WILL STATES PROTECT US, EQUALLY, FROM DAMAGE CAPS IN MEDICAL MALPRACTICE LEGISLATION?

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> "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection."[1]

> "Equal protection raises the question most fundamental to a society: Who gets what? Of course, that problem, approached from a different angle may be reformulated: Who gives up what?"[2]

INTRODUCTION

Tim was an achiever. He was his school's star quarterback, the lead in most of the school's drama productions, class president, and a straight A student. During the school's homecoming game, Tim's ankle was broken, and he was rushed to the emergency room. The orthopedic surgeon told the nurse to "give him five" of Versed while he waited for an available operating room. The nurse administered five milliliters of Versed intravenously; then she left the room for fifteen minutes to check on an incoming emergency. When she returned, Tim was not breathing. Evidently the surgeon had intended Tim to receive five milligrams of Versed, not five milliliters.[3] Tim has permanent brain damage; he is totally dependent, with seizure disorder, dysphasia, and cognitive dysfunction. His ankle has healed, but his once-promising future has disappeared. He will require full-time care for the remainder of his life.

A jury awarded Tim $5,000,000 for present and future medical expenses, $750,000 for lost earnings, and $1,000,000 for loss of enjoyment of life and other noneconomic damages. Tim's medical and rehabilitation bills at the time of trial were in excess of $1,500,000. However, a recent statute in Tim's state, the result of powerful lobbying by the state's medical and insurance industries, limits his recovery to $400,000. This amount will not even cover his immediate medical expenses and legal fees. Had the nurse's negligence resulted in less devastating harm, Tim would have been compensated for all of his damages. As it stands, a successful challenge to the statute under the state's equal protection clause is the only chance Tim has to prevent his parents' eventual bankruptcy and his own

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1. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803).

2. James W. Torke, *The Judicial Process in Equal Protection Cases*, 9 HASTINGS CONST. L.Q. 279, 343 (1982).

3. There are ten milligrams per milliliter.

placement in a state institution.

This Note will demonstrate that a state's independent interpretation of its equal protection clause may not only be the best source of protection from damage caps in medical malpractice acts, but it may be the only source. The first section will review the Supreme Court's Fourteenth Amendment equal protection analysis. This analysis is the starting point for many states' interpretations of analogous provisions in their state constitutions; some simply interpret their own clauses as repetitions of the federal. The section will end with a criticism of the traditional three-tiered analysis, and will address the alternative methods suggested by Justices Marshall and Stevens.

The second section of this Note will introduce the concept of new judicial federalism in equal protection analysis and suggest that states have followed two distinct methods for providing their citizens with such protection independent of the Federal Constitution. The third section will discuss the equal protection analysis as it has been applied to medical malpractice acts. One of the most common types of legislation enacted imposes caps on the amount of damages that a victim of malpractice can recover in a suit. Some legislatures have enacted damage caps limiting only noneconomic damages, while others have limited total recovery. The rationale for, and harm caused by, both types of limits will be discussed. This Note will argue that state courts should protect their citizens through independent interpretations of their equal protection clauses when legislatures place caps on damages for the following reasons: (1) the inefficacy of the traditional federal approach in this area, (2) the disparity in political clout between victims and physicians, (3) the inadequate substantiation that these caps result in lower malpractice insurance premiums or health care costs, (4) fidelity to the twin goals of tort law—increasing the quality of care through deterrence and compensating victims, and (5) the uniqueness of the states' constitutions provide an opportunity for a broader interpretation than the Federal Constitution. This Note will review cases using independent analysis and those using the traditional federal analysis of statutes imposing caps on noneconomic damages and statutes imposing caps on total recovery.

The fourth section will assess the effect of the new judicial federalism in equal protection cases as applied to damage caps. Concluding, the Note makes a plea to state judiciaries to protect their citizens, equally, from damage caps in medical malpractice legislation.

I. U. S. SUPREME COURT'S ANALYSIS

The Fourteenth Amendment is now one of the most important constitutional provisions protecting individual rights.[4] It ensures individuals are not denied equal protection of the law by any state.[5] Its limitations on the states are largely

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4. *See* JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 14.1 (4th ed. 1991).

5. U.S. CONST. amend. XIV, § 1 provides: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."

mirrored by the Fifth Amendment's Due Process Clause limitations on the federal government.[6]

The Equal Protection Clause prevents state legislatures from classifying groups either arbitrarily or based upon unacceptable criteria, and it prevents them from using any such violative classification to burden a particular group.[7] If the classification is based on "permissible" criteria, then the government may classify a group to further a legitimate societal interest.[8]

During the period following Roosevelt's court-packing plan in the 1930s, a dichotomy developed in the review applied by the Court. If a claim involved economic or social legislation, the Court gave high deference to the legislature.[9] At the same time, classifications involving or affecting individual rights deemed "fundamental" by the Constitution were subjected to a high degree of scrutiny.[10]

The U.S. Supreme Court currently professes to apply three standards of review in its equal protection analysis.[11] These standards are commonly termed the rational basis, strict scrutiny, and intermediate or quasi-suspect standards of review. Some commentators have suggested that the Supreme Court has not strictly followed its own delineation of these standards in all cases, and that it has at times used a higher degree of scrutiny while declaring to use a rational basis test.[12]

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6. *See* Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097, 2125 (1995).

7. *See* United States v. Carolene Prods. Co., 304 U.S. 144, 152-53 n.4 (1938). In *McGowan v. Maryland*, 366 U. S. 420, 425-26 (1961), the Court stated:

> [T]he Fourteenth Amendment permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others. The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.

See also Forum: Equal Protection and the Burger Court, 2 HASTINGS CONST. L.Q. 645, 650-51 (1975).

8. *See* NOWAK & ROTUNDA, *supra* note 4, § 14.2.

9. *Id.* § 14.3.

10. *Id.*

11. *See, e.g.*, City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 451 (1985) (Stevens, J., concurring).

12. *See* Richard E. Levy, *Escaping* Lochner's *Shadow: Toward a Coherent Jurisprudence of Economic Rights,* 73 N.C. L. REV. 329, 337-39 (1995) (arguing that although a few cases in the 1980s hinted at the Court's readiness to engage in a less deferential review under its rational basis analysis, any optimism about the courts continued use of such review was extinguished by the Court's highly deferential analysis in *Nordlinger v. Hahn*, 505 U.S. 1, 13-14 (1992), and in *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 317-18 (1993)).

A. Rational Basis

Under the rational basis test, applied in general economic and social legislation,[13] the courts do not apply any significant level of review. The Supreme Court has determined that in this area the judiciary has no special or unique role to play.[14] As an institution, it considers itself either incapable or less capable than the legislature to determine exactly what ends are legitimate or the reasonableness and effectiveness of the means chosen to achieve those ends. When relinquishing these determinations to the legislature, the Court will not delve into whether a classification is actually effective in achieving its purported purpose. It will only inquire whether the classification conceivably has a rational relationship to an end which is not prohibited by the Constitution. Under this level of review, as long as the government's classification arguably has some correlation to the legislative ends, the court will defer to the legislature's judgment, and the classification will stand if challenged as a violation of the Fourteenth Amendment.[15]

B. Strict Scrutiny

If the Court determines that strict scrutiny is the appropriate level of review, deference to the legislature disappears. The Court will independently decide whether the classification is closely related to, and effective in, achieving the professed end; the Court will also require that end to serve a compelling or overriding governmental purpose. Many ends have not been found sufficiently compelling to justify classifications when subjected to this level of review.[16] The strict scrutiny test has been termed "strict in theory and fatal in fact. . . ."[17]

The court may further find the classification violative of equal protection, even where there appears to be a compelling governmental purpose, if the legislation is overly broad or not narrowly tailored to promote that end. The Court may also

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13. *See, e.g.*, Duke Power Co. v. Carolina Envtl. Study Group, Inc., 438 U.S. 59 (1978) (statutory limit on liability for nuclear accidents); San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973) (education).

14. *See* NOWAK & ROTUNDA, *supra* note 4, § 14.3, at 574.

15. *Id.* at 574-75.

16. *Id. See, e.g.*, Shapiro v. Thompson, 394 U.S. 618, 634-38 (1969) (holding that the legislatures' professed ends of: (1) aiding in planning the welfare budget; (2) providing an objective test of residency; (3) decreasing the probability of welfare recipients fraudulently receiving benefits from more than one state; and (4) encouraging new residents to obtain employment, were not sufficiently compelling to justify the legislatures' denials of welfare benefits to residents whom had been in the states for less than one year. The classification affected the fundamental right to travel.).

17. Gerald Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine On A Changing Court: A Model for A Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972). *But see* Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097, 2117 (1995) ("Finally, we wish to dispel the notion that strict scrutiny is strict in theory, but fatal in fact.") (internal quotations omitted) (citations omitted).

independently consider whether the legislation is necessary.[18]

"The Court . . . employs the strict scrutiny compelling interest test . . . in two categories of civil liberties cases: First, when the governmental act classifies people in terms of their ability to exercise a fundamental right;[19] second, when the governmental classification distinguishes between persons, in terms of any right, upon some 'suspect' basis."[20] Because of the history and purpose of the Fourteenth Amendment, the Supreme Court has determined that strict scrutiny is the appropriate standard of review when legislation involves a classification of persons based on their racial status or based on their national origin.[21]

C. Intermediate Review

Until the late 1960s, courts used either strict or rational basis scrutiny; they have since developed an intermediate standard of review. This intermediate standard gives less deference to the legislature than the rational basis standard, but more deference to the legislature than is allotted under strict scrutiny.[22] This standard requires the legislature to show that the classification in question involves a "substantial relationship" to an "important" governmental end.[23] The essence of the intermediate test is that the Court uses a means/ends analysis, requiring that the means in question bear a substantial relation to the ends sought by the legislature.[24] The Supreme Court has applied this test to cases involving classifications by gender[25] and classifications by illegitimacy. [26] These classifications have been

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18. *See* Mary A. Willis, *Limitation on Recovery of Damages Medical Malpractice Cases: A Violation of Equal Protection?*, 54 U. CIN. L. REV. 1329, 1334 (1986).

19. *See, e.g.*, McIntyre v. Ohio Elections Comm'n, 514 U.S. 337 (1995) (law burdening core political speech); Dunn v. Blumstein, 405 U.S. 330 (1972) (travel and voting); Kramer v. Union Free Sch. Dist., 395 U.S. 621 (1969) (voting); Shapiro v. Thompson, 394 U.S. 618 (1969) (interstate travel) *overruled in part by* Edelman v. Jordan, 415 U.S. 651 (1974); Loving v. Virginia, 388 U.S. 1 (1967) (marriage); Griswold v. Connecticut, 381 U.S. 479 (1965) (right to privacy); NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449 (1958) (freedom of expression and association); Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535 (1942) (marriage and procreation).

20. NOWAK & ROTUNDA, *supra* note 4, § 14.3, at 575. *See, e.g.*, Hunter v. Erickson, 393 U.S. 385 (1969) (race); Oyama v. California, 332 U.S. 633 (1948) (national origin).

21. *See, e.g.*, Shaw v. Reno, 509 U.S. 630, 631-32 (1993).

22. *See* NOWAK & ROTUNDA, *supra* note 4, § 14.3.

23. Craig v. Boren, 429 U.S. 190, 197 (1976). *Accord* United States v. Virginia, 116 S. Ct. 2264, 2274 (1996) ("Parties who seek to defend gender-based government action must demonstrate an exceedingly persuasive justification for that action.") (internal quotations omitted).

24. *See* Willis, *supra* note 18, at 1336.

25. *See, e.g.*, *Craig*, 429 U.S. at 204 (invalidating a statute that established different legal ages for alcohol consumption for men and women).

26. *See, e.g.*, Levy v. Louisiana, 391 U.S. 68, 72 (1968) (invalidating a wrongful death statute that excluded illegitimate children from the class entitled to recover for their parents' death).

termed "quasi-suspect."[27]

D. Suggested Alternatives

Justices Thurgood Marshall and John Paul Stevens have rejected the traditional tiered analysis in equal protection cases. In *San Antonio Independent School District v. Rodriguez*, Justice Marshall suggested that the Supreme Court was not honest about its use of the tiered analysis and that it was actually applying a "spectrum of standards"[28] or a sliding scale level of review, depending on the "substantiality of the state interests sought to be served, and . . . [the] reasonableness of the means by which the State has sought to advance its interests."[29] In Marshall's view, placing interests in the two or three types of legislation for different levels of review may be arbitrary and may not adequately take into account the importance of the interests of either those classified or of the state.[30] Marshall explained:

> The task in every case should be to determine the extent to which constitutionally guaranteed rights are dependent on interests not mentioned in the Constitution. As the nexus between the specific constitutional guarantee and the nonconstitutional interest draws closer, the nonconstitutional interest becomes more fundamental and the degree of judicial scrutiny applied when the interest is infringed on a discriminatory basis must be adjusted accordingly.[31]

Justice Marshall determined that as the importance of the right increases, the Court should look closer at the effectiveness of the act and whether any less restrictive means are available to reach the legislation's goals.[32] Although Marshall claimed to be merely illuminating what the Court was actually doing in its equal protection analysis, his explanation came during a period in which the Court seemed to be applying a heightened rational basis review in some cases. Because the Court has seemingly returned to a rational basis review with minimal scrutiny,[33] Marshall's pronouncements can be viewed as suggestions to the current Court.

Justice Stevens has proposed a continuum of judgmental responses.[34] The responses will differ according to what the Court determines are the answers to a

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27. *Id.*

28. 411 U.S. 1, 98 (1973) (Marshall, J., dissenting).

29. *Id.* at 124.

30. *Id.* at 110 (finding that in placing this school finance case in with other economic legislation the Court was at odds with previous decisions and "thereby ignores the constitutional importance of the interest at stake and the invidiousness of the particular classification").

31. *Id.* at 102-03.

32. *Id.* at 125.

33. *See* Levy, *supra* note 12.

34. City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 453 (1985) (Stevens, J., concurring) (footnotes omitted).

group of questions. These questions include: (1) "What class is harmed by the legislation, and has it been subjected to a 'tradition of disfavor' by our laws?"; (2) "What is the public purpose that is being served by the law?"; and, (3) "What is the characteristic of the disadvantaged class that justifies the disparate treatment?"[35] These questions are to be asked regardless of the type of classification involved because Justice Stevens has determined that their answers will show whether the legislature has rationally enacted the legislation with the "legitimacy and neutrality that must always characterize the performance of the sovereign's duty to govern impartially."[36]

Justice Stevens postulated that the answers to these questions explain why classifications by race are not rational.[37] With other types of classifications, however, Justice Stevens suggested a less clear-cut result because the characteristic of those being classified might rationally support some legislatively imposed burdens but not others, depending on the legislative purpose.[38] A legislative purpose, in Justice Stevens' view, is rational if it "transcends the harm to the members of the disadvantaged class."[39] Although Justice Stevens' questions do not directly address classifications which create privileged groups, it is highly unlikely that a classification which creates a favored group does not create a correspondingly burdened group. For Justice Stevens, equal protection is a question of reasonableness; the answer is discovered through a series of questions which balance the interests involved.

II. NEW JUDICIAL FEDERALISM IN EQUAL PROTECTION CASES—INDEPENDENT ANALYSIS

Some state courts have reacted to the U.S. Supreme Court's limited interpretation of equal protection by declaring their independence from the Court's interpretation. These courts no longer claim to be interpreting their own states' constitutions as if their language and effect were merely coterminous with the Equal Protection Clause; states have engaged in this analysis even when their own constitutions do not contain an "equal protection clause."[40] The effect of this independence has been varied. State courts wishing to broaden the scope of equal protection given to their citizens have approached this goal in different ways.

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35. *Id.*

36. *Id.* at 452. *Cf.* Romer v. Evans, 116 S. Ct. 1620, 1628 (1996) ("Central to both the ideal of the rule of law and to our own Constitution's guarantee of equal protection is the principle that government and each of its parts remain open on impartial terms to all who seek its assistance.").

37. *City of Cleburne*, 473 U.S. at 453 (Stevens, J., dissenting).

38. *Id.* at 454.

39. *Id.* at 452.

40. *See, e.g.*, S.D. CONST. art. VI, § 18 ("No law shall be passed granting to any citizen, class of citizens or corporation, privileges or immunities which upon the same terms shall not equally belong to all citizens or corporations."); Behrns v. Burke, 229 N.W.2d 86, 88 (S.D. 1975) (noting that "equal protection" does not appear in their state constitution and that the analysis under the state and federal constitutions are not the same).

Some state courts have professed to follow the federal approach, while giving some "bite" to the rational basis analysis.[41] Other state courts have expressly determined that their constitutions offer broader protection than the Fourteenth Amendment,[42] and have either followed the tiered analysis, while analyzing more social and economic legislation under strict or intermediate scrutiny, or have applied their own single-test analysis to all classifications.[43]

A. The Tiered Approach of New Judicial Federalism in Equal Protection

California has elected to adopt the U.S. Supreme Court's three-tiered analysis by evaluating classifications under either high, moderate, or low-level scrutiny. At the high level are "suspect" classifications and classifications affecting fundamental rights. The methodology California courts have used to broaden equal protection is through independent decisions of what is included in the "suspect" classification and what are "fundamental rights."[44]

Using this independent analysis, California was one of the few states to strike down its school financing system on the explicit ground that it violated the State's Equal Protection Provisions.[45] The Supreme Court of California determined that education was a fundamental right in California.[46] Therefore, any classification

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41. *See* Willis, *supra* note 18, at 1338.

42. *See, e.g.*, Daly v. Del Ponte, 624 A.2d 876, 883 (Conn. 1993) ("In appropriate circumstances, we have interpreted the equal protection provisions of the state constitution differently than that contained in the federal constitution, particularly when the distinctive language of our constitution calls for an independent construction."). *Cf.* Grissom v. Gleason, 418 S.E.2d 27, 29 n.1 (Ga. 1992) ("We do not foreclose the possibility that this court may interpret the equal protection clause in the Georgia Constitution to offer greater rights than the federal equal protection clause as interpreted by the U.S. Supreme Court."). Georgia's constitution does differ from the federal. "Protection to person and property is the paramount duty of government and shall be impartial and complete. No person shall be denied the equal protection of the laws." GA. CONST. art. I, § 1, para. 2.

43. *See* Willis, *supra* note 18, at 1338.

44. Examples of other courts taking similar approaches include *Horton v. Meskill*, 376 A. 2d 359 (Conn. 1977) (education is fundamental); and *Idaho School for Equal Education Opportunity v. Evans*, 850 P.2d 724 (Idaho 1993) (new two-part test to determine whether a right is fundamental).

45. CAL. CONST. art. I, §§ 11, 21 (§ 11 repealed 1974, current version at *id.* art. IV, § 16) (§ 21 repealed 1974, current version at *id.* art. I, § 7(b)). Prior to 1974, article I, section 11 provided: "All laws of a general nature shall have a uniform operation." Prior to 1974, article I, section 21 provided: "No special privileges or immunities shall ever be granted which may not be altered, revoked, or repealed by the Legislature; nor shall any citizen, or class of citizens, be granted privileges or immunities which, upon the same terms, shall not be granted to all citizens." In 1974, article I, section 7(a) was added, which provides: "A person may not be deprived of life, liberty, or property without due process of law or denied equal protection of the laws . . . ."

46. Serrano v. Priest, 487 P.2d 1241, 1263-64 (Cal. 1971) (often cited as *Serrano* I—remanded finding that if facts alleged were proven, the system of public school financing would

affecting this right must serve a compelling state interest to be valid.[47]

B. The Single-Test Approach of New Judicial Federalism in Equal Protection

When Oregon interprets its equal protection provisions, the method of analysis is completely distinct from the federal three-tiered method. The Oregon courts' analysis is based on the distinct language of the Oregon Constitution[48] and considers the unique historical and political considerations applicable to the state.[49] The Oregon Supreme Court determined in *State v. Clark*, that the Oregon Constitution prevents the state from distributing privileges or burdens unsystematically.[50] The court noted that, unlike the Fourteenth Amendment, which was enacted to prevent discrimination against black citizens, Oregon's provisions were enacted to prevent the states from granting privileges to some citizens, thereby burdening others.[51] This provision in the Oregon Constitution was adopted prior to the adoption of the Fourteenth Amendment.

The Indiana Supreme Court in *Collins v. Day*[52] announced its independent interpretation of equal protection provisions in the Indiana Constitution[53] and rejected the three-tiered analysis. Under the new test, a court first decides whether disparate treatment accorded by legislation is reasonably related to inherent characteristics which distinguish the unequally treated classes, then it determines whether the preferential treatment is uniformly applicable and equally available to all persons similarly situated.[54] Although an Indiana court is still bound to

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be violative of equal protection under a strict scrutiny analysis); Serrano v. Priest, 557 P.2d 929, 949 (Cal. 1976) (*Serrano* II—refusing to reevaluate its use of strict scrutiny under its state constitution in light of the intervening Supreme Court decision in *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 28 (1973), which found that education was not a fundamental right and thus applied low-level scrutiny).

47. Other courts reached similar results, but most based their decisions on grounds other than equal protection, such as their constitutions' education clauses. *See, e.g.*, Rose v. Council for Better Educ., 790 S.W.2d 186, 193 (Ky. 1989) (state constitution explicitly required an "efficient school system"); Helena Elementary Sch. Dist. No. 1 v. State, 784 P.2d 418 (Mont. 1990) (state constitution required a basic system of free quality education); Abbott v. Burke, 575 A.2d 359 (N.J. 1990) (state constitution required a thorough and efficient education for all students).

48. "No law shall be passed granting to any citizen or class of citizens privileges, or immunities, which, upon the same terms, shall not equally belong to all citizens." OR. CONST. art. I, § 20.

49. *See* David Schuman, *A Failed Critique of State Constitutionalism*, 91 MICH. L. REV. 274, 275 (1992).

50. 630 P.2d 810, 814 (Or. 1981).

51. *Id.*

52. 644 N.E.2d 72 (Ind. 1994).

53. "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." IND. CONST. art. I, § 23.

54. *Collins*, 644 N.E.2d at 78. For examples of other courts taking similar approaches, see

accord a high degree of deference to the legislature, the supreme court stated that it expected this ruling to broaden the protection given.[55] Prior to *Collins*, Indiana had interpreted its own constitution as consistent with or as a simple reiteration of the federal constitution.[56]

III. MEDICAL MALPRACTICE ACTS AND EQUAL PROTECTION

Having discussed the traditional federal equal protection analysis and ways in which state courts have sought to broaden the protection they provide under their own constitutions, this section will review the possibilities, under the different methods of analysis, of striking down damage caps in medical malpractice acts as violative of equal protection. It is first necessary to describe the rationale behind these acts and the arguments counseling the state courts to strike them down. Subsequently, cases applying the different methods of analysis to damage cap provisions will be discussed.

A. States' Reactions to the Medical Insurance Crisis

There was an increase in the percentage of Gross National Product (GNP) Americans spent on health care in every year between the mid-1960s and the late 1980s.[57] In 1991, the United States spent 13% of its GNP on health care.[58] Working Americans were increasingly unable to afford health insurance.[59] President Clinton, among others, partially blamed the increasing cost of health care on the increasing costs of medical malpractice insurance.[60] Beginning in the 1960s, the cost of liability insurance for medical malpractice began to rise; the costs and risks to insurers increased at such a rate that some insurance companies ceased to provide medical malpractice insurance.[61] All fifty states passed

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Arctic Structures, Inc., v. Wedmore, 605 P.2d 426 (Alaska 1979) (applying an independent sliding-scale or balancing test); Hale v. Port of Portland, 783 P.2d 506, 516 (Or. 1989) (applying an independent single standard of review).

55. *Collins*, 644 N.E.2d at 80-81.

56. *Id.* at 75. *See also* Johnson v. Elkhart Gen'l Hosp., 404 N.E.2d 585 (Ind. 1980).

57. *See* Frank A. Sloan et al., *Finding Solutions to Problems of Access, Quality Assurance, and Cost Containment, in* COST, QUALITY, & HEALTH CARE 1, 2 (Frank A. Sloan et al. eds., 1988).

58. *See* Walter A. Costello, Jr., *President's Message*, MASS. L. WKLY., June 8, 1992, at 37, 37.

59. *See* Dennis J. Rasor, *Mandatory Medical Malpractice Screening Panels: A Need to Re-Evaluate*, 9 OHIO ST. J. ON DISP. RESOL. 115 (1993).

60. *Id.* at 116.

61. In 1975, premiums increased 64%. Patricia Munch, *Causes of the Medical Malpractice Insurance Crisis: Risks and Regulation, in* THE ECONOMICS OF MEDICAL MALPRACTICE 126-27 (Simon Rottenberg ed., 1978). The "availability crisis" subsided in the 1980s, yet the costs of health care continued to soar. Thus, the health care and insurance industries in the 1980s relied on the lack of affordability of insurance, rather than availability, to get their reform measures passed. Franklin D. Cleckley & Govind Hariharan, *A Free Market Analysis of the Effects of Medical Malpractice Damage Cap Statutes: Can We Afford to Live with Inefficient Doctors?*, 94 W. VA.

legislation in response to this perceived "crisis."[62] The legislative response included establishing review panels,[63] allowing voluntary arbitration agreements between patients and physicians,[64] removing the collateral source rule in malpractice suits,[65] removing ad damnum clauses,[66] instituting patient compensation funds,[67] limiting attorneys' contingency fees,[68] limiting the number of claims through reduced statutes of limitation,[69] and placing caps on both noneconomic and total damages.[70] The legislatures' placement of damage caps on malpractice recoveries may violate the states' equal protection provisions.

L. REV. 11, 26 (1991).

62. *See* Willis, *supra* note 18, at 1329. "There has never been such dramatic and immediate response by the state legislatures to the pressure for any reform such as the reaction of all fifty state assemblies to the demands made by and on behalf of the medical profession in 1975." J. Kent Richards, *Statistics Limiting Medical Malpractice Damages*, 32 FED'N INS. COUNS. Q. 247, 247 n.2 (quoting Fuller, *The Insurance Crisis in Medical Malpractice, in* MEDICAL MALPRACTICE 10-1, 10-14 (Illinois Institute for Continuing Legal Education ed., 1975)).

63. See, for example, ARIZ. REV. STAT. ANN. § 12-567 (West 1982) (repealed 1989), which provided that malpractice actions were initially to be submitted to a medical liability review panel that would make a ruling for the plaintiff or defendant. In order to proceed to court, the losing party had to submit a bond of $2000 for the prevailing party's expenses. In *Eastin v. Broomfield*, 570 P.2d 744, 750-51 (Ariz. 1977), the Arizona Supreme Court found that these requirements did not violate the state's equal protection provisions.

64. Rasor, *supra* note 59, at 116; *see, e.g.*, ALASKA STAT. § 09.55.535 (Michie 1996).

65. Rasor, *supra* note 59, at 116. The collateral source rule requires a defendant to refrain from introducing evidence at trial that a plaintiff has recovered for the same injury from other sources, such as medical insurance. *See, e.g.*, R.I. GEN. LAWS § 9-19-34.1 (Supp. 1996) (eliminating the collateral source rule in medical malpractice cases, thus allowing a defendant to introduce evidence of a plaintiff's recovery from other sources—the jury is further to be instructed to reduce the plaintiff's award for damages by the amount of such alternative recovery). *See also* James J. Watson, Annotation, *Validity and Construction of State Statute Abrogating Collateral Source Rule as to Medical Malpractice Actions*, 74 A.L.R. 4TH 32 (1990).

66. An ad damnum clause informs the defendant of the maximum amount of the claim; see FED. R. CIV. P. 8(a)(3). An Arizona statute required that no dollar amount be included in a medical malpractice complaint. ARIZ. REV. STAT. ANN. § 12-566 (West 1992).

67. *See* Rasor, *supra* note 59, at 116 (arguing that such funds are "variations on a no-fault system").

68. *Id.*

69. *See, e.g.*, Ledbetter v. Hunter, 652 N.E.2d 543 (Ind. Ct. App. 1995) (applying an Indiana statute of limitation on a minor bringing claim for birth injuries).

70. *See* Willis, *supra* note 18, at 1332-33. As of 1987, 27 states had enacted statutes with medical malpractice damage cap provisions which, as of that year, had not been repealed. These states were: Alabama, Alaska, California, Colorado, Georgia, Hawai'i, Idaho, Indiana, Kansas, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Nebraska, New Hampshire, New Mexico, Ohio, Oregon, South Dakota, Texas, Utah, Virginia, Washington, West Virginia, and Wisconsin. Cleckley & Hariharan, *supra* note 61, at 21-22 n.32.

B. The Need and Justifications for States' Judiciaries Striking Damage Caps as Violative of Their Equal Protection Provisions

Although damage caps are enacted frequently,[71] they are one of the most controversial[72] methods used by state legislatures in medical malpractice reform. State court challenges to such legislation have produced varied results.[73] However, even though the results have been inconsistent, if a victim of medical malpractice is to successfully challenge a damage cap as violative of equal

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71. *See* Kevin Bushnell, *Constitutional Challenges to Medical Malpractice Reform Laws*, 12 VERDICTS, SETTLEMENTS & TACTICS 370 (1992).

72. *See* John Desmond, *Michigan's Medical Malpractice Reform Revisited-Tighter Damage Caps and Arbitration Provisions*, 11 T.M. COOLEY L. REV. 159, 164 (1994).

73. Cases upholding damage caps in medical malpractice acts include: Fein v. Permanente Med. Group, 695 P.2d 665 (Cal. 1985) ($250,000 cap on noneconomic damages upheld under rational basis review); Scholz v. Metropolitan Pathologists, P.C., 851 P.2d 901 (Colo. 1993) ($250,000 cap on noneconomic and $1,000,000 cap on total recovery upheld under rational basis review); Johnson v. St. Vincent Hosp., Inc., 404 N.E.2d 585 (Ind. 1980) ($500,000 cap upheld under rational basis review; the court found significant the availability of an alternative remedy through a patient compensation fund); Samsel v. Wheeler Transp., 789 P.2d 541 (Kan. 1990) ($250,000 cap on noneconomic damages upheld), *overruled by* Bair v. Peck, 811 P.2d 1176 (Kan. 1991); Adams v. Children's Mercy Hosp., 832 S.W.2d 898 (Mo. 1992) ($350,000 cap on noneconomic damages upheld under rational basis review); Prendergast v. Nelson, 256 N.W.2d 657 (Neb. 1977) (upholding an elective $500,000 cap under rational basis review); Etheridge v. Medical Ctr. Hosps., 376 S.E.2d 525 (Va. 1989) ($750,000 cap on total recovery upheld); Robinson v. Charleston Area Med. Ctr., Inc., 414 S.E.2d 877 (W. Va. 1991) ($1,000,000 cap on noneconomic damages upheld under rational basis review).

Cases finding damage caps in medical malpractice acts violative of state constitutions include: Moore v. Mobile Infirmary Ass'n, 592 So. 2d 156 (Ala. 1991) (striking a $400,000 cap on noneconomic damages as violative of equal protection under intermediate scrutiny, and of state right to jury trial); Smith v. Department of Ins., 507 So. 2d 1080 (Fla. 1987) (striking $450,000 cap on noneconomic damages as violative of access to courts and right to a jury trial); Wright v. Central Dupage Hosp. Assoc., 347 N.E.2d 736 (Ill. 1976) (striking $500,000 cap as violative of right to jury trial and as a prohibited "special law"); Kansas Malpractice Victim's Coalition v. Bell, 757 P.2d 251 (Kan. 1988) (striking $250,000 cap on noneconomic damages under state due process and right to jury trial; issue of equal protection moot), *overruled by Peck*, 811 P.2d at 1176; Arneson v. Olson, 270 N.W.2d 125 (N.D. 1978) (striking $300,000 cap on total recovery as violative of state equal protection under intermediate scrutiny); Brannigan v. Usitalo, 587 A.2d 1232 (N.H. 1991) (striking a $875,000 cap on noneconomic damages as violative of state equal protection, applying intermediate scrutiny); Carson v. Maurer, 424 A.2d 825 (N.H. 1980) (striking $250,000 cap on noneconomic damages as violative of state equal protection under intermediate scrutiny); Morris v. Savoy, 576 N.E.2d 765 (Ohio 1991) (striking $200,000 cap on general damages on due process grounds, but not violative of equal protection under rational basis review); Lucas v. United States, 757 S.W.2d 687 (Tex. 1988) (striking $500,000 cap on total recovery as violative of state access to courts provision); Sofie v. Fibreboard Corp., 771 P.2d 711 (Wash. 1989) (cap on noneconomic damages violates state right to jury trial).

protection, his only real chance lies with a challenge under his own state's constitution. For the following reasons, state judiciaries need to independently interpret their respective equal protection clauses and protect their citizens from these caps.

1. The Federal Analysis is Insufficient.—Implicitly, the Supreme Court has held that there is no federal constitutional right to damages;[74] federal courts apply the lowest standard of review when a damage cap is challenged under the Fourteenth Amendment.[75] At least one commentator has noted,

> [A]nalysis under the rigid two-tiered model does not result in equal protection for severely-injured malpractice plaintiffs. . . . This arbitrary discrimination against patients rewards medical negligence at the expense of the victim and is benignly rationalized by the legislature as well as those courts applying minimal scrutiny on the ground that it improves the quality of health care.[76]

As in other areas, when the federal rational basis test is applied to damage caps, the result is little, if any, protection at all.

2. The Disparity Between the Victims' and the Medical and Insurance Industries' Political Clout Justifies a Higher Level of Review.—The courts' role is essential in an area such as medical malpractice, where "the beneficiary of favored legislation is a powerful, affluent group and the classification deprives a small, politically ineffective group" of benefits.[77] According to a recent study by the Center of Public Integrity, a nonprofit Washington group, there are 650 groups supported by the medical and insurance industries who have "spent more than $100 million from January 1993 to . . . March [1994] to influence the outcome of health care legislation."[78] By applying only minimal scrutiny to these cases in

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74. *See* Duke Power Co. v. Carolina Envtl. Study Group, Inc., 438 U.S. 59, 84-98 (1978) (suggesting that federal case law denies an absolute right to general and, especially, economic damages).

75. Knowles v. United States, 829 F. Supp. 1147, 1153-54 (D.S.D. 1993) (holding that because medical malpractice victims are not a suspect class and because the limitation on damages did not affect a fundamental right, "the Court must apply the rational basis test"), *rev'd on other grounds*, 91 F.3d 1147 (8th Cir. 1996).

76. Willis, *supra* note 18, at 1348.

77. *Id.* at 1349. As Justice Marshall explained of another politically powerless group, welfare families, in *New York State Department of Social Services v. Dublino*: "It is widely yet erroneously believed . . . that recipients of public assistance have little desire to become self-supporting. . . . Because the recipients of public assistance generally lack substantial political influence, state legislators may find it expedient to accede to pressures generated by misconceptions." 413 U.S. 405, 431-32 (1973) (Marshall, J., dissenting) (citation omitted). Similarly, public misconceptions concerning the frequency of overzealous juries doling out millions, coupled with the persuasive efforts of powerful lobbies, have made it more expedient for legislators to concede to pressures by enacting these damage caps.

78. Katharine Q. Seelye, *Lobbyists Are the Loudest in the Health Care Debate*, N.Y. TIMES, Aug 16, 1994, at A1 (quoting a study by the Center for Public Integrity).

which one group is most likely not adequately represented in the legislature[79] "courts relinquish the opportunity to examine the disparity in position between the lobbies of the medical and insurance industries and the representatives of a handful of severely-injured victims."[80]

3. Victims' Damage Awards are not a Substantial Cause of the Medical Malpractice Insurance Crisis, and Damage Caps are not an Effective Cure for the Rising Cost of Health Care.—The rationale for caps on damages appears to be, at least in part, that the large amount of damages awarded in medical malpractice cases has led to the medical malpractice insurance crisis, which in turn has led to the skyrocketing costs of healthcare nationwide. However, there are statistics which indicate that medical insurance costs are not a substantial cause of the astronomical increases in the cost of health care.[81] Data also suggests that tort reform has not been successful in decreasing the cost of medical malpractice insurance nor in decreasing the costs of health care to consumers.[82] Thus, the lobbyists' argument that the public will ultimately be the beneficiaries of such caps falls short.

Indirectly, the costs of defensive medicine practiced in fear of high damages awarded in malpractice suits may contribute to increases in the cost of health care; however, this effect cannot be quantitatively determined.[83] Because the United

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79. "In medical malpractice, one very powerful class of people creates and imposes risks on another, relatively powerless class . . . As a practical matter, severely injured patients are not an identifiable or organized interest group that can assert its claims in the Legislature." SYLVIA A. LAW & STEVEN POLAN, PAIN AND PROFIT: THE POLITICS OF MALPRACTICE 145 (1978).

80. Willis, *supra* note 18, at 1349.

81. *See* Rasor, *supra* note 59, at 119.

> During the period of increase in medical malpractice premiums, the total bill for malpractice insurance only accounted for 0.9% in 1983 and 1.22% in 1985 of the total national health care cost. In 1989, premiums were less than one percent of the total health care cost and that fell by another four percent in 1991. During this most recent decline in the costs of malpractice insurance, health care costs have "skyrocketed." Recent data suggests that the cost of medical malpractice suits, as exhibited through malpractice premiums, has little effect on the total cost of health care in the United States.

Id. (footnotes omitted).

82. *See* Cleckley & Hariharan, *supra* note 61, at 30-33.

83. *See* Rasor, *supra* note 59, at 119.

> The U.S. Department of Health, Education and Welfare, Commission on Medical Malpractice, defined "defensive medicine" as "the alteration of modes of medical practice, induced by the threat of liability, for the principal purpose of forestalling the possibility of lawsuits by patients as well as providing a good and legal defense in the event such lawsuits are instituted." . . . [this] does not include alterations in medical practices that may result from fear of a later malpractice suit but that are also medically justified.

Id. (quoting STEVEN E. PENGALIS & HARVEY F. WACHSMAN, AMERICAN LAW OF MEDICAL MALPRACTICE § 2.9 at 49 (2d ed. 1992)).

States Department of Health, among others, has recognized the impropriety of the practice of defensive medicine,[84] legislatures should not consider this effect when assessing the costs and benefits of medical malpractice legislation.

In equal protection analysis, the result hinges on the amount of deference a court gives to the legislature in its determination that a health care crisis exists and that their selected remedy is effective at resolving it.[85] Some commentators have determined that "the size and frequency of medical malpractice claims have little effect on the cost of malpractice insurance; . . . the cost of medical malpractice insurance contributes only slightly to the cost of health care,"[86] and that other factors, instead, are responsible for the increases in medical malpractice insurance and health care costs.[87] If these claims are correct, any level of scrutiny short of complete deference (no scrutiny at all) might lead to a finding that damage caps violate equal protection.[88] Even if individual jury awards are assumed to be too high, the evidence of the effectiveness of damage caps in reducing the costs of malpractice insurance or health care is at least conflicting.[89] "Courts should not

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84. *See* Rasor, *supra* note 59, at 120.

85. *Id.* at 130-31. Despite the fact that statutory reforms, including damage caps, had been in place for nearly ten years in some states, the General Accounting Office found that in the period "[f]rom 1983 to 1985, total medical malpractice insurance costs for physicians and hospitals rose from $2.5 billion to $4.7 billion." U.S. GEN. ACCOUNTING OFFICE, MEDICAL MALPRACTICE: INSURANCE COST INCREASED BUT VARIED AMONG PHYSICIANS AND HOSPITALS 2 (1986), *microformed on* GAO Doc. No. 1.13:HRD-86-112 (U.S. Gov't Printing Office). This was higher than the Consumer Price Index.

86. Rasor, *supra* note 59, at 131. *See also* Frank A. Sloan, *State Responses to the Malpractice Insurance "Crisis" of the 1970s: An Empirical Assessment*, 9 J. HEALTH, POL., POL'Y & L. 629, 643 (1985).

87. *See, e.g.*, James S. Cline & Keith A. Rosten, *The Effect of Policy Language on the Containment of Health Care Cost*, 21 TORT & INS. L.J. 120, 136 n.1 (1985) (stating that these factors included: "federal funding in 1946 of hospital construction, which led to an oversupply and therefore a tendency to over-utilize hospitals; an increase in the number of physicians available to provide medical services . . . ; advanced and much more expensive technology and equipment; increased longevity; . . . and a general lack of competition in the health care industry, coupled with little incentive on the part of the consumer to reduce costs"); Cleckley & Hariharan, *supra* note 61, at 20 n.31 (suggesting that defensive medicine contributed to the increases in the costs of health care) (citing Karen S. Edwards, *Defensive Medicine: Health Care with a Pricetag*, 81 OHIO ST. MED. J. 38 (1985)). Some have suggested that the high number of incompetent and negligent doctors is the cause of the high cost of malpractice insurance. *Id.* at 53-60.

88. Cleckley & Hariharan state a similar position: "There is no rational relationship between punishing victims of medical malpractice and lowering the cost of medical malpractice insurance or health care costs in general. The only relationship that exists between these issues is a lobbying relationship." Cleckley & Hariharan, *supra* note 61, at 70.

89. *See, e.g.*, Jane C. Arancibia, Note, *Statutory Caps on Damage Awards in Medical Malpractice Cases*, 13 OKLA. CITY U. L. REV. 135, 142 (1988); Marshall B. Kapp, *Solving the Medical Malpractice Problem: Difficulties in Defining What "Works,"* 17 LAW, MED. & HEALTH CARE 156, 158-59 (1989). *See also Attorneys Fight Change on Medical Malpractice*, BOSTON

shrink from their duty to protect the minority behind a vague notion of deference to legislatures, especially in an area of traditional judicial cognizance, namely the right of injured individuals to seek redress in the courts." [90] However, in practice, the level of scrutiny appears to be outcome determinative; when low scrutiny is applied, damage caps are upheld.[91]

4. The Tort System's Goals of Increasing the Quality of Care and of Compensating Tortfeasors' Victims are Ravaged by Damage Caps.—

a. The quality of health care in the United States will not be sufficiently protected if those responsible for injury are not liable for all of the damages they cause.—The courts should also consider the tort system's traditional role of increasing the quality of care through deterrence.[92] Public Citizen, an advocacy group, reports that between 150,000 and 300,000 people each year are victims of physicians' negligence.[93] It has been estimated that 10,000 people die annually from the negligent administration of anesthesia.[94] Nearly 20% of patients leave the hospital with a condition that they did not have when they arrived.[95] The percentage of patients who die from complications of surgery attributable to malpractice may be as high as 35%, and nearly 50% of postoperative complications have been attributed to malpractice.[96] The quality of care in the United States is below that of several other developed nations, and the tort system (and the threat of liability) has been a motivating factor toward improvements in that care.[97] Damage caps may even encourage "more low quality doctors to enter the field" and "reduce the level of effort and care taken to prevent the incidence

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GLOBE, Aug. 9, 1993, at 6 ("Caps on noneconomic damages have not had the dramatic impact that supporters think.") (statement of Clifford D. Stromberg, Chairman, ABA Working Group on Health Care Reform).

90. Rasor, *supra* note 59, at 131.

91. *See, e.g.*, Hoffman v. United States, 767 F.2d 1431, 1437 (9th Cir. 1985) (upholding damage caps under rational basis review); Fein v. Permanente Med. Group, 695 P.2d 665, 684 (Cal. 1985); Adams v. Children's Mercy Hosp., 832 S.W.2d 898, 905 (Mo. 1992).

92. Rasor, *supra* note 59, at 135. Rasor also stated that:

> The primary purpose of the tort system is to provide compensation to individuals who have been wrongly injured according to society's standards. Assuring the availability of health care is not the province of the tort system. The focus of tort reform should concentrate more heavily on: (1) providing fair and prompt compensation to injured patients, (2) improving the quality of care, and (3) enhancing the physician-patient relationship.

Id. at 132.

93. *See* John F. Bales, *Medical Malpractice Developments, in* HEALTH CARE REFORM LAW INSTITUTE 563, 621-22 (PLI, Comm. Law Practice Course Handbook Series No. 700, 1994) (citing PUBLIC CITIZEN'S HEALTH RESEARCH GROUP, 10,289 QUESTIONABLE DOCTORS (1993); PUBLIC CITIZEN'S HEALTH RESEARCH GROUP, COMPARING STATE MEDICAL BOARDS (1993)).

94. *See* Don Sperling, *The Dark Side of Medical Care*, USA TODAY, May 12, 1988, at D4.

95. *Id.*

96. *Id.*

97. *See* Rasor, *supra* note 59, at 135.

of malpractice."[98]

The real problems that legislatures should address are the number of negligent and incompetent physicians and the profession's inadequate self-regulation.[99] Further, insurance companies could reduce their costs, and thus the premiums they charge, by changing from group premium rates to an experience rated premium.[100] With experience rated premiums, the performance of each physician would be monitored; those whose performances were consistently inadequate would be priced out of the market and the public would be protected from their continued malpractice. If physicians had more effective self-regulation, if insurance companies used experience rated premiums, and if these industries were held responsible for the full amount of damages they caused, quality control could be effectuated simultaneously with lower premiums for proficient physicians. In contrast, "[t]ort reform that simply creates barriers to bringing valid negligence suits frustrates the needed deterrent value our tort system should provide."[101]

b. Damage caps result in those victims' most severely injured receiving inadequate compensation in order to benefit the doctors who have caused the harm.—One of the tort system's main objectives is to compensate victims of those who have breached their standard of care and caused harm. Damage caps in medical malpractice acts create classifications that result in discrimination between those who are less severely injured and those who are more severely injured and between the victims of medical malpractice and all other tort victims.[102] Medical malpractice damage caps also create a special privilege for physicians, discriminating against all other tortfeasors.[103] These classifications deny those adversely classified (those most severely injured, victims of medical malpractice, and nonmedical tortfeasers) equal protection of the laws, and they destroy one of the tort system's primary goals—to compensate victims.

"[E]qual protection, if approached in all candor, is a matter of morality and justice. . . . Purpose and rationality are simply means of organizing and displaying considerations relevant to a moral decision."[104] Thus, the question, no matter what

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98. Cleckley & Hariharan, *supra* note 61, at 59-60. Law and economics professionals generally agree that in order to have the most efficient, cost effective deterrence, the parties responsible for harm should bear the full cost, including noneconomic injuries, of the harm they cause. WILLIAM M. LANDIS & RICHARD A. POSNER, THE ECONOMIC STRUCTURE OF TORT LAW 186-87 (1987).

99. Cleckley & Hariharan, *supra* note 61, at 66.

100. *Id.* at 57-58.

101. Rasor, *supra* note 59, at 136. As one commentator succinctly stated: "[W]e cannot sacrifice human lives so that a handful of incompetent doctors can afford to buy expensive cars." Cleckley & Hariharan, *supra* note 61, at 18.

102. Willis, *supra* note 18, at 1338. *See also* Fein v. Permanente Med. Group, 695 P.2d 665, 682 (Cal. 1985); Jones v. State Bd. of Med., 555 P.2d 399, 411 (Idaho 1976); Carson v. Maurer, 424 A.2d 825, 830 (N.H. 1980).

103. *See* Willis, *supra* note 18, at 1339; *Carson*, 424 A.2d at 830.

104. Torke, *supra* note 2, at 320, 322. For a view suggesting moral issues are better decided by the courts than the legislature, see MICHAEL J. PERRY, THE CONSTITUTION, THE COURTS, AND

phraseology the courts use, should be whether it is just and moral for the burden of noneconomic caps on recovery to fall on victims with high damages, while simultaneously benefiting the physicians who caused the harm and the insurance industry which has contracted and been paid to shoulder the risk of these damages.[105] Although this "moral" question does not present the courts with a "test" as such, as a factor in the courts' analyses, its answer clearly should guide their consciences toward the conclusion that these caps should not stand.[106]

5. States' Constitutions are Unique from the Federal and Subject to Broader Interpretation.—State constitutions are more code-like and explicit than the U.S. Constitution, and therefore they are inherently more susceptible to expansive readings. [107] Where a state court uses minimal scrutiny, it may be abdicating its role as interpreter of the state's constitution and the principles upon which its constitution was founded.[108] The language of state constitutions often differs from the Fourteenth Amendment's terms. The state courts are more closely tied to their communities. They are more likely to be aware of the size and power of the lobbyists in their states, the realities of whether damage caps are necessary or effective, and what best serves the purposes of their tort systems.[109]

HUMAN RIGHTS 100 (1982), stating: "In any recent generation, certain political issues have been widely perceived to be fundamental moral issues as well . . . . Our electorally accountable policymaking institutions are not well suited to deal with such issues in a way that is faithful to the notion of moral evolution . . . ."

105. From 1976 to 1983, the proportion of the average physician's gross income necessary to pay malpractice premiums decreased from 4.4% to 3.69%. Sylvia A. Law, *A Consumer Perspective on Medical Malpractice*, 49 LAW & CONTEMP. PROBS. 305, 308 (1986).

106. The use of conscience or morality as a factor in a court's analysis is demonstrated in *Duren v. Suburban Community Hosp.*, 495 N.E.2d 51, 56 (Ohio, C.P. Cuyahoga County 1985) wherein the court stated that the "scheme of shifting responsibility for loss from one of the most affluent segments of society [, i.e., doctors,] to those who are most unable to sustain that burden, i.e., horribly injured or maimed individuals, is not only inconceivable, but shocking to [the] conscience."

107. *See* Lawrence Schlam, *State Constitutional Amending, Independent Interpretation, and Political Culture: A Case Study in Constitutional Stagnation*, 43 DEPAUL L. REV. 269, 276-77 (1994).

108. *See* Willis, *supra* note 18, at 1349.

109.

> Once the Warren Court had developed expansive interpretations of citizens' federal constitutional rights, state courts had no incentive to vindicate rights under the state constitution—even if litigants had been feckless enough to claim them. During this period, raising state constitutional issues became futile. Thus, the "social consensus" in favor of the federal Constitution arose to fulfill a need that no longer exists; today, the states' constitutions frequently offer *more* protection than their federal counterpart. Increasing reliance on state constitutions is simply a return to normalcy. . . . For those of us who believe that the nation is too large a polity ever to achieve meaningful community, the recent weakening of distinctive state identities argues *for* a vital state constitutionalism as a restorative tonic.

C. Caps on Noneconomic Damages

A number of legislatures have enacted medical malpractice acts which contain caps on noneconomic damages.[110] These states limit the amount of recovery a victim of malpractice can be compensated for inconvenience, physical impairment, and pain-and-suffering.[111]

Schuman, *supra* note 49, at 280. Schuman also argues for state constitutionalism because he found "recent *federal* constitutionalism to be impoverished—not because it is increasingly conservative, but because it is increasingly petulant, shrill, formulaic, and intellectually incoherent." *Id.* at 277 n.18 (emphasis in original).

110. *E.g.*, CAL. CIV. CODE § 3333.2 (West 1996) ($250,000 limit on noneconomic damages in medical malpractice actions); COLO. REV. STAT. ANN. § 13-21-102.5 (West 1989 & Supp. 1996) ($250,000 limit on noneconomic damages in medical malpractice actions, unless the plaintiff presents clear and convincing evidence of such damages, in which case the limit is $500,000); MASS. GEN. LAWS ANN. ch. 231, § 60H (West Supp. 1996) ($500,000 limit on noneconomic damages "per incident" unless there is a finding of "a substantial or permanent loss or impairment of a bodily function or substantial disfigurement, or other special circumstances"); MD. CODE ANN., CTS. & JUD. PROC. § 11-108 (1995 & Supp. 1996) ($500,000 cap on noneconomic damages); MICH. COMP. LAWS ANN. § 600.1483 (West 1996) ($280,000 limit on noneconomic damages in medical malpractice actions unless the victim has permanent paralysis, has permanently impaired cognitive capacity, or permanent infertility, in which case the cap on noneconomic damages is $500,000); MO. ANN. STAT. § 538.210 (Vernon 1988 & Supp. 1997) ($350,000 limit on noneconomic damages in medical malpractice actions per defendant and per occurrence); W. VA. CODE § 55-7B-8 (1994 & Supp. 1996) ($1,000,000 limit on noneconomic damages in medical malpractice actions); WIS. STAT. ANN. § 893.55(4) (West 1997) ($350,000 per occurrence limit on noneconomic damages in medical malpractice actions, adjusted to reflect changes in the consumer price index).

111. *See* Wesley Leonard & Marcia B. Stevens, Note, *Legislative Limitations on Medical Malpractice Damages: The Chances of Survival,* 37 MERCER L. REV. 1583, 1585 (1986). The American Law Institute defines pain and suffering as follows:

> Pain and suffering is a term that actually covers a number of categories of nonpecuniary loss, the most important of which are the following:
>
> (1) Tangible physiological pain suffered by the victim at the time of injury and during recuperation . . . .
>
> (2) The anguish and terror felt in the face of impending injury or death . . . .
>
> (3) The immediate emotional distress and long-term loss of love and companionship resulting from the injury or death of a close family member.
>
> (4) Most important, the enduring loss of enjoyment of life by the accident victim who is denied the pleasures of normal personal and social activities because of his permanent physical impairment . . . .

Steven P. Croley & Jon D. Hanson, *The Nonpecuniary Costs of Accidents: Pain-and-Suffering Damages in Tort Law*, 108 HARV. L. REV. 1785, 1789 n.11 (1995) (quoting 2 AMERICAN LAW INSTITUTE, ENTERPRISE RESPONSIBILITY FOR PERSONAL INJURY 199-200 (1991) (footnotes omitted)).

Compensating victims of malpractice for the often substantial decrease in the quality of life they suffer seems rational. There is no reason to believe that a legislature's broad assessment of the maximum value of all cases is more rational or fair than the jury system's case-by-case assessment of damages. If a trial court determines that the jury award is above the reasonable maximum amount justified by the facts of the case, or not "within the bounds of reasonable inference from the evidence,"[112] then the court, depending on the jurisdiction, is likely to have the option of remittitur. Using remittitur, the judge conditionally orders a new trial unless the plaintiff agrees to accept a lesser amount of damages which the judge determines is reasonable.[113] Using this device, the question of unreasonably high jury awards is evaluated on a case by case basis, in light of the evidence, and is not simply answered by an across the board arbitrary limit set by the legislature and the lobbyists. "It is intriguing to question why belief in the . . . excessiveness of non-economic damages [is] so widespread and why many authors and policymakers have failed to recognize the flimsy or contrary evidence . . . ."[114] Caps on noneconomic losses arbitrarily discriminate against those most severely injured. Furthermore, they are unlikely to effectuate their intended purpose of lowering malpractice insurance premiums and health care costs. Some states, recognizing this, have struck down such caps as violative of their states' equal protection provisions.

1. Cases Using Independent Three-tiered Analysis Involving Caps on Noneconomic Damages.—Most state courts using an independent tiered analysis have not gone so far as to use strict scrutiny when they face an equal protection challenge to a medical malpractice act.[115] State courts have generally held that the right to bring an action is not fundamental and that malpractice victims are not a suspect class.[116] Thus, courts using the tiered analysis have either used the rational

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112. Glazer v. Glazer, 278 F. Supp. 476, 481-82 (E.D. La. 1968) (quoting Miller v. Maryland Cas., 40 F.2d 463, 465 (2d Cir. 1930)). *See also* Bonera v. Sea Land Serv., 505 F.2d 665, 669 (5th Cir. 1974) (remission allowed only if verdict was above the maximum award which is reasonably supported by the evidence).

113. *See* Gorsalitz v. Olin Mathieson Chem. Corp., 429 F.2d 1033, 1047 (5th Cir. 1970); *Glazer*, 278 F. Supp. at 481-82.

114. Neil Vidmar, *Empirical Evidence on the Deep Pockets Hypothesis: Jury Awards for Pain and Suffering in Medical Malpractice Cases*, 43 DUKE L.J. 217, 263 (1993).

115. Willis, *supra* note 18, at 1339. *See, e.g.*, Jones v. State Bd. of Med., 555 P.2d 399, 410 (Idaho 1976); Everett v. Goldman, 359 So. 2d 1256, 1266 (La. 1978); Carson v. Maurer, 424 A.2d 825, 830 (N.H. 1980). For rare examples of courts applying strict scrutiny to medical malpractice acts, see Kenyon v. Hammer, 688 P.2d 961, 975 (Ariz. 1984) (holding that, under the Arizona Constitution, the right to bring and pursue a medical malpractice action was fundamental); Galloway v. Baton Rouge Gen. Hosp., 602 So. 2d 1003, 1005 (La. 1992) (holding that "[b]ecause the Act 'constitutes a special legislative provision in derogation of general rights available to tort victims' it must be strictly construed" (quoting Head v. Erath Gen. Hosp., 458 So. 2d 579, 581-82 (La. Ct. App. 1984))).

116. Willis, *supra* note 18, at 1339. *See, e.g.*, *Jones*, 555 P.2d at 410; *Everett*, 359 So. 2d at 1266; *Carson*, 424 A.2d at 830.

basis or intermediate scrutiny test when evaluating whether damage caps are violative of their equal protection provisions.[117] When they use the rational basis test, the courts' rationale generally includes the idea that the legislature is better equipped to deal with and decide social and economic issues.[118] When courts determine that an intermediate classification is more appropriate, the presumption is that important rights are at issue and should not be infringed unless the means and ends of the legislation bear a substantial relationship to each other.[119] Courts using this level of review have at times questioned whether there was in fact a health care crisis.[120]

In *Carson v. Maurer*, utilizing intermediate scrutiny, the New Hampshire Supreme Court determined that because the right to recover for personal injuries was an important right, the legislature's $250,000 limit on noneconomic damages violated New Hampshire's equal protection provisions.[121] The court looked to see whether the legislative means (i.e., classification through damage caps) were reasonable rather than arbitrary, and whether these means had a close and substantial relationship to the legislative objectives of stabilizing the risks to malpractice insurers and of reducing the cost of such insurance.[122]

The New Hampshire court concluded that the relationship between the legislative goal and means was weak and unfair, and therefore the legislation failed to meet the "fair and substantial" relationship test.[123] The classification was deemed unfair because it placed the burden of loss, and thereby the burden of supporting the medical industry, on those most severely injured.[124] The court determined that the relationship between the means and ends was weak because the number of plaintiffs suffering noneconomic damages above the limit were few, and because damage awards were only negligibly contributing to the costs of malpractice insurance premiums.[125] Thus, the court, applying an intermediate level of review, decided that the classifications created by caps on noneconomic damages were not reasonable. Because they did not bear a close and substantial relationship to the stabilization of malpractice insurance and health care costs, they

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117. Willis, *supra* note 18, at 1339.

118. *Id.*

119. *Id. See, e.g.*, *Carson*, 424 A.2d at 830 (right to recover for personal injuries is sufficiently important to require intermediate scrutiny).

120. Willis, *supra* note 18, at 1340. *See, e.g.*, Arneson v. Olson, 270 N.W.2d 125, 136 (N.D. 1978) (determining that there was insufficient evidence of an actual medical malpractice crisis in North Dakota).

121. *Carson*, 424 A.2d at 838 (holding that N.H. REV. STAT. ANN. § 507-c (1979) (the damage cap provision) violated the state's equal protection guarantees under N.H. CONST. art. I, §§ 2, 12). *See also* Brannigan v. Usitalo, 587 A.2d 1232 (N.H. 1991) (holding that a subsequently enacted higher cap on noneconomic damages ($875,000) also violated New Hampshire's equal protection provisions).

122. *Carson*, 424 A.2d at 831.

123. *Id.* at 838.

124. *Id.* at 836.

125. *Id.*

violated New Hampshire's equal protection provisions under its independent tiered analysis.[126]

On the other hand, in *Fein v. Permanente Medical Group*, the California Supreme Court applied the minimal scrutiny test to a statutory cap on noneconomic damages in a medical malpractice case.[127] The court determined that the cap was reasonably related to reducing the costs of malpractice insurance and that "[a]lthough reasonable persons can certainly disagree as to the wisdom of this provision, we cannot say that it is not rationally related to a legitimate state interest."[128] The *Fein* court did not consider whether the damage caps effectuated their purported end; the court concluded that the choice of means and the determination that the necessity for action existed were decisions for the legislature.[129] Although the California courts have interpreted their equal protection provisions to provide broader protection than the federal provisions in some cases,[130] their continued reliance on a tiered analysis, as applied to noneconomic damage caps, has resulted in no greater protection than that afforded by the traditional federal analysis.[131]

2. Cases Using an Independent Single-test Analysis Involving Caps on Noneconomic Damages.—The Supreme Court of Alabama struck down a statute that limited noneconomic damages to $400,000 as violative of its equal protection provisions under an independent single-test analysis.[132] The victim had been given a shot in an inappropriate location which resulted in a loss of feeling in her fingers and later caused injury leading to gangrene and amputation. The court noted that the burden of a noneconomic injury is no less real than an economic injury, in that, to "a child who has been paralyzed from the neck down, the only compensation for a lifetime without play comes from noneconomic damages."[133]

The Alabama test, under its equal protection provision, was whether the classification was reasonably related to the legislative ends and whether the benefit

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126. *Id.* at 838.

127. 695 P.2d 665, 682 (Cal. 1985) (holding that CAL. CIV. CODE § 3333.2 (West Supp. 1997), which capped noneconomic damages, did not violate either the federal or state constitution). It is interesting to note that this cap has remained at $250,000 since its adoption in 1975.

128. *Id.* at 681 (footnote omitted). The court noted that even though victims will likely receive lower damages, it is well established that "the Legislature retains broad control over the measure, as well as the timing, of damages that a defendant is obligated to pay and a plaintiff is entitled to receive." *Id.* at 680.

129. *Id.* at 680, 683.

130. *See, e.g.*, Serrano v. Priest, 557 P.2d 929, 949-50 (Cal. 1976) (Serrano II).

131. On appeal, the U.S. Supreme Court dismissed the case because they found it involved no federal question. *See* Fein v. Permanente Med. Group, 474 U.S. 892 (1985). *See also* Willis, *supra* note 18, at 1346-47, stating: "In dismissing the appeal . . . the Supreme Court affirmed the holding of the California Supreme Court on its merits and elevated *Fein* to the level of controlling [federal] precedent."

132. Moore v. Mobile Infirmary Ass'n, 592 So. 2d 156, 170 (Ala. 1991).

133. *Id.* at 169 (quoting Fein v. Permanente Med. Group, 695 P.2d 665, 689 (Cal. 1985) (Bird, C.J., dissenting)).

society gained from the Act outweighed the burden which it imposed on private rights.[134] The court found that the legislative purpose of increasing the availability of health care did not outweigh the burden placed on those most severely injured by the classification.[135] They also determined that the statute created "favored subclasses within the favored class by shielding those health care providers whose actions are the most egregious."[136] The court assessed the likely effectiveness of the statute (and similar statutes in other states) in reaching its purported end and found that the relationship between the cost of health care and the cap on damages was attenuated and remote.[137] Thus, recognizing that the right to noneconomic damages was an important right, that those most egregiously injured would not be compensated, that the deterrence effect of malpractice actions would be decreased by the caps, and that the caps were unlikely to aid in the achievement of their purported goal, the court concluded that the caps on noneconomic damages were unreasonable and violated the state's constitution under its independent single-test analysis.[138]

3. Cases Using the Traditional Federal Analysis Involving Caps on Noneconomic Damages.—The Missouri Supreme Court, in *Adams v. Children's Mercy Hospital*,[139] followed the traditional federal analysis in upholding a cap on noneconomic damages. The Missouri statute limited the amount of noneconomic damages in a medical malpractice case to $350,000.[140] In this case, an anesthesiologist was found culpable by the jury for giving an eight-year-old girl too much saline solution, causing brain damage, epilepsy, and blindness. The jury had awarded the girl $13,905,000 in noneconomic damages. The court held that the legislature's objective of procuring affordable health care was rationally related to this classification.[141] The court analogized this limitation on recovery to the legislature's power to abrogate completely a cause of action.[142] This analogy seems to miss the whole point of the equal protection challenge; the legislature cannot abrogate a cause of action for only some similarly situated persons—at least not without some "rational basis" for its classification. Nevertheless, applying the traditional tiered analysis, the court determined that this cap on noneconomic damages did not violate equal protection.

The Ninth Circuit in *Hoffman v. United States*[143] similarly applied the minimal scrutiny test to a statute limiting noneconomic damages. The court found that the

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134. *Moore*, 592 So. 2d at 166.

135. *Id.* at 167.

136. *Id.* at 166-67.

137. *Id.* at 167-69.

138. *Id.* at 169.

139. 832 S.W.2d 898 (Mo. 1992).

140. MO. ANN. STAT. § 538.210 (West 1996).

141. *Adams*, 832 S.W.2d at 907.

142. *Id.* ("If the legislature has the constitutional power to . . . abolish causes of action, [it] also has the power to limit recovery in those causes of action.")

143. 767 F.2d 1431, 1437 (9th Cir. 1985). Under the Federal Tort Claims Act, the law of the state where the claim against the United States arose applies. 28 U.S.C. § 1346(b) (1994).

damage cap was rationally related to a legitimate state purpose, showing extreme deference to the legislature by accepting its determination that a crisis existed and that the cap would be an effective means to limit the rising cost of malpractice insurance.[144] The court only required that the legislature have a "plausible belief" in the existence of the problem and that its means would effectuate some solution; it did not require the legislature to show that its presumptions were factually based.[145] Thus, under the traditional tiered analysis, the cap on noneconomic damages withstood an equal protection challenge.

D. Caps on Total Recovery

The arguments made for and against caps on total recovery are similar to those pertaining to noneconomic damage caps. The caps on total recovery appear to be even more egregious than caps on noneconomic damages. These caps may result in a victim of malpractice not being compensated for all of the medical expenses resulting from her injury or for other out-of-pocket costs resulting from the malpractice. In addition, the measure of actual damages is less likely to be speculative than a calculation of noneconomic damages.[146] The argument that caps are necessary because a jury might overcompensate a victim rings hollow when the damages involved are concretely quantifiable and the caps are below this amount. Those most severely injured will sustain this onerous price.

A government report in 1993 found that about one-half of all proceeds involved in a plaintiff's medical malpractice case do not go to the plaintiff, but rather are spent in administrative costs and legal fees.[147] Although this information is used as an argument in favor of damage caps, it further reveals the drastic results caused by caps on total recovery. A successful victim with high damages and a long, drawn-out case may end up owing her attorneys more than she receives. Although cases taken on a contingency basis may decrease this possibility, many malpractice acts have also limited contingency fees. Thus, the number of attorneys willing to take cases on contingency has also decreased. The possibility that a victim will owe more than she receives is not illusory. These caps will deter the most egregiously harmed victims from bringing suits, and those physicians whose malpractice results in the most exorbitant harm will not be subject to legal sanctions. The effective weeding out of the inept, and the subsequent increase in the quality of care patients receive, will not occur. The quality control purpose of

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144. *Hoffman*, 767 F.2d at 1437.

145. *Id.*

146. Most proponents note that when caps on total damages are compared to caps on noneconomic damages, noneconomic damages appear "speculative in nature and susceptible to manipulation by juries motivated to overcompensate a sympathetic plaintiff." Amanda E. Haiduc, Note, *A Tale of Three Damage Caps: Too Much, Too Little and Finally Just Right,* 40 CASE W. RES. L. REV. 825, 830 (1990).

147. OFFICE OF TECHNOLOGY ASSESSMENT, U.S. CONGRESS, IMPACT OF LEGAL REFORMS ON MEDICAL MALPRACTICE COSTS (1993), *microformed on* OTA Doc. No. BP-H-119 (U.S. Gov't Printing Office).

the states' tort systems is too important to be discarded because powerful interest groups have managed to get legislation enacted for their benefit.

1. Cases Using Independent-Tiered Analysis Involving Caps on Total Recovery.—The Supreme Court of North Dakota, applying an intermediate level of review in *Arneson v. Olson*, determined that a $300,000 cap on all claims arising from the same occurrence violated both the state and federal equal protection provisions.[148] The test that the *Arneson* court used for its intermediate analysis was expressed by the court as "whether there is a sufficiently close correspondence between [the] statutory classification and legislative goals."[149] The legislative purpose set out by the statute included the assurance of "the availability of competent medical and hospital services," to eliminate "the expense involved in nonmeritorious malpractice claims," to assure "adequate compensation to patients with meritorious claims," and to encourage qualified physicians to move to and remain in the state.[150] The court determined that the statute did not effectuate these enumerated ends.[151] The court also found that the statute did not provide adequate compensation to those with meritorious claims; it limited recovery to those most seriously injured and most in need of compensation.[152] The court noted that those most severely injured often have normal life expectancies, yet now must incur the cost of "care around the clock."[153]

The *Arneson* court dismissed the government's argument that the classification was justified because of some equalizing quid pro quo analysis, whereby the victims' loss of recovery is offset by the state populace's gain in lower insurance and medical costs.[154] The court concluded that the limitation was

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148. 270 N.W.2d 125, 136 (N.D. 1978). The court determined that section 26-40.1-11 of the North Dakota Century Code (repealed 1983) violated article I, section 20 of the North Dakota Constitution. The court compared the Act to an automobile guest statute challenge, in which the court had applied an intermediate level of scrutiny. For its federal analysis the court distinguished this case from *Duke Power Co. v. Carolina Envtl. Study Group*, 438 U.S. 59 (1978), by finding that in this case, unlike *Duke Power*, there was a "strong possibility" of victims suffering damages above the cap. *Arneson*, 270 N.W.2d at 135 n.6.

149. *Arneson*, 270 N.W.2d at 135.

150. N.D. CENT. CODE § 26-40.1-01 (1978) (repealed 1983). The statute further provided that "[t]he legislative assembly finds that the exercise of the sovereign and police power of this state for the good of the majority of its citizens is necessary to improve the availability of medical care, to assure its competence, and to reduce the cost thereof." *Id.*

151. *Arneson*, 270 N.W.2d at 135.

152. *Id.* "Furthermore, the very seriously injured malpractice victim, because of the recovery limitation, might be unable to recover even all the medical expenses he might incur, in which event he would recover nothing for any other loss suffered." *Id.* at 136 (quoting Wright v. Central Dupage Hosp. Assoc., 347 N.E.2d 736, 742 (Ill. 1976)).

153. *Id.*

154. *Id.* at 136. "This *quid pro quo* does not extend to the seriously injured medical malpractice victim . . . ." *Id.* (quoting *Wright*, 347 N.E.2d at 742).

arbitrary[155] and did "nothing toward the elimination of nonmeritorious claims."[156] Although the court conceded that the Act might induce physicians to practice in the state, it concluded that the expense of this end was paid for by those with valid claims who would be unable to recover for their injuries.[157] The court determined that the trial court's finding that there was no crisis in North Dakota, in terms of the availability or cost of malpractice insurance, was not clearly erroneous. Thus, in light of the harms of the classification, there was not a "sufficiently close correspondence between statutory classification and legislative goals"[158] for the cap on total recovery to avoid violation of the state constitution under its independent tiered review.[159]

The Idaho Supreme Court in *Jones v. State Board of Medicine* directed the trial court on remand to apply an intermediate level of review to a statute limiting total damages against physicians to $150,000 per claim and $300,000 per occurrence of medical malpractice.[160] The *Jones* court found that where, on its face, a statute was discriminatory and where the classification chosen and the professed purpose lacked an apparent relationship, higher scrutiny was warranted.[161] The court noted that there were other explanations for losses in the insurance industry, including stock market reversals and the chosen investment strategies of the insurance industries themselves.[162]

The Idaho court concluded that there was not a factual basis in the record for

> understanding the nature and scope of the alleged medical malpractice crisis nationally or in Idaho. It is thus impossible for this Court to assess the necessity for this legislation and whether or not the limitations on medical malpractice recovery set forth in the Act bear a fair and substantial relationship to the asserted purpose of the Act.[163]

The court thus seemed to be calling for the legislature to prove not only the existence of a crisis, but also to show that its measures would be effective in reaching the statute's avowed purpose. Absent such a showing, under its independent tiered analysis through which this court elevated its scrutiny of caps on total recovery to an intermediate level, the Act would not withstand an equal protection challenge.

2. *Cases Using Independent Single Test Analysis Involving Caps on Total Recovery.*—The Alabama Supreme Court in *Smith v. Schulte*, applying the same

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155. *Id.*

156. *Id.* at 135-36.

157. *Id.* at 136. ("One comparison of rates given to the Legislature shows that premiums in North Dakota are the sixth lowest in the United States.").

158. *Id.* at 135.

159. *Id.* at 135-36.

160. 555 P.2d 399, 411, 416 (Idaho 1976).

161. *Id.* at 411.

162. *Id.* at 413.

163. *Id.* at 413-14.

independent single test it laid out in *Moore*,[164] struck down a cap on total recovery as violative of its equal protection provisions.[165] The victim in the case was injured when an endotracheal tube had been negligently placed through her esophagus and into her stomach instead of into her lungs. The tube was left there long enough to cause oxygen deprivation causing her brain to swell out of its cavity and leading to her death. Although the trial court had agreed that the jury award was supported by the evidence, it reduced that verdict to the maximum allowed by an Alabama statute.[166]

Basing its conclusion solely on state provisions, the *Smith* court concluded that the benefit of this legislation to society did not outweigh the burden it placed on private individuals.[167] The court stated that in Alabama, "citizens enjoy a fundamental right not to be deprived of liberty and life as a consequence of fatal malpractice," and "representatives of victims of fatal malfeasance, acting as agents of the citizen body, need to vindicate the abridgment of that interest."[168] The court thus seemed to recognize the deterrent function of the tort system as a persuasive factor in its analysis. One classification created by the statute that the court was particularly concerned with, was the creation of subclasses "according to the reprehensibility of the defendant's conduct, that is, by separating those tort-feasors whose conduct warrants damages in excess of the cap from those whose conduct does not."[169]

The *Smith* court was also persuaded by the statistics cited in *Moore*, which indicated that there was little, if any, correlation between damage caps and lowering the cost of health care—in part because malpractice insurance was a comparatively small expense of health care providers, with little effect on prices paid by consumers.[170] Because the right to recover was deemed "fundamental" by the court, and because the statistics indicated a remote relationship between the classifications and the statute's professed ends, the court determined that the benefit to society was not justified by the burden on private rights; thus, under its independent single-test analysis, the cap on total recovery in medical malpractice actions violated Alabama's equal protection guarantees.[171]

In *Lucas v. United States*,[172] the Texas Supreme Court struck down a damage cap on total recovery.[173] The court did not base its decision on "equal protection"

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164. *See supra* Part III.C.2.

165. 671 So. 2d 1334 (Ala. 1995), *cert. denied*, 116 S. Ct. 1849 (1996).

166. *Id.* at 1336-37 (applying ALA. CODE § 6-5-547 (1975), which limited total damages to $1,000,000 against a health care provider).

167. *Id.* at 1342.

168. *Id.* at 1338-39.

169. *Id.* at 1339.

170. *Id.* at 1339-41.

171. *Id.* at 1342.

172. 757 S.W.2d 687 (Tex. 1988).

173. The statute limited the liability of health care providers to $500,000 with exceptions for the costs of necessary medical and custodial care. TEX. REV. CIV. STAT. ANN. art. 4590i §§ 11.02-03 (West 1986).

provisions, but instead found that the cap violated the open court provisions of the Texas Constitution.[174] The analysis used by the court, however, was remarkably similar to other states' use of an independent single test for equal protection; the court cited to several state cases which have struck down caps on equal protection grounds.[175] The test the court used to determine whether the damage cap violated the open court provisions was whether the victim "has a cognizable common law cause of action that is being restricted . . . [and whether he can] show that the restriction is unreasonable or arbitrary when balanced against the purpose and basis of the statute."[176]

The *Lucas* court found that it was unreasonable and arbitrary to restrict the recovery of those catastrophically injured by medical malpractice in a "speculative experiment" to see if insurance rates would decrease.[177] In reaching this conclusion, the court found that there was insufficient data to indicate that these caps would effectively lower insurance rates or the cost of health care.[178] Furthermore, the uniqueness of the Texas Constitution and its importance in protecting individual liberties was also persuasive to the court.[179] Because the burden of this cap was sustained by those most severely injured who had an important common law right to recovery, the court found that the cap was unfair and unreasonable and therefore violated Texas' open court provisions.[180]

Although the Texas court did not profess to be applying equal protection provisions to this cap on total recovery, the rationales and terminology it used are difficult to discern from such an analysis. The court may have chosen its open court provisions to avoid confusion with the federal analysis.[181] This seems likely because the case came to them as a certified question from a federal appellate court that had already determined that the Act did not violate the Fourteenth Amendment.[182] However, the Texas Constitution may simply contain language less conducive to an express equal protection analysis. In any case, the result is that Texans were protected, equally, from damage caps on total recovery.

3. Cases Using the Traditional Federal Analysis Involving Caps on Total Recovery.—State decisions applying the minimal scrutiny test usually find that the statutory damage caps do not violate their own constitutions or the Federal Constitution.[183] The Indiana Supreme Court, prior to its recent decision to break

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174. *Lucas*, 757 S.W.2d at 692.

175. *Id.* at 688-91.

176. *Id.* at 690 (quoting Sax v. Votteler, 648 S.W.2d 661, 666 (Tex. 1983)).

177. *Id.*

178. *Id.* at 691.

179. *Id.* at 692.

180. *Id.* (agreeing with Carson v. Mauerer, 424 A.2d 825 (N.H. 1980)).

181. The court noted that "there is no provision in the federal constitution corresponding to our constitution's 'open courts' guarantee." *Id.* at 690.

182. *Id.* at 688. The federal case which determined that the cap did not violate the Fourteenth Amendment was *Lucas v. United States*, 807 F.2d 414 (5th Cir. 1986).

183. Willis, *supra* note 18, at 1343.

from the federal analysis in *Collins v. Day*,[184] provided a typical example of such analysis in *Johnson v. St. Vincent Hospital, Inc.*[185] Although the *Johnson* court used language similar to that of an intermediate scrutiny analysis, it actually applied a minimal scrutiny test.[186] The court presumed that the statute limiting recovery to $500,000 was constitutional and required the plaintiff to bear the burden to refute any conceivable basis which might justify the legislature's limit on malpractice damages.[187]

The *Johnson* court relied in part on the U.S. Supreme Court's precedent of *Dandridge v. Williams*, in finding that, because this was a challenge to a social and economic regulation, the minimal scrutiny test was appropriate.[188] The court also rationalized its decision by citing to *Sidel v. Majors*,[189] in which the Indiana Supreme Court deferred to the state legislature's enactment of a statute limiting the recovery allowed by guest passengers who sued negligent drivers. The *Johnson* court determined that the minimal scrutiny test was appropriate because the interest of a malpractice victim was not greater than either the guest passenger in *Sidel* or the welfare children in *Dandridge*.[190] Because of the deference given to the legislature when applying this minimal scrutiny test, the court concluded that the damage cap statute did not violate equal protection.[191]

Although the likelihood of a malpractice victim winning a suit under the minimal scrutiny test is slim, at least one state has invalidated a cap while presumably applying this test. In *Arneson v. Olson*,[192] the Supreme Court of North Dakota found a $300,000 cap on total recovery to violate the equal protection provisions of both the state and federal constitutions.[193] Although the court appeared to be applying an intermediate level of review, when it found that the statute violated the Fourteenth Amendment, it seems logical to assume, although

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184. 644 N.E.2d 72, 75 (Ind. 1994) ("[T]here is no settled body of Indiana law that compels application of a federal equal protection analytical methodology to claims alleging special privileges or immunities . . . [and Indiana's equal protection provisions] should be given independent interpretation and application."). The effect of this decision on the constitutionality of Indiana's Malpractice Act's damage caps remains to be seen.

185. 404 N.E.2d 585 (Ind. 1980).

186. Willis, *supra* note 18, at 1343 (arguing that "the *Johnson* court applied minimal scrutiny and did not actually require a 'fair and substantial relationship' despite having articulated such a test").

187. *Johnson*, 404 N.E.2d at 600 (citing Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356 (1973)).

188. *Id.* at 600 (citing Dandridge v. Williams, 397 U.S. 471 (1970)). The *Dandridge* Court applied minimal scrutiny to a statute under which welfare families with five or more children received the same amount of federal aid no matter how many additional children they were actually required to support.

189. 341 N.E.2d 763 (Ind. 1976).

190. *Johnson*, 404 N.E.2d at 600.

191. *Id.* at 601.

192. 270 N.W.2d 125 (N.D. 1978).

193. *See supra* note 148 and accompanying text.

it was not articulated, that the court also found that the cap violated equal protection under the federal rational basis analysis. If so, this rational basis test had more bite than it does as traditionally applied.

IV. Effect of New Judicial Federalism in Equal Protection Cases

As exhibited in the previous section, the effect of states' independent interpretation of equal protection pertaining to damage caps has been varied. The results are, however, more promising for victims than challenges in those states treating their equal protection provisions as mere repetitions of the federal provision. Although both methods of independent interpretation (following tiered analysis, but treating more classifications as suspect or quasi-suspect, and a single test analysis) have been successful in striking down damage caps, states following the tiered analysis run the risk of reviewing the classification under the lowest level of review, which provides no greater protection than that afforded by traditional federal analysis. In contrast, those states with a single test analysis generally treat all classifications as warranting some review (often comparable to an intermediate analysis), which may be more promising for those wishing to challenge damage caps.

Justices Marshall and Stevens have provided some insight into a useful test state courts could apply. Both suggested abandoning the tiered analysis and reviewing each case on its own merits rather than arbitrarily placing the classification in an outcome-determinative level of review. The questions that Justice Stevens offers to help determine a court's level of scrutiny[194] could be viewed as an express articulation of the factors relevant to the determination, in Justice Marshall's view, of how close the burdened right is associated with a constitutional right (which for Justice Marshall determines the level of review on a sliding scale). "By emphasizing the invidious nature of the classifications, the Marshall model also takes into account historical prejudice, stereotypes, political powerlessness, and immutability. As in the Stevens model, however, these factors are balanced against constitutional and societal interests."[195]

Both Justices Marshall and Stevens, in effect, look to a test which will balance the actual importance of the interests involved. As the individual interest which is burdened becomes more important, the means used appear less rational if the burden is not outweighed by a governmental interest. If state courts were to apply either the Marshall or Stevens analysis to damage caps, given the ineffectiveness of the caps and the importance of the rights involved, the courts would likely strike the caps as violative of equal protection.

Often, states use judicial opinions from other states when reviewing equal protection challenges to similar damage cap acts.[196] Some states, currently

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194. *See supra* Part I.D.

195. John D. Wilson, Comment, Cleburne*: An Evolutionary Step in Equal Protection Analysis,* 46 Md. L. Rev. 163, 192 (1986).

196. *See, e.g.*, Moore v. Mobile Infirmary Ass'n, 592 So. 2d 156, 158 (Ala. 1991); *Arneson*, 270 N.W.2d at 135-36; Carson v. Maurer, 424 A.2d 825, 833 (N.H. 1980).

interpreting their own equal protection provisions as the equivalent of federal provisions, might be persuaded to use an independent interpretation by the arguments in the opinions of other states' appellate courts. If states currently using the traditional federal analysis choose to afford more protection to their citizens through an independent interpretation,[197] the results may not assure all damage caps are struck down, but the probability of a successful challenge will increase from implausible to possible.

CONCLUSION

Regardless of the outcome of the debate on health care reform, the business of medicine is changing. The main impact on medical malpractice insurance and victims' compensation has resulted from actions and inactions on the part of the state legislatures and state courts. State courts should not blindly defer to the legislature by applying the traditional federal analysis in areas affecting such important rights as the right to recover from the person who caused the harm.[198] The political process offers insufficient protection to victims because doctors and insurance companies are organized and have vast resources to lobby state legislatures. Potential victims do not. Thus, the political checks on the legislature will be ineffective in this area. Furthermore, exorbitant jury awards are not a significant cause of the insurance crisis or health care costs, and caps on damages are not an effective or fair cure. The tort system's goals of deterring malpractice, and thus increasing the quality of care, and of compensating victims are frustrated

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197. *See, e.g.*, Ledbetter v. Hunter, 652 N.E.2d 543, 549 (Ind. Ct. App. 1995) (remanding a case challenging the statute of limitation in Indiana's Malpractice Act—an issue seemingly settled in *Johnson v. St. Vincent Hospital., Inc.*, 404 N.E.2d 585 (Ind. 1980)—due to the Indiana Supreme Court's announcement in *Collins v. Day*, 644 N.E.2d 72, 75 (Ind. 1994), that the state and federal equal protection analyses were no longer synonymous). *See also* Martin v. Richey, 674 N.E.2d 1015, 1019-23 (Ind. Ct. App. 1997) (holding IND. CODE § 27-12-7-1(b), medical malpractice statute of limitation, unconstitutional); Eleanor D. Kinney & Myra C. Selby, *History and Jurisprudence of the Physician-Patient Relationship in Indiana*, 30 IND. L. REV. 263, 265 n.18 (1997).

198. Robert Lockaby, Jr. suggested that the states should have a substantial role in determining whether a medical malpractice statute violated equal protection:

> Most state courts give considerable deference to the state legislatures' specific declarations in statutes that such a crisis does exist and that the substantive portions of the statute are intended to alleviate that crisis. A better approach for those courts that have yet to decide the issue would be, however, to take a more skeptical attitude toward the evidence presented by the medical profession and the insurance industry and toward the conclusion reached by the state legislature regarding the existence of a crisis. . . .
>
> . . . Proper scrutiny of the constitutional validity of state legislation demands more than a perfunctory deferral to the legislature's conclusions regarding the existence of a health care crisis in the particular state.

Robert Lockaby, Jr., Comment, *Constitutional Challenges to Medical Malpractice Review Boards*, 46 TENN. L. REV. 607, 645 (1978).

by the institution of damage caps.[199] State constitutions are unique and more susceptible to a broader interpretation resulting in more protection for its citizens.[200] State judiciaries must ensure that their citizens are equally protected from damage caps in medical malpractice legislation.[201] In order to accomplish this, they must interpret their equal protection provisions independently, each considering their own state's history, values and realities.

199.

> Medical malpractice damage caps increase the probability of a patient suffering negligent injury or death by a treating doctor. This is the unfortunate consequence of attempting to control the cost of malpractice insurance through damage caps. . . . Lives have been saved and permanent injuries averted because of the pressure placed on doctors by the threat of large verdict awards. Removing this threat is tantamount to intentionally killing or permanently injuring untold numbers of American citizens. No government can legitimately turn against its people in this manner . . . .

Cleckley & Hariharan, *supra* note 61, at 60.

200. The Texas Supreme Court aptly explained the importance of the uniqueness of state constitutional rights:

> While state constitutions cannot subtract from rights guaranteed by the United States Constitution, state constitutions can and often do provide additional rights for their citizens. The federal constitution sets the floor for individual rights; state constitutions establish the ceiling. . . .
>
> Like the citizens of other states, Texans have adopted state constitutions to restrict governmental power and guarantee individual rights. . . . Our constitution has independent vitality, and this court has the power and duty to protect the additional state guaranteed rights of all Texans. By enforcing our constitution, we provide Texans with their full individual rights and strengthen federalism.

LeCroy v. Hanlon, 713 S.W.2d 335, 338-39 (Tex. 1986) (citations and footnote omitted).

201. Ronald Ellis reminds us that:

> Justice Marshall believed in the rule of law, and he pressed our courts to make justice a reality for people who otherwise had little reason to believe in it. During the first part of his tenure on the Court, there was cause for optimism. More recently, some have expressed concern that the Court has embarked on a course of retrenchment. Justice Marshall was not the kind of advocate to admit defeat; instead, he took such setbacks as a challenge to develop more creative legal approaches. That is an important lesson for all of us who carry on his work.

Ronald L. Ellis, *In Memory of Thurgood Marshall*, 68 N.Y.U. L. REV. 215, 220 (1993).