“One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections."

- Justice Robert Jackson, *West Virginia Board of Education v. Barnette* 319 U.S. 624 (1943).

Statutes of Repose and the Equal Protection Clause of the 14th Amendment of the U.S. Constitution

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Introduction

The right of sick or injured people to at least have a day in court is fundamental to the notion of equal protection and should not vary depending on the result of any election or misguided legislative whim. The equal protection clause of the 14th Amendment of the U.S. Constitution, which states in part that "no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws,"[1] would seem to further the notion held by the founders of our country that all people are created equal and possess certain inalienable rights to be regulated by state and local governments in the same way.[2] However, state legislatures, often with the acquiescence of courts, have done their best to mold and modify this freedom, often with awkward results.

An area where such awkward results have been particularly apparent is state statutes of limitations and statutes of repose. Statutes of limitation are statutes in civil and criminal codes which set forth the maximum period of time, after certain events, in which legal proceedings based on those events may be commenced. Statutes of repose, on the other hand, extinguish any right to a cause of action after a proscribed amount of time – even if the potential claimant has no knowledge that the potential cause of action may exist.[3] While this paper will focus mainly on the application of the 14th Amendment's equal protection clause to state statutes of repose, this paper also will examine statutes of

[1] See United States Constitution, Amendment XIV, Section 2.
[2] The 5th Amendment Due Process clause has been interpreted as containing an equal protection requirement applicable to the federal government. See *Barron v. Baltimore*, 32 U.S. 243 (1833).
[3] See page 3, *infra*, for further discussion of statutes of repose and statutes of limitation.

limitation as a necessary complement in any discussion of statutes of repose.[4]

This paper attempts to present a balanced analysis of the reasons why many commentators find that statutes of repose are anathema to the principle of equal protection under the law; and why many commentators argue that time periods for statutes of repose should, at the very least, be lengthened, if not phased out altogether. First, this paper will argue that a statute of repose that only applies to a particular type of legal claim is invalid under the equal protection clause because it irrationally discriminates against only particular types of legal claims, in violation of the rational basis test for equal protection. Secondly, this paper argues that if a state has a statute or statutes of repose that apply/applies to all legal claims, such a statute or statutes, in order to comply with the equal protection clause's rational basis test, must establish a reasonable repose period for each type of legal claim, with the repose period for each type of claim required to be based upon the relevant latency or discovery period for the disease or injury upon which a particular legal claim is based.

Statutes of Repose and Statutes of Limitation

Statutes of limitation "are found and approved in all systems of enlightened jurisprudence."[5] They represent the legislative judgment that an adversary should have reasonable notice to defend within a specified period of time and therefore "the right to be free of stale claims in time comes to prevail over the right to prosecute them."[6] Statutes of limitation "find their justification in necessity and convenience rather than in

[4] Much of the background information discussing statutes of repose appearing is this article has recently been discussed in Note, *Excuses, Excuses: The Application of Statutes if Repose to Environmentally-Related Injuries*, 33 B.C. Envtl. Aff. L. Rev. 345 (2006). Unlike that note, this paper argues that statutes of repose limited to specific legal claims are unconstitutional under the equal protection clause.
[5] *Wood v. Carpenter*, 101 U.S. 135, 139 (1879).
[6] *Order of Railroad Telegraphers v. Railway Express Agency*, 321 U.S. 342, 349 (1944).

logic."[7] They "are by definition arbitrary, and their operation does not discriminate between the just and the unjust claim, or the avoidable and unavoidable delay."[8] The plea of limitations is considered "a meritorious defense, in itself serving a public interest."[9]

Statutes of repose, however, are different from statutes of limitation. A statute of repose establishes a "right not to be sued," rather than a "right to sue."[10] A statute of repose "limits the time within which an action may be brought and is unrelated to the accrual of any cause of action."[11] Statutes of limitation have been described as affecting only a party's remedy for a cause of action, while the running of a statute of repose serves to "nullify both the remedy and the right."[12] A statute of repose begins to run after a "triggering event," which is the event that "starts the clock running on the time allowed for filing suit."[13]

There is also a procedural difference between statutes of limitation and statutes of repose: "Statutes of limitation, though they can have a material effect on the outcome of a case, are usually characterized as procedural."[14] On the other hand, "a statute of repose is substantive . . . it relates to the jurisdiction of the court and any failure to commence the action within the applicable time period extinguishes the right itself and divests the ...

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[7] *Chase Securities Corp. v. Donaldson*, 325 U.S. at 314.
[8] *Jewson v. Mayo Clinic*, 691 F.2d 405, 411 (8th Cir. 1982) (quoting *Chase Securities Corp. v. Donaldson*, 325 U.S. at 314).
[9] *Guaranty Trust Co. v. United States*, 304 U.S. 126, 136 (1938).
[10] *Burlington Northern & Santa Fe R. Co. v. Poole Chemical Co*., 419 F.3d 355, 363 (5th Cir. 2005).
[11] *Hayes v. General Motors Corp.*, 1996 U.S. App. LEXIS 22345 (6th Cir. 1996); *Bruce v. Hamilton*, 894 S.W.2d 274, 276 (Tenn. Ct. App. 1993), overruled on other grounds by *Cronin v. Howe*, 906 S.W.2d 910 (Tenn. 1995).
[12] See *Bruce v. Hamilton*, 894 S.W.2d at 276; *Via v. General Elec. Co.*, 799 F. Supp. 837, 839 (W.D. Tenn. 1992).
[13] *Wyatt v. A-Best Products Co. Inc*., 924 S.W. 2d 98 (Tenn. App. 1995).
[14] *Wayne v. Tennessee Valley Authority*, 730 F.2d 392, 399 (5th Cir. 1984).

court of any subject matter jurisdiction which it might otherwise have."[15] These distinctions are important when distinguishing between statutes of limitation and statutes of repose for purposes of equal protection analysis or when a federal court considers frequently litigated questions involving an *Erie* issue (i.e., whether a federal court, sitting under diversity of citizenship jurisdiction, should follow a state statute of repose or limitation).[16]

Statutes of limitation and statutes of repose both serve to meet the goals described in the proceeding paragraphs. However, statutes of repose possess more of an air of absolute finality and in this way can be seen to have evolved beyond the protection afforded to wrongdoers by statutes of limitation. In Texas, for example, statutes of repose are considered to "represent a response by the legislature to the inadequacy of traditional statutes of limitations."[17] Statutes of repose "terminate any right of action after a specific time has elapsed, regardless of whether or not there has as yet been an injury"[18] to the plaintiff. A repose statute "begins to run from the occurrence of some event other than the event of an injury that gives rise to a cause of action and, therefore, bars a cause of action before the injury occurs."[19] Also, "a statute of limitation ... cuts off the remedy" whereas "a statute of repose limits the time during which a cause of action can arise and usually

[15] *Hayes v. General Motors Corp.*, 1996 U.S. App. LEXIS 22345 (6th Cir. 1996); *Bruce v. Hamilton*, 894 S.W.2d at 276 (Tenn. Ct. App. 1993), overruled on other grounds by *Cronin v. Howe*, 906 S.W.2d 910 (Tenn. 1995).
[16] See *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938); see also *Gasperini v. Center for Humanities, Inc*., 517 U.S. 1102 (1996).
[17] *Tex. Gas Exploration Corp. v. Fluor. Corp.*, 828 S.W.2d 28 at 32 (Tex. App. 1991) (discussing the Texas statute of repose that applies to claims against architects and builders).
[18] *Hoffner v. Johnson*, 2003 ND 79, 660 N.W.2d 909, 913 (2003).
[19] *Id.*, 913.

runs from an act of a defendant. It abolishes the cause of action after the passage of time even though the cause of action may not have occurred yet."[20]

Much criticism has been leveled at the absurd results created by statutes of repose when a claimant's potential claim is barred before a claimant even has reason to know of a potential cause of action against the defendant.[21] For example, a person could be exposed to a chemical or pollutant that does not result in any immediate symptoms of disease. After a period of time longer than that proscribed by a statute of repose has run, this person discovers that they now suffer from a disease or illness as a result of the exposure. Since the elapsed time period is longer than the period allowed under the applicable statute of repose to bring suit, any claim filed in a court by that person is thus extinguished by the applicable statute of repose. Courts have stated somewhat obtusely that the statute of repose:

> requires an unfortunate result . . . especially since plaintiff's injury was not ascertainable before the statute extinguished her right to bring the action, and her suit would have been timely had the amended statute not intervened. It is clear, however, that the legislature has the authority to set statutes of limitation, that the classification of 'health care providers' is justified and reasonable, and without constitutional infirmity.[22]

Despite this illogical result, courts have declared that "it is clear that the legislature has the constitutional power to enact statutes of repose which, by definition, have the possible effect of barring a claim before it occurs."[23] Many courts wash their hands of constitutional challenges to statutes of repose by stating brusquely that the results of these

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[20] *Burlington Northern & Santa Fe R. Co. v. Poole Chemical Co.*, 419 F.3d at 363.
[21] *Wyatt v. A-Best Products Co. Inc.*, 924 S.W.2d 98, 103 (Tenn. App. 1995).
[22] *Stephens v. Snyder Clinic Ass'n.*, 631 P.2d 222, 226 (Kan. 1981).
[23] *Wyatt v. A-Best Products Co. Inc.*, 924 S.W.2d at 103; see also *Jones v. Five Star Engineering, Inc.*, 717 S.W.2d 882, at 883 (Tenn. 1986)(upholding constitutionality of Tennessee Product Liability Act statute of repose); *Harrison v. Schrader*, 569 S.W.2d 822 (Tenn. 1978); *Harmon v. Angus R. Jessup Assoc., Inc.*, 619 S.W.2d 522 (Tenn. 1981).

statutes mark a legislative decision, and "its wisdom is not the concern of courts."[24] In addition, one court has stated that "the very purpose of a statute of repose is to create a settled time when such losses can no longer be subject to claims. Ample authority establishes a governmental right to do this even though harsh results can occur under any such arbitrary time limit."[25]

Statutes of repose have been enacted in some states for products liability cases, for medical treatment cases, for claims arising from many types of chemical and environmental exposures, and for a wide range of other potential tort claims involving the potential development of future injuries from various causes.[26] A majority of states have also passed statutes of repose limiting the time in which an action can be brought against architects, builders, and material suppliers for defects arising from improvements to real property.[27] Statutes of repose are coming under more criticism of late, including a recent note which discusses the application of statutes repose to actions where liability arises due to improvements to real property as well as to certain environmental and toxic tort claims.[28]

Statutes of repose take many forms. Usually, they establish a total ban on particular types of suits after a set period of time, which can range anywhere from a few years to a few decades. In Texas for example, "a claimant must commence a products liability action against a manufacturer or seller of a product before the end of 15 years

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[24] *Silver v. Silver*, 280 U.S. at 123.
[25] *Wayne v. Tennessee Valley Authority*, 730 F.2d 392, 404 (5th Cir. 1984).
[26] See e.g. Tex.Civ.Prac. & Rem. Code §16.008(2005); Tex.Civ.Prac. & Rem. Code §16.009(2005).
[27] See e.g. Minn. Stat. § 541.051 (2005)(amended in 1986 to shorten the limitation period from 15 to ten years); Cal Code Civ Proc § 337.1 (2006)(four years); Md. COURTS AND JUDICIAL PROCEEDINGS Code Ann. § 5-108 (2006)(20 years); MCLS § 600.5839 (2005)
(10 years); Va. Code Ann. § 8.01-250 (2006)(five years).
[28] Note, *Excuses, Excuses: The Application of Statutes if Repose to Environmentally-Related Injuries*, 33 B.C. Envtl. Aff. L. Rev. 345 (2006).

after the date of sale of the product by the defendant."[29] In Tennessee, the legislature has enacted a ten-year statute of repose for products liability claims against product manufacturers and sellers.[30]

States offer a variety of reasons for statutes of repose, many of which are fairly similar. In Tennessee, the preamble to the state's product liability statute of repose suggests a legislature concerned about "the effect of increased insurance premiums and increased claims" upon the cost of products as a result of "manufacturers, wholesalers and retailers passing the cost of the premium to the consumer" and about "certain product manufacturers [being] discouraged from continuing to provide and manufacture such products because of the high cost and possible unavailability of product insurance."[31] In North Dakota courts have observed that "it is necessary to protect the public interest by enacting measures designed to encourage private insurance companies to continue to provide products liability insurance."[32] Minnesota has determined that "by setting forth a 15-year period of repose, the statute helps avoid litigation and stale claims which could occur many years after an improvement to real property has been designed, manufactured or installed."[33]

It is possible that the types of arguments discussed in the previous paragraph might be extended to suits against any type of business or professional for alleged tortious conduct that involves any type of environmental or toxic tort claim. Since any defendant who is held liable for tortuous conduct may face increased insurance premiums

[29] Tex. Civ. Prac. & Rem. Code Ann. § 16.012(b) (Vernon Supp. 2004-05) quoted in *Burlington Northern & Santa Fe R. Co. v. Poole Chemical Co.*, 419 F.3d at 358.
[30] See Tenn. Code Ann. § 29-28-103 (2005).
[31] See Tenn. Code Ann. § 29-28-103 (2005); See also *Kochins v. Linden-Alimak, Inc.*, 799 F.2d at 1137.
[32] N.D. Cent. Code, § 28-01-01 (2005).
[33] *Sartori v. Harnischfeger*, 432 N.W.2d 448, at 453 (Minn. 1988).

and/or reduced profits that may increase the price it charges for its product and/or service or decrease the amount it pays its employees in salaries and wages, these facts would seem to offer strong policy reasons for having a broad, generic statute of repose that is not limited to specific types of legal claims against any specific profession or industry.

Exceptions to Statutes of Repose

Even though statutes of repose are presumed valid under the equal protection clause, many states provide an exception from statutes of repose where claims based on injuries from exposure to asbestos are involved. The typical asbestos exception mirrors Tennessee's, which states: "the foregoing limitation of actions shall not apply to any action resulting from exposure to asbestos."[34] The reason for this exception to the statute of repose, as stated by the 6th Circuit, is that "we think the statute's exemption of asbestos-related injuries has a rational basis if only because such injuries often take considerably longer than ten years to manifest themselves."[35] Another exception to Tennessee's statute of repose was added in 1993 for actions arising from the use of silicone gel breast implants, ostensibly due to the cruel nature of a claim being extinguished even though the potential claimant had no knowledge of any problem until after the period allowed by the statute.[36]

In light of these exceptions to statutes of repose that some states have enacted, potential claimants in those states seeking redress for non-exempted injuries have attempted to argue that other medical conditions and diseases are analogous to asbestos and that such exception provisions violate equal protection by not including such non-

[34] See Tenn. Code Ann. § 29-28-103(b) (2005).
[35] *Kochins v. Linden-Alimak, Inc.*, 799 F.2d at 1138; *Clutter v. Johns-Manville Sales Corp.*, 646 F.2d 1151, 1153 (6th Cir. 1981).
[36] See 1993 Tenn. Pub. Acts, Chapter 457, §§ 1,2 effective May 26, 1993.

exempted injuries.[37] These claimants argue that if discoverability is the reason for an asbestos exception, then logically any claim where discoverability problems are involved should be granted a similar exception.

The fairly uniform court response to these arguments has been that "we find unconvincing appellants' argument that 'there is absolutely no rational basis for exempting asbestos-related injuries from the ten year absolute bar for bringing a products liability claim and not exempting other long term continuing type injuries such as injuries relating to exposure to low level radiation."[38] Yet this response seems to beg the question, offering an answer without a rational supporting explanation. If problems with the discoverability of a legal claim are the basis for such exceptions, then there should be an exception from a statute of repose for any legal claim which could not reasonably be discovered during the repose period - and therefore the repose period for a particular legal claim should be based upon the reasonable period required for a person to discover the existence of the legal claim.

Another argument, in favor of expanding the asbestos exception to other similar claims, has been that "the right of access to the courts is a fundamental right" so any classification "arbitrarily and capriciously distinguishing between asbestos-related claims" and any other type of exposure is a violation of equal protection under the law.[39] Courts have been content in denying any such similarity, since recognition of such a similarity would require exemptions for claims based on symptoms similar to the asbestos and other similar exceptions, even though not within the exact specific statutory exception. In Tennessee, for example, a state statute of repose prescribes that *"in any*

[37] *Spence v. Miles Laboratories, Inc.*, 37 F.3d 1185, 1191 (6th Cir. 1994).
[38] *Wayne v. Tennessee Valley Authority*, 730 F.2d at 404.

event, the action *must* be brought within ten (10) years from the date on which the product was first purchased for use or consumption (emphasis added)."[40] The only conclusion offered by a court in support of this statute's discrimination is that "although the conclusion may be harsh, we are bound by the plain language of the Tennessee legislature" as "the plain language of the statute allows for no exceptions."[41] The only consolation offered by the court is "crocodile tears": "the court recognizes and regrets appellants' losses."[42]

The harshness of literal interpretation of the language of exception provisions in statutes of repose is based upon a lack of recognition that the role of a court should not be simply to be a rubber stamp for the legislature. Challenges to statutes of repose are further exacerbated by the burden presented to a person challenging the constitutionality of a statute since "a statute is presumed constitutional unless proven otherwise beyond a reasonable doubt."[43] Although the exceptions to statutes of repose carved out for asbestos exposure and silicon gel breast implants are limited, even with these exceptions seemingly restricting the overall negative impacts of statutes of repose as a whole, most arguments based on statutes of repose being unconstitutional, as a denial of equal protection, have fared poorly.

Overview of the Equal Protection Clause of the 14th Amendment of the U.S. Constitution

There are two clauses of the Fourteenth Amendment that may be invoked when a person seeks to have state legislation declared unconstitutional. The first states that no

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[39] *Id.* at 402.
[40] See Tenn. Code Ann. § 29-28-103(b) (2005) as quoted in *Hayes v. General Motors Corp.*, 1996 U.S. App. LEXIS 22345 (6th Cir. 1996).
[41] *Id.*
[42] *Wayne v. Tennessee Valley Authority*, 730 F.2d at 404.
[43] *Hickman v. Group Health Plan, Inc.*, 396 N.W.2d 10, 13 (Minn. 1986) (*citing Minnesota Higher Education Facilities Authority v. Hawk*, 305 Minn. 97, 232 N.W.2d 106 (1975)).

state shall "deprive any person of life, liberty, or property, without due process of law."[44] The second declares that no state shall "deny to any person within its jurisdiction the equal protection of the laws."[45] In explaining equal protection, Justice Robert Jackson stated that "courts can take no better measure to assure that laws will be just than to require that laws be equal in operation."[46] Equal application of the law is necessary since "we are much more likely to find arbitrariness in the regulation of the few than of the many."[47]

In describing equal protection requirements, Justice Jackson wrote: "I regard it as a salutary doctrine that cities, states and the Federal Government must exercise their powers so as not to discriminate between their inhabitants except upon some reasonable differentiation fairly related to the object of regulation."[48] Justice Thurgood Marshall, a champion of expanded equal protection, wrote that equal protection "mandates nothing less than that 'all persons similarly circumstanced [*sic]* shall be treated alike.'"[49] However, application and analysis of equal protection principles by the courts are not as simple and straightforward as the general concept of equal treatment might suggest.

Current equal protection analysis by federal and state courts has identified three different levels of classification for governmental regulation, with each of the three levels being subject to separate standards of scrutiny under the equal protection clause. Rational basis scrutiny is the test that is usually used to evaluate whether a statute complies with

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[44] *Railway Express Agency, Inc. v. New York*, 336 U.S. 106, 111 (1949)*; Chase Securities Corp. v. Donaldson*, 325 U.S. 304, 315 (1945)
[45] See *Railway Express v. New York,* 336 U.S. at 111.
[46] *Id.*, 113.
[47] *Id.*, 113.
[48] *Id*., 112.
[49] See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 89 (1973) (quoting *F.S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920)); see also *DuPree v. Alma Sch. Dist. No. 30*, 651 S.W.2d 90, 93 (Ark. 1983); *Horton v. Meskill*, 376 A.2d 359, 373 (Conn. 1977).

equal protection requirements; the rational basis test requires a statute to have a rational relationship to a legitimate state interest.[50] Under intermediate scrutiny, which applies to gender-based discrimination and discrimination against persons born illegitimately, a proposed state action must bear a substantial relationship to an important state interest.[51] The "intermediate scrutiny" test is used in cases raising an equal protection challenge "where a statute implicates both an important right and a semisuspect *sic* class not accountable for its status."[52] Finally, strict scrutiny is applied when a statute discriminates either against conduct that is a fundamental constitutional right or on the basis of a suspect classification (race, religion, alienage); this test requires a statute to further a compelling state interest which could not be achieved by other means.[53]

Unless a party establishes that the intermediate or strict scrutiny test is applicable, a court typically uses the rational basis test as the proper approach when reviewing the constitutionality of a statute under the equal protection clause. Of the three equal protection tests, the rational basis test is the most deferential to the legislative branch of government. Under rational basis review a statute satisfies the requirements of equal protection if: "1) the classification created by the statute is rationally related to its legislative purpose; 2) the members of the class are treated like those similarly situated; and 3) the classification rests on some rational basis."[54] In other words, "a legislative action not affecting a suspect class or infringing upon a fundamental right is upheld if it is

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[50] See *Jenkins v. Meares*, 394 S.E.2d 317 (S.C. 1990); *Ex parte Estate of Evans*, 384 S.E.2d 748 (S.C. 1989); *Smith v. Smith*, 354 S.E.2d 36 (S.C. 1987).
[51] *DeYoung v. Providence Medical Center*, 960 P.2d 919, 921 (Wash. 1998).
[52] *Id.* 921.
[53] See *Wayne v. Tennessee Valley Authority*, 730 F.2d 392, 404 (5th Cir. 1984); *Boddie v. Connecticut*, 401 U.S. 371 (1971); *United States v. Kras*, 409 U.S. 434 (1973); *Ortwein v. Schwab*, 410 U.S. 656, 660 (1973).
[54] *Jenkins v. Meares*, 394 S.E.2d at 319; *Ex parte Estate of Evans*, 384 S.E.2d at 749; *Smith v. Smith*, 354 S.E.2d at 39.

rationally related toward the advancement of any legitimate legislative interests of society."[55] In addition, "to sustain the legislation" under the rational basis test, the government only "must show a reasonably substantial interest and a scheme reasonably closely tailored to achieving that interest."[56]

In determining if legislation is constitutional under the equal protection clause, only rights under the United States Constitution which are considered fundamental warrant strict scrutiny protection. By contrast, non-fundamental rights are reviewed under one of the lower levels of scrutiny. As a result, the determination of what constitutional rights are classified as fundamental rights is therefore of paramount importance in equal protection analysis. This issue has presented considerable controversy over the years for a variety of reasons. Since a legislature may not regulate or punish the exercise of a fundamental right unless strict scrutiny requirements are satisfied, if a statute regulates or denies a fundamental right then it usually is struck down as unconstitutional under the strict scrutiny test.

As noted above, equal protection analysis requires strict scrutiny of a legislative classification only when the classification impermissibly interferes with the exercise of a fundamental right[57] or operates to the particular disadvantage of a suspect class.[58] The Colorado Supreme Court has stated that "fundamental rights are essentially those rights

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[55] *King Bradwell Partnership v. Johnson Controls*, 865 S.W.2d 18, 21 (Tenn. App. 1993); *Kochins v. Linden-Alimak, Inc.*, 799 F.2d 1128 (6th Cir. 1986).

[56] J. Marshall, dissenting, *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307, at 325 (1975). See also *San Antonio School District v. Rodriguez*, 411 U.S. at 124-126.

[57] *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307 (1975). See e.g., *Roe v. Wade*, 410 U.S. 113 (1973) (right of a uniquely private nature); *Bullock v. Carter*, 405 U.S. 134 (1972) (right to vote); *Shapiro v. Thompson*, 394 U.S. 618 (1969) (right of interstate travel); *Williams v. Rhodes*, 393 U.S. 23 (1968) (rights guaranteed by the First Amendment); *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942) (right to procreate).

[58] E.g., *Graham v. Richardson*, 403 U.S. 365 (1971) (alienage); *McLaughlin v. Florida*, 379 U.S. 184 (1964) (race); *Oyama v. California*, 332 U.S. 633 (1948) (ancestry).

which have been recognized as having a value essential to individual liberty in our society."[59] Fundamental rights include voting, privacy, interstate travel, and the freedoms of speech and association.[60] A suspect class includes any group of people "saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian *sic* political process."[61] Suspect classifications include race, alienage, and national origin.[62] In addition, the suspect class must be a "discrete and insular group"[63] in need of legislative protection.

These categories and classifications undergo a constant state of analysis and are open to re-consideration and review despite the principle of stare decisis. Justice Thurgood Marshall almost always took a broader view than many other Justices of the United States Supreme Court as to what should be considered a fundamental right. Justice Marshall noted that "whether 'fundamental' or not 'the right of the individual . . . to engage in any of the common occupations of life' has been repeatedly recognized by this Court as falling within the concept of liberty guaranteed by the Fourteenth Amendment."[64] Even as long ago as 1884 Justice Bradley stated that the right to work "is an inalienable right; it was formulated as such under the phrase 'pursuit of happiness' in the Declaration of Independence . . . This right is a large ingredient in the civil liberty of the citizen."[65]

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[59] *Lujan v. Colorado State Bd. of Educ.*, 649 P.2d 1005, at 1015 n. 7 (Colo. 1982).
[60] See generally Ronald D. Rotunda & John E. Nowak*, Treatise on Constitutional Law: Substance & Procedure*, 2nd., Section 15.7 (1992).
[61] *San Antonio School District v. Rodriguez,* 411 U.S. at 28.
[62] See *City of Cleburne, Tex. v. Cleburne Living Center*, 473 U.S. 432 (1985).
[63] *United States v. Carolene Products Co.*, 304 U.S. 144, 152-153, n. 4 (1938).
[64] See *Board of Regents v. Roth*, 408 U.S. 564, 572 (1972), quoting *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).
[65] *Butchers' Union Co. v. Crescent City Co.*, 111 U.S. 746, 762 (1884).

Nearly every state has a provision in their state's constitution stating that "no person shall be deprived of life, liberty, or property without due process of law."[66] The United States Supreme Court has also noted that "all men are entitled to the equal protection of the law in their right to work for the support of themselves and families."[67] Finally, the Court has stated that "liberty means more than freedom from servitude, and the constitutional guarantee is an assurance that the citizen shall be protected in the right to use his powers of mind and body in any lawful calling."[68] Governmental employment, however, has been determined not to be a fundamental constitutional right.[69]

However, there is room for argument about which rights under "life, liberty, or property" are fundamental constitutional rights, and about whether particular discrimination in a specific statute's regulatory scheme is justified, thus ensuring a healthy debate. As a result, the application of the equal protection clause to particular statutory discrimination can present some controversy as well as great difficulty. The United States Supreme Court has noted that "perfection in making the necessary classifications is neither possible nor necessary"[70] and that a statute "does not violate the Equal Protection Clause merely because the classifications made by [it] are imperfect."[71]

If a legislative classification "rationally furthers the purposes identified by the State, it does not violate the equal protection clause" when only the rational basis test is

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[66] South Carolina Constitution Article I, § 3.
[67] *Smith v. Texas*, 233 U.S. 630, 636 (1914).
[68] See *Smth v.Texas*, 233 U.S. at 636. See also *Arnett v. Kennedy*, 416 U.S. 134 (1974); *Perry v. Sinderman*, 408 U.S. 593 (1972); *Bell v. Burson*, 402 U.S. 535 (1971); *Keyishian v. Board of Regents*, 385 U.S. 589, 605-606 (1967); *Schware v. Board of Bar Examiners*, 353 U.S. 232, 238-239 (1957); *Slochower v. Board of Higher Education*, 350 U.S. 551 (1956); *Wieman v. Updegraff*, 344 U.S. 183 (1952); *Truax v. Raich*, 239 U.S. at 41.
[69] See *San Antonio School District v. Rodriguez,* 411 U.S. 1 (1973). See also *Lindsey v. Normet*, 405 U.S. 56, 73 (1972); *Dandridge v. Willaims*, 397 U.S. 471, 485 (1970).
[70] *Massachusetts Board of Retirement v. Murgia*, 427 U.S. at 314.
[71] See *Dandridge v. Williams*, 397 U.S. at 485.

applicable.[72] Under a rational basis review, the court must apply "a relatively relaxed standard reflecting the Court's awareness that the drawing of lines that create distinctions is peculiarly a legislative task and an unavoidable one."[73] A classification established in a regulatory statute by a legislature is presumed to be valid,[74] and overcoming this burden is quite difficult when only the rational basis test is applied. A statute's classification for regulatory purposes must rest only on a reasonable basis to survive a rational basis test challenge: for a statute to be held to violate equal protection under the rational basis test "it must be shown that it has no reasonable or natural relation to the legislative objective."[75]

Many courts refer to the proposition that technical inequalities do not offend the equal protection clause of the 14th Amendment.[76] Courts still adhere to the concept that "there is no constitutional requirement that a regulation, in other respects permissible, must reach every class to which it might be applied – and reject the proposition that a legislature must be held rigidly to the choice of regulating all or none.[77] The United States Supreme Court has noted that "the Equal Protection Clause does not require that a State must choose between attacking every aspect of a problem or (sic) not attacking the problem at all. It is enough that the State's action be rationally based and free from

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[72] *Massachusetts Board of Retirement v. Murgia*, 427 U.S. at 314. See also *Darks v. City of Cincinnati*, 745 F.2d 1040, 1042-43 (6th Cir. 1984).
[73] *Massachusetts Board of Retirement v. Murgia*, 427 U.S. at 314.
[74] See, e.g., *San Antonio School District v. Rodriguez*, 411 U.S. at 40-41; *Madden v. Kentucky*, 309 U.S. 83, 88 (1940); *Lindsey v. Natural Carbonic Gas Co.*, 220 U.S. 61, 78-79 (1911); *Kochins v. Kinden-Alimak, Inc.*, 799 F.2d 1128, 1135 (6th Cir. 1986).
[75] See *City of Chattanooga v. Harris*, 442 S.W.2d 602 (Tenn. 1969); *Phillips v. State*, 304 S.W.2d 614 (Tenn. 1957).
[76] *Louisville & N. R. Co. v. Melton*, 218 U.S. 36, 52 (1910); *Lindsley v. Natural Carbonic Gas Co.,* 220 U.S. at 78.
[77] *Silver v. Silver*, 280 U.S. 117, 123 (1929); see also *Patsone v. Pennsylvania*, 232 U.S. 138, 144 (1914); *Miller v. Wilson*, 236 U.S. 373, 382 (1915); *International Harvester Co. v. Missouri*, 234 U.S. 199, 215 (1914); *Barrett v. Indiana*, 229 U.S. 26, 29 (1913).

invidious discrimination."[78] In addition, courts follow the principle that "a statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it."[79]

As equal protection analysis evolved, or was muddled (depending on one's perspective), Justice Thurgood Marshall frequently found himself dissenting from the majority in cases involving equal protection challenges to a statute.[80] A major problem with the Court's equal protection analysis, according to Justice Marshall, consisted in the Court "apparently los[ing] interest in recognizing further 'fundamental' rights and 'suspect' classes."[81] As Justice Jackson noted two decades earlier, "the equal protection clause ceases to assure either equality or protection if it is avoided by any conceivable difference that can be pointed out between those bound and those left free."[82] Although some persons might not find a problem with the expansion of equal protection, in fact believing that the number of suspect classes has been stretched too broadly, it would seem counterintuitive to believe that mid-level and strict scrutiny equal protection analyses now have been extended to every possible group that deserves such heightened protection and that no further expansion of equal protection is necessary. Indeed, consideration of increased protection for new groups is what resulted in recognition of increased protection for the current groups that are now protected as suspect classes.

According to Justice Marshall, an approach of arbitrarily declining to further expand heightened scrutiny to new classes fails to further the pursuit of equality under the

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[78] *Dandridge v. Williams*, 397 U.S. at 486-87.
[79] See *Dandridge v. Williams,* 397 U.S. at 485*,* quoting *McGowan v. Maryland*, 366 U.S. 420, 426 (1961).
[80] "Although we have called the right to work 'of the very essence of the purpose of the [Fourteenth] Amendment to secure,' *Truax v. Raich*, 239 U.S. 33, 41 (1915), the Court finds that the right to work is not a fundamental right." *Massachusetts Board of Retirement v. Murgia*, 427 U.S. at 318.
[81] *Massachusetts Board of Retirement v. Murgia*, 427 U.S. at 318-319.
[82] *Railway Express Agency, Inc. v. New York*, 336 U.S. at 115.

equal protection clause.[83] Justice Marshall noted that "all interests not 'fundamental' and all classes not 'suspect' are not the same; and it is time for the Court to drop the pretense that, for purposes of the Equal Protection Clause, they are."[84]

Justice Brennan and Justice Stevens often joined Justice Marshall in dissent in equal protection cases. In a comment relevant to environmental law, one dissenting opinion by Justice Stevens discusses the discoverability factor involved in application of statutes of limitation in medical claim actions. Justice Stevens, writing in dissent, commented:

> The victim of medical malpractice frequently has no reason to believe that his legal rights have been invaded simply because some misfortune has followed medical treatment. Sometimes he may not even be aware of the actual injury until years have passed; at other times, he may recognize the harm but not know its cause; or . . . he may have knowledge of the injury and its cause, but have no reason to suspect that a physician has been guilty of any malpractice. In such cases – until today – the rule that has been applied in the federal courts is that the statute of limitations does not begin to run until after fair notice of the invasion of the plaintiff's legal rights.[85]

Justice Stevens also interestingly noted that even though statutes can be changed and adjusted by legislatures, the Supreme Court should not enforce unjust results as a way of providing the legislature with this authority.[86]

As a result, many medical malpractice claimants are now being told to be on the lookout for something having gone wrong for them from the date of enactment of a new statute of limitations. Justice Stevens seems to be suggesting that the U.S. Supreme Court is encouraging potential medical malpractice claimants to look for potential legal claims

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[83] See *San Antonio School District v. Rodriguez*, 411 U.S. 1 (1973) (rejecting education as a fundamental right); *Frontiero v. Richardson*, 411 U.S. 677 (1973) (declining to treat women as a suspect class).
[84] *Massachusetts Board of Retirement v. Murgia*, 427 U.S. at 321 (Marshall, J., dissenting).
[85] *United States v. Kubrick*, 444 U.S. 111, 125 (1979).
[86] J. Stevens, dissenting, *United States v. Kubrick*, 444 U.S. 111, 125 (1979) (Stevens, J., dissenting).

rather than assume that other people with whom one is involved are not going to commit tortious acts. The problem of discoverability of certain problems arising from medical treatment of an illness is a major factor as to why statutes of repose for medical malpractice claims should be considered anathema to the pursuit of justice. Therefore, it should come as no surprise that there is little uniformity by courts in the application of equal protection standards to statutes of limitation and statutes of repose.

Arguments in Support of Statutes of Limitations and Statutes of Repose

In Kansas, the justification for statutes of repose mirrors that of many other states. A Kansas court has stated that medical statutes of repose mark, with no small degree of political spin, "the legislature's attempt to assure quality health care . . . by combating the rapidly rising cost of medical malpractice insurance and the increasing reluctance of insurance underwriters to underwrite medical professionals."[87] Another court in Kansas went on to conclude "there is a reasonable basis for treating malpractice actions against health care providers differently from cases involving other tortfeasors."[88] A North Dakota court lamented that there was "an insurance crisis facing North Dakota products manufacturers" and a concomitant "crisis situation."[89] In Texas, a court has claimed that statutes of repose "are specifically designed to protect [manufacturers] . . . from protracted and extended vulnerability to lawsuits."[90] In Washington, a court has observed that "by enacting an eight-year statute of repose, the Legislature intended to protect insurance companies while 'hopefully not resulting in too many individuals not getting

[87] *Stephens v. Snyder Clinic Ass'n*, 631 P.2d at 234-35 (Kan. 1981).
[88] *Schneider v. Liggett*, 576 P.2d 221 (Kan. 1978).
[89] *Hoffner v. Johnson*, 660 N.W.2d at 914.
[90] *Tex. Gas Exploration Corp. v. Fluor. Corp.*, 828 S.W.2d at 32. (discussing the Texas statute of repose that applies to claims against architects and builders).

compensated.'"[91] Again, these types of justifications for a statute of repose limited to particular types of legal claims against specific categories of persons are applicable to any type of legal claim against any type of business or professional.

In upholding statutes of repose, "courts have stressed the need to create a reasonable limit on the legal consequences of a wrong and the difficulty in proof of old claims."[92] Many courts have concluded that "a rational relation exists between the shorter limitation period for health care providers and the legitimate objective of providing quality health care."[93] Lower courts find encouragement in the United States Supreme Court's position that liability limitations with an economic purpose are constitutional unless the legislature acted in an arbitrary and irrational way.[94] Support for statutes of repose also has been found in the proposition that "when an act has an economic purpose, limitations created by it must be upheld unless they are irrational and arbitrary."[95] In addition, courts have stated that "limiting the time within which actions may be brought has in numerous cases been held to be a rational, non-arbitrary means of achieving economic ends."[96] Inevitably, economic considerations seep into courts' analysis in support of statutes of repose.

Furthermore, a large number of judges are hesitant to issue any judgment or order without specific legislative authority. This view is often stated in this manner (or a similar manner): "this court cannot, after all, *legislate* – no matter how admirable its

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[91] WASHINGTON HOUSE JOURNAL, 44th Legis. Sess. 318 (1976) (comment by Representative Walt O. Knowles) quoted in *DeYoung v. Providence Medical Center*, 960 P.2d at 921.
[92] *Hoffner v. Johnson*, 660 N.W.2d at 916.
[93] *Brubaker v. Cavanaugh*, 741 F.2d 318 (10th Cir. 1984).
[94] *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 83-84, 88 (1979).
[95] *Wayne v. Tennessee Valley Authority,* 730 F.2d at 403.
[96] *Id*. at 403; see, e.g., *Mathis v. Eli Lilly & Co.,* 719 F.2d 134, 141 (6th Cir. 1983); *Buckner v. GAF Corp*., 495 F. Supp. 351, 353 (E.D. Tenn. 1979), aff'd, 659 F.2d 1080 (6th Cir. 1981); *Harmon v. Angus R. Jessup Association*, 619 S.W.2d 522, 524 (Tenn. 1981).

objectives might be in doing so."[97] Courts also state that "sympathy for the plaintiff in this case, and those similarly situated, is not enough to compel this court"[98] to overturn a valid statute.

Counter-Arguments/Criticism

Keeping costs down, however, is neither universally recognized nor accepted as a legitimate justification for a statute of repose. One argument against statutes of repose for product liability claims is that "product liability insurance rates are set on the basis of countrywide, rather than individual state, experience," and "that there is little an individual state can do to solve the problems caused by products liability."[99] Another argument is based on numerous studies which have shown that "it is reported that 97% of all product related accidents occur within six years of the time the product is purchased and that a statute of repose precluding suit for actions accruing more than ten years after the product is sold will not significantly impact the product liability crisis.[100] As a result, more judges are starting to agree that "some rational basis must be advanced for the selection of the specific period of years in a statute of repose's 'bar' or 'repose,' other than the economic interests . . . of insurance companies and physicians."[101]

A state legislature's goal of keeping illegitimate claims from clogging the judicial branch of a state government certainly is a valid concern. However, statutes of repose seem to be designed primarily to prevent people from even having a day in court to try the substantive merits of a claim. If a claim is without substantive merit, without support

[97] *DeYoung v. Providence Medical Center*, 960 P.2d at 926.
[98] *Id*.
[99] See Section 101, Model Uniform Product Liability Act, 44 Fed. Reg. 62, 714, 62,716 (1979).
[100] See Massery, Date-of-Sale Statutes of Limitations – A New Immunity for Product Suppliers, 1977 Ins. L.J. 535, 542; McGovern, The Variety, Policy and Constitutionality of Product Liability Statutes of Repose, 30 Am. U.L. Rev. 579 (1981).

from the benefit of witnesses' memories or documents, then the claim probably will fail on the substantive merits. The concern of a state legislature to keep claims from even being heard on the substantive merits in a state court seems an unfair and unreasonable basis for enactment of a statute of repose.

A common judicial argument in support of a statute of repose is the argument that if one type of claim is granted or allowed, then "the sky will fall" as every claim necessarily will be allowed to be tried in state courts and "the slippery slope of chaos" would therefore reign supreme.[102] This broad sweeping fear is unfounded. There is no reason to believe that all private insurance carriers will stop offering liability insurance to any or all businesses and/or professionals if there are no statutes of repose for product, business or professional liability claims in any state.

Furthermore, health care would continue to be available to most individuals and would be the highest quality even if statutes of repose for medical malpractice claims were abolished or extended. Those who espouse the virtues of the free market should surely recognize that there will always be a demand for quality health care; and thus there will always be physicians willing to provide such care.

In fact, the very basis of the exceptions in statutes of repose for asbestos and breast implants demonstrates that the decision to exclude some types of products liability claims for long latency illnesses, while allowing certain other claims to be tried in a state's courts, is illogical and inconsistent. This inconsistency cannot be said to be a rational basis for a regulatory distinction under the equal protection clause and therefore should not be followed by a court when a statute of repose is challenged on equal

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[101] *Hoffner v. Johnson*, 660 N.W.2d at 925; *Hanson v. Williams County*, 389 N.W.2d 319, 1986 N.D. LEXIS 328 (1986).

protection grounds. At the very least a statute of repose should have a period of repose somewhere between ten to thirty years (a period that is more reasonable than ten years) rather than between five to eight years (a less rational repose period).[103]

In many cases, state statutes of repose seem to have been enacted for the benefit of the customers of the insurance industry. For example, one state court found that "the legislative history [of that state's statute of repose for medical malpractice claims] makes it crystal clear that the statute of repose was designed to remedy the rising cost of malpractice insurance."[104] There is nothing wrong with assisting certain professionals and businessmen from attempting to control the costs of their insurance premiums and helping insurance companies to formulate a business plan to provide for the broadest possible coverage at the lowest possible costs. There is also nothing wrong with assisting a business to make reasonable profits. However, denying an injured person, who allegedly has been harmed by the tortious conduct of a professional or a businessman, the opportunity to try a meritorious claim on its substantive merits in court is anathema to the principles of freedom and justice that form the foundations of American jurisprudence.

A statute of repose that favors the rights of insured professionals and businessmen and their insurance companies' rather than the rights of injured individuals cannot be justified by any rational policy. To avoid the appearance of unjustifiable favoritism of businessmen and professionals, courts have upheld statutes of repose on the more palpable sounding position that "the Equal Protection Clause does not demand for purposes of rational-basis review that a legislature or governing decisionmaker [*sic]*

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[102] See *DeLoach v. Alfred*, 191 Ariz. 82; 952 P.2d 320 (1998).
[103] *Jewson v. Mayo Clinic*, 691 F.2d at 405.
[104] See hearing on S.B. 2348 Before the Senate Judiciary Comm., 44th N.D. Legis. Sess. (Feb. 5, 1975) (testimony of H.W. Wheeler, Counsel for the North Dakota Medical Association).

actually articulate at any time the purpose or rationale supporting its classification."[105] This position is weak because to uphold a statute of repose, the underlying purpose of the legislature should be identified by the court and found to be irrational; however, the intent of the legislature may not be articulated explicitly on the face of a statute or in its legislative history, leaving a court to speculate as to the legislature's reasons for enactment of the statute even when the court is predisposed to dismiss a meritorious claim.

If a legal claim is stale or old, with a lack of witnesses or memories to support it, then this claim either will be barred by a statute of limitations or probably is not going to succeed on its substantive merits in a trial in court of such claim. There is really no need to rely upon a statute of repose to preemptively deny a claimant a day in court to try such a claim on the substantive merits.

Many state constitutions have an "open courts" provision to allow its citizens a day in court to try their claims on the merits[106] but many courts have held that statutes of repose do not violate a state constitution's open courts provision because a statute of repose does not deny every injured party access to the courts, although the access permitted under the statute of repose only is for a limited time.[107] In addition, many state constitutions contain an "open access to courts" provision; however, arguments based

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[105] *NL Indus., Inc. v. North Dakota State Tax Comm'r*, 498 N.W.2d 141, 149 (N.D. 1993) (quoting *Nordlinger v. Hahn*, 505 U.S. 1, 15-16 (1992).

[106] The constitutions of thirty-eight states contain open courts or right to remedy provisions and twenty-two state constitutions require that their state courts be "open." William C. Koch, Jr., *Reopening Tennessee's Open Courts Clause: A Historical Reconsideration of Article I, Section 17 of the Tennessee Constitution,* 27 U. Mem. L. Rev. 333, 434-35 (1997). Many state constitutions contain some type of open courts provision *and* some type of right to remedy provision. *Cf. id*. See e.g. North Carolina Constitution Article I, § 18.

[107] *Burlington Northern & Santa Fe R. Co. v. Poole Chemical Co.*, 419 F.3d at 361. See *also McCollum v. Sisters of Charity of Nazareth Health Corp.*, 799 S.W.2d 15, 19 (Ky. 1990) (holding that the five-year medical malpractice statute of repose violated the open courts provisions of the state constitution).

upon alleged violation of this principle have met with little success.[108] Many courts have concluded that "there is no absolute right of access to the courts. All that is required is a *reasonable* right of access to the courts – a reasonable opportunity to be heard."[109]

A similar right to a remedy provision is also contained in many state constitutions, and this type of provision has served as a successful basis for some challenges to a state statute of repose.[110] This result could be due in part to the often heard colloquial: 'a right without a remedy is no right at all.' A state constitutional right to a remedy and a statute of repose seemingly are exclusive of one another because a person injured after the statutory period of repose is "left without a remedy for the injury."[111] However, a state legislature can restrict a time for filing a claim without violating a state constitution's right to a remedy provision so long as "it affords a reasonable time or fair opportunity to preserve a claimant's rights . . . or if the amendment does not bar a remedy."[112] But neither the federal judiciary nor a state legislature should arbitrarily limit a claimant from even having a day in court to try the substantive merits of a claim.

However, reliance upon a state constitutional right to a remedy is an inadequate and limited approach to invalidate unjust statutes of repose. This conclusion is due in part to the fact that not every state constitution has such a provision and also because unconstitutional statutes of repose should be invalidated by all courts in their entirety all

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[108] *Spence v. Miles Laboratories, Inc.*, 37 F.3d at 1191.
[109] *Boddie v. Connecticut*, 401 U.S. at 383 (quoted in *Wayne v. Tennessee Valley Authority*, 730 F.2d at 403).
[110] See Minn. Const. Art. 1, § 8; see also *Kohnke v. St. Paul Fire & Marine Ins. Co*., 140 Wis. 2d 80, 410 N.W.2d 585, 588 (Wisc. Ct. App. 1987) (holding that the five-year statute of repose as applied, violated the right-to-a-remedy clause of the state constitution).
[111] *Hoffner v. Johnson*, 660 N.W.2d at 913.
[112] *Burlington Northern & Santa Fe R. Co. v. Poole Chemical Co.*, 419 F.3d at 358.

at once; rather than only invalidated in states that have an appropriate right to a remedy provision in the state's constitution.[113]

Consequently, statutes of repose that apply only to particular types of legal claims should be invalidated by courts as unconstitutional in violation of the equal protection clause of the 14th Amendment of the United States Constitution, not occasionally invalidated in some state courts on state constitutional grounds. For example, a decision by a particular state's appellate court invalidating a state statute of repose that bans claims against architects and builders might not necessarily support a challenge to a different statute of repose in that state governing claims in other fields.

An insurance company should draft its policies in ways that spread its costs of doing business among all its policy holders rather than simply closing the courthouse doors on many insured individual's claims forever. Insurance policies could be structured so that an insured's premiums stay level each year (or even decrease), and only rise if a suit against the company is actually brought by an insured. Insurance rates should not necessarily increase for all of a company's policy holders every year. Even the necessity for profits and reasonable business growth does not require double digit growth in profits every year.

Under this author's suggested approach to statutes of repose, potential defendants would still have insurance coverage, insurance providers would enjoy reasonable profits, and the courts would be available to try insurance claims on their substantive merits if harm occurs to an insured. In addition, a potential claimant, whose claims are not barred

[113] See e.g., *Perkins v. Northeastern Log Homes*, 808 S.W.2d 809, 817 (Ky. 1991) (finding five year statute of repose for claims against architects, contractors, and builders unconstitutional*); Hanson v. Williams County*, 389 N.W.2d at 328 (invalidating similar ten-year date-of-use statute of repose for products-liability

by the statute of limitations, would at least have an opportunity to have a day in court to try the substantive merits of potential claims and legislatures could focus their time on other matters. Because statutes of limitations would still bar stale claims, by no means are the judicial floodgates going to be opened under this author's approach to statutes of repose. Just because a potential claimant is allowed a day in court does not translate into a judgment in favor of the plaintiff.

In addition to arguments that statutes of repose are unconstitutional, claimants have attempted to argue that statutes of repose violate federal due process.[114] A Kansas court, however, concluded "although [a statute of repose] works a hardship on particular plaintiffs, there is no violation of due process in its application."[115] Furthermore, medical malpractice statutes of repose have been held not to violate due process since the legislature's concern with shortening the lapse of time between treatment of a patient and a potential medical malpractice suit is considered a permissible legislative objective.[116]

Equal Protection and Statutes of Repose

The most often stated general justification for the constitutionality of statutes of repose is the oft-quoted statement that "it is no requirement of equal protection that all evils of the same genus be eradicated or none at all."[117] Although the creation of classifications at all might seem counterintuitive to any notion of equality, this typical judicial justification for not invalidating, on equal protection grounds, an act of the legislature, is merely an excuse for a court evading equal protection analysis. Courts also

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claims); *Berry v. Beech Aircraft Corp.*, 717 P.2d 670, 684-86 (Utah 1985) (invalidating ten-year date-of-use statute of repose for products liability claims).

[114] *Lourdes High School, Inc. v. Sheffield Brick & Tile Co.*, 870 F.2d 443 (8th Cir. 1989).

[115] *Brubaker v. Cavanaugh*, 741 F.2d at 320.

[116] *Jewson v. Mayo Clinic*, 691 F.2d at 411-12.

[117] *Railway Express Agency v. New York*, 336 U.S. at 110.

evade their responsibility to ensure equal protection by reviewing a statute's regulatory classifications' under a standard of "reasonableness," granting the classification "fairly broad leeway" and not questioning the legislature "unless the classification is clearly arbitrary and has no rational basis."[118]

Many courts, in upholding a statute of repose against an equal protection challenge, offer, in consolation, the statement that "we do not necessarily agree philosophically with the results we reach. We can only construe the statute as it is, not as we think it ought to be."[119] In one case the Sixth Circuit concluded that "we cannot say that the legislature's decision to limit § 29-28-103 to those defendants in the manufacturing and distribution chain, who have control over the cost and availability of products, is irrational."[120]

These rationales are overly absolute and naively simplistic because they fail to explain why a statute of repose is being limited only to certain types of claims and to such claims only against certain categories of persons. A court should not simply be a rubber stamp for the legislature. Every court has an inherent duty to ensure that every law passed by the legislature conforms to the guiding principles set forth in both the state and federal constitutions. A court has the duty to strike down statutes that are unconstitutional; legislatures cannot be depended upon to enact constitutional statutes every time.

Other rationales offered by courts in support of statutes of repose include limiting "claims that would be difficult to prove due to difficulty of finding witnesses with

[118] *Wyatt v. A-Best Products Co. Inc.*, 924 S.W.2d at 105.
[119] *Id.,* 103.
[120] *Kochins v. Linden-Alimak, Inc*., 799 F.2d at 1137.

knowledge of events of ten years before."[121] Also, one court has stated that "long lapses of time result in the absence and unavailability of critical witnesses as well as faded memories."[122] As mentioned earlier, there is a "strong and legitimate interest in preventing litigation of stale claims."[123] However, this interest is fully achieved through statutes of limitations.

In addition, statutes of repose are ostensibly designed to "protect defendants and the courts from having to deal with cases in which the search for truth may be seriously impaired by the loss of evidence, whether by death or disappearance of witnesses, fading memories, disappearance of documents, or otherwise.[124] This interest also is fully achieved by statutes of limitation. Finally, courts also want "to avoid the difficulty in proof and record keeping which suits involving [older] claims impose."[125] These types of interests are fully achieved by statutes of limitations, and these arguments are applicable to all types of legal claims, not just specific types of legal claims against certain categories of defendants. As a result, these policy reasons should not provide justification for a statute of repose that is limited to a specific type of legal claim against a specific category of persons.

The future of Statutes of Repose and Equal Protection Analysis

Some courts have concluded "that there was no close correspondence between the 'legislative goal of providing certainty in litigation or of reducing insurance costs' and

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[121] *Stutts v. Ford Motor Co.*, 574 F. Supp. 100, at 104 (1983).
[122] *Jewson v. Mayo Clinic*, 691 F.2d 405, at 411 (8th Cir. 1982)
[123] *Id.* at 411. See also *Order of Railroad Telegraphers v. Railway Express Agency., Inc.*, 321 U.S. at 349.
[124] *United States v. Kubrick*, 444 U.S. at 117. See also *United States v. Marion*, 404 U.S. 307, 322, n. 14 (1971); *Burnett v. New York Central R. Co.*, 380 U.S. 424, 428 (1965*); Chase Securities Corp. v. Donaldson*, 325 U.S. at 314; *Missouri, K. & T. R. Co. v. Harriman*, 227 U.S. 657, 672 (1913); *Bell v. Morrison*, 1. Pet. 351, 360 (1828).
[125] *Hoffner v. Johnson*, 660 N.W.2d at 917, quoting *Sanborn v. Greenwald*, 39 Conn. App. 289, 664 A.2d 803, 811-12 (Conn. App. Ct. 1995).

the classification established by the statute of repose."[126] Consequently, amendments to statutes of repose, based upon changes in attitudes and progress in understanding how to better take care of society as a whole, should occur as inevitable aspects of the human experience. To paraphrase Thomas Jefferson, we should no more expect an adult to wear the clothes they were given as a child than to expect all laws from the past to adequately govern the society of today.

An assertion that a judge does not have authority to invalidate a statute of repose is no more a valid argument than an argument that a judge is compelled to interpret a statute of repose a certain way. Furthermore, when considering the constitutionality of a statute, a court "may consider unarticulated, as well as articulated, legislative purposes and goals."[127] It is imperative for a court to determine the constitutionality of a statute of repose rather than simply determine the legislative intent behind the statute.

Statutes of repose also might be invalidated under the equal protection clause's strict scrutiny test on the grounds that the statute is infringing upon a newly-recognized fundamental right. Courts should recognize a new fundamental constitutional right that is infringed by a state statute of repose applicable to environmental and toxic torts claims and would be protected by the strict scrutiny test of equal protection. The right to a clean environment should be considered a fundamental right that is infringed by a state statute of repose that applies to an environmental or toxic torts claim and that is protected under strict scrutiny, since it is the foundation for many of the other recognized fundamental rights. This right should include the right to protection of personal bodily integrity.

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[126] See *Dickie v. Farmers Union Oil Co.*, 2000 ND 111 at P7, 611 N.W2d 168 (2000); *Hanson v. Williams County*, 389 N.W.2d at 328.

[127] *Hoffner v. Johnson*, 660 N.W.2d at 914; see also *Haney v. North Dakota Workers Comp. Bureau*, 518 N.W.2d 195, 202 (N.D. 1994).

An environmental or toxic torts claim seeking damages from a disease caused by exposure to a hazardous substance should be considered within this fundamental right to protection of bodily integrity. The Supreme Court already recognizes a fundamental right to bodily integrity.[128] Bodily integrity is certainly furthered by a clean environment. Once the right to a clean environment and a healthy body are recognized as fundamental, any statute affecting these rights would be reviewed by a court under strict scrutiny. Under strict scrutiny evaluation, statutes of repose that apply to an environmental or toxic torts claim related to the right to a clean environment or to a healthy body would be found to be the unconstitutional leviathans that they are.

A court, however, is unlikely to accept any argument in favor of either a right to a clean and healthy body or a right to a clean environment as a fundamental right, all the more so given that access to a public education is not recognized as a fundamental right in this country.[129] Nonetheless, protection of health, education and environment should be recognized as fundamental rights even if current courts are reluctant to so rule. If this argument is accepted by the courts, there can be no rational basis for a statute of repose that provides an exception for an illness from exposure to asbestos or silicon gel implants, while not providing an exception to claims for illnesses resulting from exposure to environmental pollutants and toxins. The minority of courts, which have stated that "when we are dealing with human life and safety we believe that more is required for a

[128] See *Washington v. Harper*, 494 U.S. 210, 221-22 (1990), where the U.S. Supreme Court held that state inmates had a Fourteenth Amendment due process right to refuse mandated medical treatment in a state run prison.
[129] See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. at 33, 59.

justification than a reference to the economics of suppliers of goods,"[130] are "ahead of the tide" in this respect.

The argument, that a right not specifically delineated by the Constitution is a right that should not be recognized by the courts as a fundamental right protected by strict scrutiny analysis, is overly simplistic and all too often an excuse for inaction. Justice Douglas commented that "there is, of course, not a word in the Constitution, unlike many modern constitutions, concerning the right of the people to education or to work or to recreation by swimming or otherwise. Those rights, like the right to pure air and pure water, may well be rights retained by the people' under the Ninth Amendment."[131] Justice Marshall would agree, having stated "it will not do to suggest that the 'answer' to whether an interest is fundamental for purposes of equal protection analysis is always to be determined by whether that interest 'is a right . . . explicitly or implicitly guaranteed by the Constitution.' I would like to know where the Constitution guarantees the right to procreate, or the right to vote in state elections, or the right to an appeal from a criminal conviction."[132] This would later prove prophetic as the Supreme Court in *Plyler* suggested that the Constitution guarantees certain rights, such as the right to participate equally in state elections, even though they are not 'explicitly or implicitly guaranteed' by the Constitution.[133] Furthermore, "the Constitution does not forbid the creation of new

[130] *Dickie v. Farmers Union Oil Co.,* 2000 ND 111 at P7, 611 N.W2d 168 (2000); *Hanson v. Williams County*, 389 N.W.2d 319, 1986 N.D. LEXIS 328 (1986).
[131] *Palmer v. Thompson*, 403 U.S. at 233-34 (1971) (Douglas, J., dissenting).
[132] *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. at 100 (Marshall, J., dissenting).
[133] *Plyler v. Doe*, 457 U.S. 202, 217 n. 15 (1982); See also *City of Mobile v. Bolden*, 446 U.S. 55, 75 (1980); *Harris v. McRae*, 448 U.S. 297, 312 (1980); *Maher v. Roe*, 432 U.S. 464, 470 (1977).

rights, or the abolition of old ones recognized by the common law, to attain a permissible legislative object."[134]

Although the United States Congress has not yet enacted any federal statute of repose, any federal statute of repose would be subject to an Equal Protection challenge because the Fifth Amendment due process clause is interpreted as containing an equal protection requirement applicable to the federal government.[135] When a federal statute is challenged on equal protection grounds, the court can find that the United States Congress had implied objectives for enacting the statute without specifically stating the legislature's objectives in enacting a statute.[136] For example, attempting to assist manufacturers with their business plans is a legitimate governmental interest; however, passing a statute of repose limiting liability of a business to only a few years in order to protect potential business defendants is unreasonable. Such statutes are unconstitutional because they deny the fundamental rights to due process, equal protection and bodily integrity guaranteed by the Constitution.

Although a federal court is "bound by plain language" if "Congress did not express a contrary intent,"[137] Congress cannot possibly legislate for every contingency; it is no giant leap of judicial effort to interpret what the intent and logical extrapolations of a federal statute may allow. A statute of repose may be both specific (the type of manufacturer or industry protected), yet also hopelessly vague (why are certain products

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[134] *Silver v. Silver*, 280 U.S. 122; see also *Louis Pizitz Dry Goods Co. v. Yeldell*, 274 U.S. 112, 116 (1927); *New York Central R. Co. v. White*, 243 U.S. 188 (1917); *Mountain Timber Co. v. Washington*, 243 U.S. 219 (1917); *Wilmington Mining Co. v. Fulton*, 205 U.S. 60, 74 (1907).

[135] See, e.g., *Jackson v. Metropolitan Edison Co*., 419 U.S. 345, 349-51 (1974).

[136] See *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396 (2003). The state of California attempted to argue that even if a state statute interfered with Executive Branch foreign policy, the United States Congress authorized a state law of this sort by two separate acts. While California was not successful on this argument, it was a 5-4 decision; thus leaving the door open for future similar arguments.

[137] *Burlington Northern & Santa Fe R. Co. v. Poole Chemical Co*., 419 F.3d at 364.

granted different periods of repose?) A court cannot hope to glean a rationale as to the Congressional intent for such distinctions since they are arbitrary and without a rational basis. The reason for the federal separation of powers doctrine is for one branch of government not to have too much power. For federal courts to be hand-tied by the U.S. Congress is not what the founders of the United States of America intended.[138]

A legislature should not have free reign to pass unconstitutional statutes of repose, which courts blithely uphold as constitutional without any adherence to constitutional principles. A blind and simplistic presumption that all statutes of repose are constitutional is dangerously naïve. One need only look at legislation from the antebellum American South to see why this posture is fraught with danger.[139]

Claims based upon exposure to asbestos and silicon gel breast implants are already granted exceptions to some state statutes of repose based on long latency periods. These exceptions would seem to indicate that claims based upon exposure to any hazardous substance with a long latency period should be granted an exception as well.

In § 9658 of CERCLA,[140] Congress did attempt to nullify unjust statutes of limitation by providing exceptions to state statutes of limitations.[141] Federal courts, however, have found ways to hold that state statutes of repose do not violate § 9658 of CERCLA, which states: "if the applicable limitations period for such action (as specified in the State statute of limitations or under common law) provides a commencement date

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[138] See U.S. Constitution, Articles I-III

[139] See An Inquiry into the Law of Negro Slavery (1858) (reprinted by the UGA Press in 1999), by Thomas R. R. Cobb. Although this is an erudite treatise on slave law, it is tragically flawed by its glorification of slavery and its curt dismissal of slavery's defects as minor and excusable.

[140] See 42 U.S.C. § 9601 *et seq.* (1980), Comprehensive Environmental Response, Compensation, and Liability Act (Superfund), which describes the provisions to toll a state statute limitations until such time as the decedent knew or allegedly should have known of his or her claim or until such time as the decedent's relatives knew or should have known of the decedent's illness and its potential causes.

[141] See CERCLA's pre-emption of state statute of limitations in 42 U.S.C. § 9658.

which is earlier than the federally required commencement date, such period shall commence at the federally required commencement date in lieu of the date specified in such State statute."[142] The 5th Circuit has commented that "CERCLA's legislative history indicates Congress intended for § 9658 to preempt a state statute of limitations that deprives a plaintiff who suffers a long-latency disease caused by the release of a hazardous substance of his cause of action, but not to preempt a state statute of repose."[143] However, § 9658 does not specifically refer or apply to statutes of repose; as a result, many courts will not use the statute of limitation language in § 9658 as indicating congressional intent to strike down statutes of repose.

A legislature should not be viewed as acting rationally if it enacts a statute of repose under which a claim based on an exposure to toxic environmental carcinogens that result in breast cancer would not be permitted while a claim based on breast cancer resulting from a silicon gel implant would be permitted to be tried by that statute of repose. No rational distinction can be made between long latency periods for exposure to asbestos versus exposure to another environmental toxin. Any such distinction should be found by a court to be irrational. The asbestos and silicon gel breast implant exceptions in statutes of repose allow a right to trial of a claim in court to some injured individuals, while denying a day in court to other injured persons. Courts should not sit back and do nothing in such a situation on the grounds that only the legislature can act in the area of statutes of repose.[144] Courts should strike down unconstitutional statutes of repose rather than wait for the legislatures to enact a conforming statute. Often, a court decision

[142] 42 U.S.C. § 9658(a)(1)
[143] *Burlington Northern & Santa Fe R. Co. v. Poole Chemical Co.,* 419 F.3d at 364.
[144] *Winningham v. Ciba Geigy Corp*., 1998 U.S. App. LEXIS 16388 (6th Cir. 1998).

striking down an unconstitutional statute is the only action that will galvanize a legislature to act properly.

Conclusion: Courts should hold Statutes of Repose to be Invalid under the Constitution

Courts should hold that a statute of repose that only applies to a particular type of legal claim (such as only to product liability claims or only to product liability claims other than asbestos and/or silicon gel breast implant cases) is invalid under the equal protection clause of the United States Constitution because it irrationally discriminates against only particular types of legal claims in violation of the rational basis test required under equal protection. In addition, if a state has a statute or statutes of repose that apply/applies to all legal claims, this statute or statutes, in order to comply with the equal protection clause's rational basis test, must establish a reasonable repose period for each type of legal claim.[145] A reasonable repose period for each type of claim should be based upon the relevant latency or discovery period for the disease or injury upon which a particular legal claim is based.[146]

Statutes of repose that have an unreasonably short period of repose should be invalidated by the courts in the states in which they are still permitted. At the very least, the period of repose in a statute of repose should be lengthened by legislatures, either as a gradual step or as a compromise. While such statutory amendment is a legislative task, courts should highlight the need for such legislative action by holding that a statute of repose is unconstitutional when the statute has a discoverability period that is

[145] See Note at 33 B.C. Envtl. Aff. L. Rev. 345, 356, for discussion of an Oregon statute of repose (Or. Rev. Stat. § 12.115 (2003)) that applies to all tort causes of action.
[146] See *Id*., at 357 for a discussion of the Florida real property statute of repose (Fla. Stat. Ann. § 95.11(3)(c)(West 1982)) that provides a longer repose period for latent injuries based on discoverability.

unreasonably short when compared to the latency period or discoverability of the disease upon which the plaintiff's underlying legal claim is based.

The fact that in some states asbestos and gel implants are granted an exception to statutes of repose, based chiefly on a long latency period, would seem to negate any logical basis for a statute of repose that bars, after a period of time shorter than this long latency period, a claim arising from injuries caused by a similar product or exposure to a substance with a similarly long latency period. Many diseases and illnesses resulting after a long latency period share several facets with the diseases and illnesses resulting from asbestos or gel implant exposure. Distinctions drawn in a statute of repose between these recognized exceptions and other illnesses are irrational. A characterization or classification that is irrational or has no rational basis is a violation of the equal protection clause of the 14th Amendment to the U.S. Constitution.