak*, 682 P.2d 41 (Colo. 1984) (holding a statute unconstitutional under equal protection guarantee); *Strahler v. St. Luke's Hosp.*, 706 S.W.2d 7 (Mo. 1986) (holding that a statute violates guarantee of open access to courts); *Carson v. Maurer*, 424 A.2d 825 (N.H. 1980) (holding that a statute violates state's constitution's equal protection guarantee under intermediate scrutiny test); *Mominee v. Scherbarth*, 503 N.E.2d 717 (Ohio 1986) (holding that a statute violates due course of law guarantee under rational basis test); *Lyons v. Lederle Labs.*, 440 N.W.2d 769 (S.D. 1989) (holding that a statute violates equal protection guarantee under rational basis test); *Sax v. Votteler*, 648 S.W.2d 661 (Tex. 1983) (holding that a statute violates open court guarantee).

187. *Smith*, *supra* note 54, at 208 (discussing the various reasons for this greater state court authority).

188. *Turkington*, *supra* note 20, at 1321.

Challenges to the medical malpractice statutes rely on several constitutional objections including: "(1) equal protection and due process guarantees . . . , (2) prohibitions against special legislation, (3) the right to trial by jury, (4) right of access to courts, and (5) usurpation of the judicial function."¹⁸⁹ As one commentator noted:

State legislatures reacted in the 1970's to a perceived crisis in medical malpractice insurance by enacting these types of limitations provisions. While such provisions no doubt go some distance in alleviating the problems of malpractice insurance and health care providers, they do so only at a high cost. Their effect is to bar the malpractice suits of minors without regard to the validity of their claims or the fact that the minors are wholly innocent in failing to timely pursue their claims. Such a result seems to unfairly penalize the blameless minor in order to protect the potentially negligent health care provider.¹⁹⁰

Several states adhere to this view, upholding state constitutional challenges to their medical malpractice statute of limitation.¹⁹¹

1. *Due Process and Open Court Guarantees.*—States typically have constitutional due process guarantees similar to those in the United States Constitution. Although challenges to statutes as violating due process guarantees have been met with mixed success, several states have upheld such challenges. The Ohio Supreme Court found such a challenge to be valid. In *Schwan v. Riverside Methodist Hospital*,¹⁹² the court held that Ohio's medical malpractice statute of limitation, which treated minors under ten years of age differently than minors over ten years of age, violated the Ohio Constitution's equal protection guarantee.¹⁹³ The court stated that no rational basis supported the statute's tolling the statute of limitation for those younger than ten until their fourteenth birthday, while requiring minors older than ten to file an action within one year of the accrual of the cause of action.¹⁹⁴

Then, in *Mominee v. Scherbarth*,¹⁹⁵ in a five to two decision, the Ohio Supreme Court held that the four year limitation was unconstitutional as applied to minors because it violated the due process and due course of law guarantees.¹⁹⁶ The *Mominee* court stated

189. Smith, *supra* note 54, at 213.

190. Thea Andrews, *Infant Tolling Statutes in the Medical Malpractice Cases: State Constitutional Challenges*, 5 J. LEGAL MED. 469, 486 (1984).

191. See, e.g., *Mominee v. Scherbarth*, 503 N.E.2d 717, 723 (Ohio 1986) (quoting Andrews, *supra* note 190).

192. 452 N.E.2d 1337 (Ohio 1983).

193. *Id.* at 1338-39.

194. *Id.* at 1338.

195. 503 N.E.2d 717 (Ohio 1986).

196. OHIO CONST. art. I, § 1 (providing: "All men are, by nature, free and independent, and have certain inalienable rights, among which are those of enjoying life and liberty, acquiring, possessing, and protecting property, and seeking and obtaining happiness and safety."); OHIO CONST. art. I, § 16 (stating in relevant part: "All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay."). See also *Mominee*, 503 N.E.2d at 726-27 (Clifford, J., concurring) (stating: "A statute which violates the open court

that a statute is "valid on due process grounds [1] if it bears a real and substantial relation to the public health, safety, morals or general welfare of the public and [2] if it is not unreasonable or arbitrary."¹⁹⁷ First, the court found that the legislative goals of the statute were to insure health care availability to Ohio citizens by reducing medical malpractice insurance premiums, and to prevent stale claims. The court found these goals proper. However, it determined that no real and substantial relationship existed between those goals and the statute as applied to minors because the defendant health care providers failed to proffer any evidence that the statute of limitation as applied to minors had any effect on insurance premiums or that malpractice claims by minors even constituted a significant part of all the medical malpractice claims.¹⁹⁸

The *Mominee* court also found that the statute of limitation as applied to minors was "totally unreasonable and patently arbitrary."¹⁹⁹ The court stated that the Ohio Constitution's Due Process/Due Course of Law Provisions, which guarantee that all courts are open to everyone who is injured, were violated by the statute of limitation, which effectively barred minors from the courts because they could not bring suit before reaching majority and they would lose their right to redress before reaching majority.²⁰⁰ For various reasons, the court rejected the assertion that a minor's suit could be brought by their parent or guardian. One reason was that parents may be unaware of the existence of any medical malpractice problems because of children's inherent inability to recognize or articulate their physical problems. Additionally, "the parents may themselves be minors, ignorant, lethargic, or lack the requisite concern to bring a malpractice action within the time provided by statute."²⁰¹ Finally, the minor might not have a parent or a concerned guardian.²⁰²

Next, the *Mominee* court rejected the appellate court's reasoning that children could sue their parents, due to the abolition of parental immunity in Ohio, for failing to file suit in the child's behalf.²⁰³ The court stated that being forced to choose between suing their parents and abandoning their claims effectively chills children's due process rights.²⁰⁴ Additionally, because the evidentiary concerns of stale medical malpractice claims remain for such a suit against a parent, the statute of limitation "would not advance its ostensible goal of preventing stale claims."²⁰⁵ Moreover, putting the parents in this dilemma may prompt purely speculative claims. And as protector of their child's possible law suit, the physician-parent relationship becomes adversarial, eroding the essential mutual

provision . . . is also in violation per se of the due course of law provision . . . of the Ohio Constitution." The judge also noted that the statute additionally violated the due process and equal protection clauses of the Constitution.)

197. *Mominee*, 503 N.E.2d at 720-21 (quoting *Benjamin v. Columbus*, 146 N.E.2d 854, 856 (Ohio 1957)).

198. *Id.* at 721.

199. *Id.*

200. *Id.*

201. *Id.* (citing *Sax v. Votteler*, 648 S.W. 2d 661 (Tex. 1983)).

202. *Mominee*, 503 N.E.2d at 721-22.

203. *Id.* at 722.

204. *Id.*

205. *Id.*

confidence of the physician-patient relationship.²⁰⁶ "Thus the ultimate goal of [the statute of limitation], the advancement of health care to Ohioans, would be frustrated."²⁰⁷

In his dissent, Justice Wright referred to published opinions and statistics that seemed to support the validity and wisdom of the legislature's enactment of the statute of limitation as a way to end the problems of stale claims and long-tail liability.²⁰⁸ The court rejected Justice Wright's view, stating that the legislature may enact legislation to meet perceived needs, but the legislation still must comply with constitutional provisions.²⁰⁹ As one commentator noted: "[I]f anyone invokes in an American court law which the judge considers contrary to the Constitution, he can refuse to apply it. This is the only power peculiar to an American judge, but great political influence derives from it."²¹⁰

The *Mominee* court restored the "disabilities" tolling statute; thus, minors with a cause of action arising before their majority have until their nineteenth birthday to file their suit.²¹¹ Minors discovering the alleged medical malpractice after their eighteenth birthday have one year or until their twenty-second birthday, whichever is first, to file a suit.²¹²

As noted in *Mominee*, several other jurisdictions have upheld similar due process challenges to medical malpractice statutes of limitation as applied to minors. The Arizona Supreme Court held the statute of limitation to be unconstitutional because it abolished the fundamental right to recover damages through a common law action.²¹³ In Missouri, the court determined that the statute of limitation unconstitutionally deprived a minor of the guarantees of a court open to everyone, and of a certain remedy afforded for every injury to a person.²¹⁴ Texas, treating the open court constitutional guarantee as synonymous with due process, found the statute to be in violation of the guarantee.²¹⁵

Although the above jurisdictions do not allow minors to bring suit in their own name, the difference from Indiana's rule, which allows minors to file suit, is immaterial when evaluating the constitutionality of Indiana's applicable medical malpractice statute of limitation. As mentioned in *Rohrbaugh v. Wagoner*,²¹⁶ minors are limited in their legal capacity to do many actions which persons of majority age are allowed to do. People are prohibited from voting due to their age because they may lack the maturity to make an informed and well-considered decision. But, these same people are held responsible for

206. *Id.*

207. *Mominee*, 503 N.E.2d at 722.

208. *Id.* at 736.

209. *Id.* at 722 n.4.

210. ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 102 (1969). See Smith, *supra* note 54, at 229.

211. *Mominee*, 503 N.E.2d at 723.

212. *Id.*

213. *Barrio v. San Manuel Div. Hosp.*, 692 P.2d 280 (Ariz. 1984).

214. *Strahler v. St. Luke's Hosp.*, 706 S.W.2d 7 (Mo. 1986). See Draper, *supra* note 51, at 735. See generally John F. Applequist, *Will Missouri's 'Open Courts' Guarantee Open the Door to Adoption of the 'Discovery Rule' in Medical Malpractice Cases?* *Strahler v. St. Luke's Hospital*, 52 MO. L. REV. 977 (1987).

215. *Sax v. Votteler*, 648 S.W.2d 661 (Tex. 1983). See Christopher J. Volkmer, *Limitation of Actions—Disability of Infancy—Medical Malpractice statute which Prevents Tolling of Limitations During Infancy Violates Due Process Clause of Texas Constitution*, 15 ST. MARY'S L.J. 207 (1983).

216. 413 N.E.2d 891 (Ind. 1980); see *supra* subpart II.B.2.

failing to comply with the medical malpractice statute of limitation, just because they—minors—may file suit. Arguably, voting and filing a timely and proper claim require an equal level of maturity. Thus, denying minors the right to vote while requiring them to fulfill the responsibility of complying with the statute of limitation seems unreasonable. One can only speculate as to whether legislatures would subject minors to these statutes of limitation if minors had voting rights. Because of their inherent limitations, the legal right of minors to file suit in Indiana should not be a factor in support of the constitutionality of Indiana's medical malpractice statute of limitation as it applies to minors.

2. *Equal Protection Guarantee.*—

a. *Rational basis test.*—In *Lyons v. Lederle Laboratories*,²¹⁷ a South Dakota case, eighteen-year-old Jody Lyons brought a medical malpractice action against the estate of Dr. Heidepriem alleging negligent care while Jody was a minor. In 1977 South Dakota's legislature enacted the statute which required actions to be:

[C]ommenced only within three years after the alleged malpractice, error or mistake or failure to cure occurred, unless the minor is less than six years of age at the time of the alleged malpractice, error, mistake or failure to cure in which case the action shall then be commenced within two years after the sixth birthday of the minor.²¹⁸

Per the statute, the time had run to bar Lyons' claim. In a three to one decision, the court used the rational basis test and held that the statute of limitation provision violated the equal protection guarantees of the South Dakota and Federal Constitutions.²¹⁹ The court found the statute's classification to be arbitrary and not rationally related to the legitimate purpose of the statute, which was to alleviate the problems of the perceived medical malpractice crisis.²²⁰

After discussing the three tests used for judicial scrutiny, which are applied depending upon the nature of the interest, the court held "that the rational basis test is most appropriate in this case involving age classification."²²¹ The court's rational basis test has two prongs, which ask: "(1) [W]hether the statute does set up arbitrary classifications among various persons subject to it. (2) [W]hether there is a rational relationship between the classification and some legitimate legislative purpose."²²² Applying the test's first prong, the court labeled the case a "classic example of the arbitrariness of the classification."²²³ The court found that the statute did not apply equally to all people, because it created "an arbitrary classification of minors who have medical malpractice claims as opposed to minors with any other kind of tort claim."²²⁴

217. 440 N.W.2d 769 (S.D. 1989).

218. *Id.* at 770 (citing S.D. CODIFIED LAW § 15-2-22.1 enacted by the 1977 legislature).

219. *Id.* at 771, 772.

220. *Id.* at 771.

221. *Id.*

222. *Lyons*, 440 N.W.2d at 771 (citing *City of Aberdeen v. Meidinger*, 233 N.W.2d 331, 333 (S.D. 1975)).

223. *Id.*

224. *Id.*

Minors with other types of tort claims have until one year after their eighteenth birthday to file their claims.²²⁵

Applying the test's second prong, the court determined that the legislation was enacted to alleviate a perceived malpractice crisis and insure health care availability to the South Dakota citizens.²²⁶ The court found no rational basis for assuming that requiring suits to be filed earlier would reduce medical malpractice claims.²²⁷

The *Lyons* court referred to *Schwan v. Riverside Methodist Hospital*, which had used the same basic reasoning to strike down, on state equal protection grounds, a similar statute of limitation which was based upon the age of ten instead of six. *Lyons* quoted *Schwan*, stating:

[W]e recognize that the [legislature] often must draw lines in legislation. Yet, it is the age of majority which establishes the only rational distinction. Young people eagerly anticipate their legal 'adulthood.' At the age of majority, our society puts them on notice that they are assuming an array of rights and responsibilities which they never had before. Age ten, however, arrives with little fanfare. It is difficult to imagine that parents or guardians—much less the children themselves—would recognize that any change in status occurs on a child's tenth birthday. We acknowledge, however, the importance of the purpose of [the statute] to alleviate the 'medical malpractice crisis' of the mid-1970's Therefore, in light of our conclusion that [the statute] creates an irrational classification which does not rationally further the purpose of [the legislation], we hold that [it] is unconstitutional on its face with respect to medical malpractice litigants who are minors.²²⁸

Like *Rohrbaugh*, both the *Lyons* and *Schwan* courts noted the inherent limited abilities of minors. However, unlike *Rohrbaugh*, *Lyons* and *Schwan* found that expecting and requiring minors to be able to comply with the statute of limitation was irrational. Additionally, neither the *Lyons* court nor the *Schwan* court was able to find a rational purpose for the legislative differentiation of this class of minors.

b. Intermediate test.—New Hampshire used the intermediate level of equal protection scrutiny to hold that the medical malpractice statute of limitation provision applying to minors was unconstitutional in *Carson v. Maurer*.²²⁹ Like Indiana's statute, minors aged eight and above were required to comply with the same two year statute of limitation time period as that applicable to adults.²³⁰ The medical malpractice statutes were enacted to reduce liability insurance costs and insure the availability of adequate liability insurance for health care providers.²³¹

225. *Id.*

226. *Id.*

227. *Lyons*, 440 N.W.2d at 772.

228. *Id.* (quoting *Schwan v. Riverside Methodist Hosp.*, 452 N.E.2d 1337, 1339 (Ohio 1983)).

229. 424 A.2d 825 (N.H. 1980). See *Turkington*, *supra* note 20, at 1328-30; *Draper*, *supra* note 51, at 780-81; *Andrews*, *supra* note 190, at 484-86.

230. *Carson*, 424 A.2d at 833 (citing N.H. REV. STAT. ANN. 507-C:4 (Supp. 1979)).

231. *Id.* at 830.

First, the court held that the right to recover for one's injuries is not a fundamental right,²³² and no suspect classification was created. Thus, the strict scrutiny test was not required. The *Carson* court chose the intermediate level of review after determining that the right to recover for personal injuries was "sufficiently important to require that the restrictions imposed on those rights be subjected to a more rigorous judicial scrutiny than allowed under the rational basis test."²³³ *Carson* recognized that the Supreme Court restricts this intermediate level test, also known as the fair and substantial relationship test, to classifications based on gender and illegitimacy.²³⁴ However, the court recognized its right, when interpreting the state constitution, to grant more freedoms than the federal Constitution requires.²³⁵

Under the intermediate level of review, the statutes' classifications "must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation."²³⁶ The court's function is "not to second-guess the wisdom of or necessity of legislation."²³⁷ Rather, its function is to determine whether the legislature could reasonably find the factual basis for the classifications to be true.²³⁸ The court found that the legislature had sufficient facts to determine that special legislation was required.²³⁹ Consequently, the issues became whether the statute had a fair and substantial relation to the legislative goal and whether unreasonable limitations were placed on private rights.

First, the *Carson* court determined that the medical malpractice statute of limitation did not "substantially further" the legislative goal of reducing liability insurance costs because the number of malpractice claims filed by or for minors was comparatively small.²⁴⁰ Second, the court noted that previously New Hampshire's saving statute allowed all minors to bring their action within two years after their disability was removed.²⁴¹ But now, only the class of medical malpractice claimants was denied the saving statute's protection. Also, the statute of limitation extinguished causes of action before minors, due to their age, may have learned that they even exist. The *Carson* court found that the medical malpractice statute of limitation "unfairly burdens and discriminates" against these minors and "is unconstitutional insofar as it extinguishes rights conferred by" the saving statute.²⁴² *Carson* did not state that the legislature failed to rationally further the purpose of the statute. Rather the court found that the classification did not further the legislative goals enough to justify such a limitation on minors' rights.

The *Carson* court held virtually every aspect of New Hampshire's medical malpractice reform to be in violation of the state's constitution. This case illustrated the

232. *Id.*

233. *Id.*

234. *Id.* at 831.

235. *Carson*, 424 A.2d at 831; *see supra* notes 187-88 and accompanying text.

236. *Carson*, 424 A.2d at 831 (quoting *F.S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920)).

237. *Id.*

238. *Id.* (citing *Vance v. Bradley*, 440 U.S. 93, 111 (1979)).

239. *Id.*

240. *Id.* at 834.

241. *Carson*, 424 A.2d at 833.

242. *Id.* at 833-34.

major constitutional problems of the reform legislation of the mid-1970s. First, the empirical data is inadequate to show that the reduced costs, which result from such reforms, will provide greater availability of reasonably priced insurance. Secondly, as *Carson* noted, "basic notions of fairness and justice" are offended and "[s]ociety cannot escape its responsibility to provide justice by simply eliminating the rights of its citizens."²⁴³

The court also recognized the unfairness of requiring minors, a group that is disadvantaged and represents a relatively small number of the injured victims of medical malpractice, to bear the burden of a perceived insurance crisis. Recognizing this unfairness, the *Carson* court used its authority to constitutionally invalidate legislation. The court applied a modified federal intermediate level test, and then used its authority to return and to grant more freedoms to individual citizens.

The same factors that faced the *Carson* court also faced the 1980 Indiana Supreme Court in *Rohrbaugh v. Wagoner*.²⁴⁴ Both courts discussed the harshness of the medical malpractice statute of limitation for minors. Both courts dealt with the same empirical data that was available to the legislatures of the mid-1970s. Yet, only *Carson* found a way to continue the historical protection afforded minors by relieving them of the statutory obligation. Now, the Indiana Supreme Court may be trying to follow the example by sending a message to the legislature to provide more medical malpractice protection to minors.²⁴⁵

IV. FEDERAL STATUTORY CHALLENGE

The Americans with Disabilities Act of 1990 (ADA) is a viable, yet currently untested, legal device that should be used to challenge various states' medical malpractice statutes of limitation as they apply to minors.²⁴⁶ The ADA was enacted "[t]o establish a clear and comprehensive prohibition of discrimination on the basis of disability."²⁴⁷ Title II, Subchapter A of the ADA specifically deals with the public services area and the prohibition against discrimination of persons with disabilities.²⁴⁸ This Subchapter became effective on January 26, 1992.²⁴⁹ It covers "public entit[ies]," which include "any State or local government" and "any department, agency, special purpose district, or other instrumentality of a State or States or local government."²⁵⁰ Thus, public entities must adhere to the requirement that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the

243. *Id.* at 838.

244. 413 N.E.2d 891 (Ind. 1980); *see supra* part II.B.2.

245. *See supra* subpart II.B.5.

246. 42 U.S.C.A. §§ 12101-12213 (West 1994).

247. S. 933, 101st Cong., 2d Sess. (1990).

248. 42 U.S.C.A. §§ 12131-12134 (West 1994).

249. 42 U.S.C.A. § 12131, Note (Other Provisions). Subchapter A "shall become effective 18 months after the date of enactment of this Act [July 26, 1990]" and § 12134 "shall become effective on the date of [the] enactment of this Act." *Id.*

250. 42 U.S.C.A. § 12131(1)(A)-(B).

services, programs, or activities of a public entity, or be subjected to discrimination by any such entity."²⁵¹

The Attorney General is responsible for promulgating regulations to implement Subchapter A.²⁵² The regulations dictate that Title II applies to the activities of executive agencies, as well as those of "the legislative and judicial branches of State and local governments."²⁵³ The regulations define disability, "with respect to an individual, [as] a physical or mental impairment that substantially limits one or more of the major life activities of such individual."²⁵⁴ Age is such a disability as reflected by the fact that age clearly restricts minors' ability to do many life activities that persons of majority age can do.²⁵⁵ Such restrictions include the lack of ability to independently manage their own legal affairs.²⁵⁶ Also, state courts have recognized that minors, due to age, are under a legal disability.²⁵⁷ Thus, Title II applies to legislative enactments such as medical malpractice statutes of limitation applying to minors.

The application of Title II to such enactments is further evidenced by the fact that statutes of limitation affect minors' abilities to pursue their claims in the judiciary, which is expressly covered by Title II. Furthermore, a major activity covered by the regulation includes "programs that provide State or local government services or benefits."²⁵⁸ Additionally, a state's court system can be considered such a program providing both a service and a benefit to individuals, especially in lieu of states' constitutional provisions granting individuals the right of access to state courts.²⁵⁹ States' medical malpractice statutes of limitation are preempted by the ADA, which establishes the minimum level of protection to individuals with disabilities.²⁶⁰ Thus, state statutes that restrict the ability

251. *Id.* § 12132.

252. *Id.* § 12134(a).

253. 28 C.F.R. § 35.102, App. A (1994). The miscellaneous provisions of the ADA provide:

A State shall not be immune under the eleventh amendment to the Constitution of the United States from an action in Federal or State court of competent jurisdiction for a violation of this chapter. In any action against a State for a violation of the requirements of this chapter, remedies (including remedies both at law and in equity) are available for such a violation to the same extent as such remedies are available for such a violation in an action against any public or private entity other than a State.

42 U.S.C.A. § 12202.

254. 28 C.F.R. § 35.104.

255. *See supra* text accompanying notes 102-03.

256. *See supra* subpart II.A.; text accompanying note 200.

257. *South Bend Community Sch. Corp. v. Widawski*, 622 N.E.2d 160, 162 (1993). *See supra* subpart II.B.5.

258. 28 C.F.R. § 35.102, App. A (1994).

259. *See, e.g., supra* note 6.

260. *See* 28 C.F.R. § 35.103. Title II, Subchapter A "does not invalidate or limit the remedies, rights, and procedures of any other Federal laws, or State or local laws (including State common law) that provide greater or equal protection for the rights of individuals with disabilities or individuals associated with them." *Id.* State laws that require minors to comply with medical malpractice statutes of limitation accord minors less protection than that provided under most tort statutes of limitation and less protection than persons of majority age with medical malpractice claims are afforded. *See supra* note 51 and accompanying text; subpart II.A.

of minors to wait until they have reached the age of majority to bring their medical malpractice claims violate the ADA. This conclusion furthers the stated purpose of the ADA—to prohibit discrimination based on disabilities.²⁶¹

One analogous case is *Concerned Parents to Save Dreher Park Center v. City of West Palm Beach*.²⁶² In *Concerned Parents*, the city of West Palm Beach, Florida, (the “City”) had provided recreational programs at the Dreher Park Center for persons with disabilities.²⁶³ However, in 1993, due to budget constraints the City eliminated the programs for persons with disabilities, and the plaintiffs sought injunctive relief.²⁶⁴ The case was removed to federal court pursuant to jurisdiction conferred by the ADA.²⁶⁵ The court noted that the plaintiffs had to pass a three part test to establish a violation of Title II.²⁶⁶ After finding that the plaintiffs satisfied the “disability” prong, the court found that such disabled individuals were discriminated against by the City.²⁶⁷

The court noted that the ADA bans both intentional acts of discrimination and actions that have discriminatory effects.²⁶⁸ Significantly, the court noted that even if a governmental entity is not required to offer a program, when it does then the program must be conducted such that its purpose or effect does not impair “its objectives with respect to individuals with disabilities.”²⁶⁹ The court found that the elimination of the programs effectively impaired the City’s goal of providing recreation services for disabled individuals.²⁷⁰ Such impairment occurred because disabled individuals were unable to benefit from the remaining general programs.²⁷¹ The court in *Concerned Parents* noted that the ADA requires public entities to “provide ‘integrated settings’ for services and programs,”²⁷² or “separate benefits or services . . . if they are ‘necessary to provide qualified individuals with disabilities with aids, benefits, or services that are as effective as those provided to others.’”²⁷³ By eliminating the special programs, and due to the inadequacy of the general programs, the City had excluded disabled persons from being

Because these state laws do not provide equal or greater protection for minors, they are preempted by the ADA.

261. See *supra* note 247 and accompanying text.

262. 846 F. Supp. 986, *consent decree entered*, 853 F. Supp. 424 (S.D. Fla. 1994).

263. *Id.* at 988.

264. *Id.* at 989.

265. *Id.* (The court also based jurisdiction on 28 U.S.C. §§ 1331, 1441 (1988 & Supp. V 1993)).

266. *Id.* at 989-90.

[A] plaintiff must show: (1) that he is, or he represents, the interests of a ‘qualified individual with a disability’; (2) that such individual was either excluded from participation in or denied the benefits of some public entity’s services, programs, or activities or was otherwise discriminated against; and (3) that such exclusion, denial of benefits, or discrimination was by reason of the plaintiff’s disability.

Id. at 990.

267. *Concerned Parents*, 846 F. Supp. at 990-91.

268. *Id.* at 991 (citing 28 C.F.R. § 35.130(b)(3) (1993)).

269. *Id.*

270. *Id.*

271. *Id.*

272. *Concerned Parents*, 846 F. Supp. at 991 (quoting 28 C.F.R. § 35.130(d) (1993)).

273. *Id.* (quoting 28 C.F.R. § 35.130(b)(1)(iv) (1993)).

able to benefit from the City's recreation services. Such exclusion violated the second prong of the court's Title II test.²⁷⁴

The court in *Concerned Parents* found that the elimination of the benefits was due to the plaintiffs' disabilities.²⁷⁵ The court noted that although Title II does not per se require particular services for disabled persons, it does require that services being made available to non-disabled individuals must be made equally available to disabled individuals.²⁷⁶ Thus, since a great disparity in the amount of funds provided for disabled persons and non-disabled persons existed, the court found that the denial of benefits was due to the plaintiffs' disabilities.²⁷⁷ The court in *Concerned Parents* held that the plaintiffs had "shown a substantial likelihood of prevailing on the merits of the ADA claim."²⁷⁸

Concerned Parents serves as persuasive precedent for using Title II to invalidate states' medical malpractice statutes of limitation for minors. First, minors are under the legal disability of age.²⁷⁹ Second, due to concerns of increased medical malpractice insurance costs, states enacted laws changing the statutes of limitation for minors to bring such claims, thus eliminating minors' traditional common-law right to toll statutes of limitation until reaching the age of majority.²⁸⁰ Through state constitutional provisions, each individual has the right to his or her day in court.²⁸¹ By eliminating minors' rights to toll statutes of limitation until the age of majority, states have effectively impaired their ability to exercise their constitutional right of access to courts.²⁸² At the very least, medical malpractice statutes of limitation containing shortened or eliminated tolling periods for minors discriminate against minors by failing to treat them equally with persons of majority age who are better able to manage their legal matters.

Third, the change in tolling laws for minors was made specifically because of the unique problems associated with minors' disability—age.²⁸³ Thus, these medical malpractice statutes of limitation for minors meet the *Concerned Parents* three prong test, and are in violation of Title II of the ADA.

CONCLUSION

In the case of medical malpractice statutes of limitation for minors, the ends do not justify the means. The legislatures of the mid-1970s enacted legislation when they were faced with a perceived medical malpractice crisis. Requiring minors to carry their present burden resulting from the medical malpractice reform is an unfair and unreasonable social

274. *Id.* at 992.

275. *Id.*

276. *Id.*

277. *Concerned Parents*, 846 F. Supp. at 992.

278. *Id.* at 992.

279. *See supra* subpart II.A.; text accompanying notes 102-03; text accompanying note 200; subpart II.B.5; note 257 and accompanying text.

280. *See supra* subpart I.B.; note 51 and accompanying text.

281. *See, e.g., supra* note 6.

282. *See supra* subpart II.A.; text accompanying note 200.

283. *See supra* notes 51-52 and accompanying text.

policy. Requiring minors, who lack the physical, mental and emotional skills to drive a car, to file a suit within the prescribed time period or lose the right to recover for their injuries is inequitable. These statutes harm minors and protect the potentially negligent physician or health care worker. We as a society should be willing to find a way to relieve minors of this burden, or at least make the burden more tolerable for them to bear.

State courts are split on the issue of whether the statutes of limitation are unconstitutional. State courts use different standards of review, and some courts even apply the same standard differently with different results. The better position is the one that strikes down the statutes as being unconstitutional. Due to minors' inherent limitations, the statutes of limitation effectively bar minors from the courts. Moreover, minors under the medical malpractice statutes of limitation are treated differently than minors with other tort claims.

Courts and legislatures, especially those of Indiana, should be willing to continue the historical trend of providing protection for minors by protecting them from these unreasonable situations. Medical malpractice statutes of limitation should allow all people to have the opportunity to file their claim. This opportunity only exists when people have the personal ability to handle their legal affairs, or when someone is legally responsible and accountable for handling the affairs for them. Legislatures have the responsibility to provide this opportunity for minors. Courts should strike down any legislation that does not provide such an opportunity for minors. And now, under the ADA, minors have a federal legislative enactment that arguably requires federal courts to invalidate state statutes of limitation that require minors to bring their medical malpractice claims before reaching the age of majority.