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Natalie H. Mantell

Suffolk University Law School

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LIMITATIONS ON A MINOR'S RIGHT TO SUE FOR MEDICAL MALPRACTICE: A CONSTITUTIONAL ANALYSIS

I. INTRODUCTION

Under Massachusetts law, a minor has three years to initiate a medical malpractice lawsuit from the date on which a medical malpractice claim "accrues." The accrual date has been interpreted to include a "discovery rule," meaning that the time during which the claimant can bring an action begins on the date that one discovers the malpractice, rather than on the date it occurs. If the malpractice occurs before age six, however, the child has until age nine to bring an action. Accordingly, the statute of limitations begins to run on the accrual or discovery date and lasts for three years, unless the child is younger than age six when the malpractice occurs, in which case the child has until age nine to file a suit.

In contrast, the statute of repose embodied in the same provision runs for seven years from the date on which the malpractice occurs, regard-

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1 MASS. GEN. LAWS ch. 231, § 60D (2000). The minority provision currently states:

Notwithstanding the provisions of section seven of chapter two hundred and sixty, any claim by a minor against a health care provider stemming from professional services or health care rendered, whether in contract or tort, based on an alleged act, omission or neglect shall be commenced within three years from the date the cause of action accrues, except that a minor under the full age of six years shall have until his ninth birthday in which the action may be commenced, but in no event shall any such action be commenced more than seven years after occurrence of the act or omission which is the alleged cause of the injury upon which such action is based except where the action is based upon the leaving of a foreign object in the body.

Id.


3 § 60D (maintaining three-year statute of limitations, except minor under age six has until age nine).

4 See id.; Harlfinger, 754 N.E.2d at 67 (quoting Klein v. Catalano, 437 N.E.2d 514, 516 (Mass. 1982)) (explaining statute of limitations is time during which plaintiff can bring a claim, or otherwise barred from so doing).
less of whether the child has discovered the injury. Unlike statutes of limitations for other tort claims in Massachusetts, the medical malpractice minority provision does not toll the action until the minor reaches the age of majority. Like the minority provision, the statutes governing an adult's ability to bring a medical malpractice claim also include a three-year statute of limitations, which begins to run on the discovery date, as well as a seven-year statute of repose, which begins to run on the occurrence date.

The specifics of the minority provision are best illustrated by example. If, for instance, an obstetrician commits malpractice during a child's delivery, but the child or his or her parent does not discover the injury until age ten, the suit would be barred. This result is not due to the statute of limitations because the three-year period would not start to run until the malpractice was discovered at age ten. Rather, the seven-year statute of repose, which began to run at birth when the physician committed the malpractice, would have expired three years prior to the patient's discovery of the injury and would, therefore, bar the claim against the physician. This example also illustrates the minority provision's rejection of tolling the claim until the child reaches eighteen because the claim would be barred even though the child is only ten years old.

Since its enactment, numerous plaintiffs have unsuccessfully challenged the minority provision's constitutionality. This note examines whether the Massachusetts Supreme Judicial Court has properly rejected such arguments. Section II explores the history of the medical malpractice statute's minority provision, including the insurance climate at the time of its adoption in 1975, reasons for adding the statute of repose in 1986, and the case law declaring its constitutionality. Section III presents decisions of other state courts that have struck down similar statutes and their reasons for so doing. Section IV analyzes the constitutionality of the Massachusetts statute and argues that the Supreme Judicial Court has

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5 See § 60D; Harlfinger, 754 N.E.2d at 67 (declaring no child shall bring action more than seven years from date of alleged occurrence, notwithstanding accrual date).

6 See Harlfinger, 754 N.E.2d at 67 (stating despite provisions of tolling statute, MASS. GEN. LAWS ch. 260, § 7, minor shall commence action within three years of accrual date); cf. MASS. GEN. LAWS ch. 260, § 7 (2004) (declaring action may be commenced after disability, such as being a minor, is removed).

7 See MASS. GEN. LAWS ch. 260, § 4 (Supp. 2004) (stating adult may bring action within three years from date of accrual); id. (prohibiting adult from bringing action after seven years from date alleged malpractice occurred).

8 See infra notes 23-42 and accompanying text.

9 See infra notes 60-95 and accompanying text.

10 See infra notes 13-42 and accompanying text.

11 See infra notes 43-59 and accompanying text.
correctly upheld the minority provision of the medical malpractice statute.12

II. HISTORY OF MASSACHUSETTS' MEDICAL MALPRACTICE STATUTE'S MINORITY PROVISION

In 1975, medical malpractice insurers in Massachusetts threatened to withdraw from the malpractice market and refused to provide insurance to physicians.13 In response, Massachusetts Sen. Daniel J. Foley and Rep. Raymond LaFontaine introduced "An Act Relative to Medical Malpractice," including among other provisions, a statute of limitations governing a minor's ability to bring a medical malpractice claim, the stated purpose of which was to ensure the continued availability of medical malpractice insurance.14 The bill's sponsors maintained that insurers were reacting to a national trend of high settlements and jury awards in medical malpractice cases, rather than to actual high settlements or jury awards in Massachusetts.15 At that time, the Massachusetts statute of limitations began to run when the alleged malpractice occurred, not when it was discovered.16 As a result, the sponsors maintained that the Massachusetts statute already reduced the likelihood of delayed claims against physicians and insurers.17 Elsewhere, they claimed, the discovery rule caused medical malpractice insurance crises because no time limit existed in which such discovery must be made.18

12 See infra notes 60-95 and accompanying text.
15 See Foley & LaFontaine Statement, supra note 13 (noting average settlement in 1975 in Massachusetts was $12,000).
18 See Foley & LaFontaine Statement, supra note 13; see also Harlfinger v. Martin, 754 N.E.2d 63, 68 (Mass. 2001) (citing legislative history and stating discovery rule does not place outer limit on time in which plaintiff can bring medical malpractice claim); ANNUAL REPORT OF THE SPECIAL COMMISSION RELATIVE TO MEDICAL PROFESSIONAL LIABILITY INSURANCE AND THE NATURE AND CONSEQUENCES OF MEDICAL MALPRACTICE, supra note 17 (stating statute of limitations requires plaintiff to bring lawsuit within three
In 1980, the Massachusetts Supreme Judicial Court declared in *Franklin v. Albert* that a medical malpractice cause of action accrues when the patient discovers the injury, not when the injury occurs. In response to *Franklin*, the Legislature reviewed the medical malpractice statute in 1986 and amended the minority provision to include a seven-year statute of repose. The statute of repose, unlike the three-year statute of limitations, begins to run at the time of the alleged malpractice's occurrence, not when a person discovers such alleged malpractice.

Since its introduction and enactment in 1975, plaintiffs have made numerous challenges to the minority provision's constitutionality. In *Plummer v. Gillieson*, a mother filed suit on behalf of her eight-year-old

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20 Id. at 461-64 (overruling prior decisions and holding statute of limitations for medical malpractice statute subject to discovery rule); see also Bowen v. Eli Lilly & Co., 557 N.E.2d 739, 742 (Mass. 1990) (noting action accrued when plaintiff had knowledge of harm and cause of harm); Santana v. Brigham & Women's Hosp., 2003 Mass. App. Div. 79, 80 (2003) (recognizing principle that patient should be put on notice before statute bars claim).


23 See Harlfinger, 754 N.E.2d at 66 (challenging statute under due process and equal protection guarantees of Federal and State Constitutions); Ciocchi v. Guenther, 370 N.E.2d 1003, 1005 (Mass. 1977) (arguing length of time provided for statute to become effective not long enough); *Plummer*, 692 N.E.2d at 530 (challenging statute similarly to *Harlfinger*, but adding right to remedy claim under Mass. Declaration of Rights, Article 11). The Supreme Judicial Court first reviewed a challenge to section 60D's constitutionality in 1977. See *Ciocchi*, 370 N.E.2d at 1004 (discussing child's and his father's suit against doctor). The Supreme Judicial Court held that the statute, which did not provide for tolling a minor's claim until the age of majority, was constitutional because it still provided a reasonable time in which a minor could bring a medical malpractice action before the statute of limitations barred it. Id. at 1004-05 (holding six months was reasonable time to commence present action).

child for injuries sustained during the child’s birth. The trial court held that the seven-year statute of repose embodied in chapter 231, section 60D of the Massachusetts General Laws barred the suit. On appeal, the appellant (plaintiff below) argued unsuccessfully that the minority provision violated the due process and equal protection clauses of the Federal and State Constitutions.

The appellate court in Plummer first addressed the due process question and deemed section 60D to be economic and social remedial legislation, that must only survive a rational basis test to be constitutional. The court rejected the appellant’s due process claims on the grounds that the statute is clear, unambiguous, and no contradiction exists between the ninth birthday component of the limitations provision and the statute of repose. The court further held that section 60D did not unconstitutionally infringe upon the due process rights of plaintiffs under two years of age because the legislative objective of reducing the cost of medical malpractice insurance and ensuring the availability of affordable health care is rationally related to a statute that limits the duration of liability for both minors and adults.

25 Plummer, 692 N.E.2d at 529.
26 Id. at 530 (stating motion judge granted summary judgment in favor of defendants).
27 See id. (affirming judgment of lower court). The appellant claimed that the statute violated the due process clauses of the Federal and State Constitutions because it was “unconstitutionally vague and infringe[d] upon the rights of plaintiffs under the age of two to seek redress against medical providers.” Id. at 531. The statute also violated the equal protection clauses of the same Constitutions, she argued, because it “treats medical malpractice plaintiffs injured between birth and age two differently than other minor plaintiffs who are under the age of six and there is no rational basis for this classification.” Id. at 532. The appellant also asserted that the statute violates Article XI of the Massachusetts Declaration of Rights, which guarantees one’s right to a remedy by recourse to the laws. See id. Article XI of the Massachusetts Declaration of Rights states:

Every subject of the commonwealth ought to find a certain remedy, by having recourse to the laws, for all injuries or wrongs which he may receive in his person, property, or character. He ought to obtain right and justice freely, and without being obliged to purchase it; completely, and without any denial; promptly and without delay; comfortably to the laws.

MASS. CONST. pt. 1, art. XI.

The Plummer court quickly dismissed this claim, however, declaring that Article XI “has never been construed to grant any person a vested interest in any rule of law entitling such person to insist that it shall remain unchanged.” Plummer, 692 N.E.2d at 532 (declaring statutes modifying or abrogating common law rights do not violate Article XI); cf. Klein v. Catalano, 437 N.E.2d 514, 522 n.16 (Mass. 1982) (holding Massachusetts Legislature may abolish a common law cause of action by statute without providing substitute remedy if statute enacted rationally relates to permissible legislative objective).

28 See Plummer, 692 N.E.2d at 531 (stating plaintiff must overcome presumption of constitutionality and deference to legislature when economic legislation at issue).
29 Id.
30 See id. at 531-32 (holding section 60D rationally related to legitimate state interest and therefore satisfies due process requirements). The court completed only one due proc-
With respect to the equal protection claim, the *Plummer* court applied a rational basis test because the plaintiff did not demonstrate that the statute burdened a suspect group or fundamental interest. The court held that the repose provision did not distinguish between minors of any age, but rather created a classification based upon medical malpractice claims and other tort actions. As such, a rational basis exists for the classification because it related to the State's interest in reducing the cost of medical malpractice insurance, thereby ensuring the availability of health care.

*Harlfinger v. Martin* also addressed the constitutionality of the statute of repose embodied in section 60D. The plaintiffs contended that the statute violated the Due Process and Equal Protection Clauses of the Federal and State Constitutions. The court held, as it had three years earlier in *Plummer*, that the statute of repose embodied in section 60D was constitutional. The *Harlfinger* court also identified the statute as economic regulation and agreed with the *Plummer* decision that the statute bore a "reasonable relationship to a legitimate legislative purpose." De-
spite plaintiffs’ argument that the statute of repose has only a “negligible impact” on the cost of health care, the Supreme Judicial Court stated that it was not the job of the courts, but rather that of the legislature, to determine the problem that needs solving.\footnote{Harlfinger, 754 N.E.2d at 69 n.8 (quoting Klein v. Catalano, 437 N.E.2d 514, 520 (Mass. 1982)).}

The plaintiffs in \textit{Harlfinger} also argued that section 60D violated the Equal Protection Clause because it distinguished between cases in which the doctor leaves a foreign object in a person’s body and those where he or she does not.\footnote{Id. at 72 (arguing unlike other medical malpractice claims, foreign object claims not subject to repose statute).} The court applied a rational basis test because the statute did not involve a suspect class or a fundamental right.\footnote{Id. (reiterating statute must rationally relate to furtherance of legitimate state interest).} The court identified the same purposes of the statute of repose as it did in the due process analysis and stated that a rational basis exists for distinguishing between cases that involve foreign objects and those that do not.\footnote{See Harlfinger, 754 N.E.2d at 69 (determining wisdom or effectiveness of statute not within province of courts).}

addressing the cost and availability of medical malpractice insurance. \textit{See id.; see also supra} note 14 and accompanying text. The court also based its decision on “limiting the duration of liability,” which it said was a “well recognized public purpose.” \textit{Harlfinger}, 754 N.E.2d at 69 n.8 (quoting Klein v. Catalano, 437 N.E.2d 514, 520 (Mass. 1982)). The court listed a third purpose, the difficulty of demonstrating the standard of care from many years ago, which a statute of repose could remedy. \textit{Harlfinger}, 754 N.E.2d at 69 n.8.

\textit{See Harlfinger, 754 N.E.2d at 69 (determining wisdom or effectiveness of statute not within province of courts).}
III. OTHER STATES’ REASONS FOR STRIKING DOWN SIMILAR STATUTES

In 1983, the Supreme Court of Texas was the first state supreme court to hold a medical malpractice minority provision unconstitutional. In *Sax v. Votteler*, the court ruled that Texas’ minority provision violated the Texas Constitution’s open courts provision. Later that same year, the Supreme Court of Ohio overturned a similar statute in *Schwan v. Riverside Methodist Hospital* and held the state’s minority provision unconstitutional on the basis that it violated the Equal Protection Clause in the Ohio Constitution. The Ohio court held that the statute created an irrational classification in treating medical malpractice victims younger than age ten differently from those who are older than ten, but still minors.

In *Mominee v. Scherbarth*, the Supreme Court of Ohio affirmed its decision in *Schwan*, holding the minority provision unconstitutional. In contrast to *Schwan*, however, the court resolved *Mominee* on due process grounds, holding that the statute violated the due process and due course of law provisions in the Ohio Constitution. The court’s reasoning focused on the defendants’ lack of evidence relating to the number of minors’ medical malpractice claims and the effect of such claims on insurance

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44 648 S.W.2d 661 (Tex. 1983).

45 *Id.* at 664 (identifying open courts provision as due process guarantee). The court held that the statute of limitations in the minority provision was unconstitutional because it unreasonably prevented a minor from seeking redress for negligently caused injuries. *See id.* at 667; *see also id.* at 665-66 (determining legislature cannot abrogate common law cause of action without surviving balancing test). In deciding *Sax*, the justices relied upon state due process grounds rather than state equal protection grounds, federal due process or federal equal protection grounds because they believed the Texas Constitution afforded its citizens additional rights. *Id.* at 664.

46 *452 N.E.2d 1337* (Ohio 1983).


48 *Id.* at 1339 (holding any classification based on age other than age of majority irrational); *see also infra* note 91 and accompanying text (specifying one year statute of limitations for minors older than ten, but four or more years to bring action for minors younger than ten).

49 *503 N.E.2d 717* (Ohio 1986).

50 *Mominee v. Scherbarth, 503 N.E.2d 717, 720 (Ohio 1986)* (recognizing *Schwan’s* holding of unconstitutionality based upon equal protection, not due process grounds).

51 *See id.* at 721 (stating statute fails rational basis test because it does not bear a real and substantial relationship to its stated purposes of ensuring the continued delivery of health care and reducing medical malpractice insurance premiums); *supra* note 50; *see also id.* at 720-22 (applying same constitutional test as under Massachusetts Constitution, but striking down statute in Ohio).
In *Mominee*, Chief Justice Celebrezze’s concurrence relied upon language from the Missouri Supreme Court in *Strahler v. St. Luke's Hospital*, stating, “[T]he method employed by the legislature to battle any escalating economic and social costs connected with medical malpractice litigation exacts far too high a price from minor plaintiffs.” The Supreme Court of Missouri in *Strahler* held the state’s medical malpractice minority provision unconstitutional on the basis that it violated the Missouri Constitution’s provision guaranteeing a citizen’s right of access to the courts.

The Supreme Court of New Hampshire in *Carson v. Maurer* overturned the state’s medical malpractice minority provision on equal protection grounds. The *Carson* court applied a higher standard of review than rational basis even though the statute did not involve a suspect class or fundamental right. The court held that the statute, which only applied the discovery rule to cases where the doctor left a foreign object in the plaintiff’s body, did not substantially relate to the legislative objective of controlling the rising costs of medical malpractice liability insurance.

IV. APPLICATION OF THE PROPER CONSTITUTIONAL TESTS: IS MASSACHUSETTS’ STATUTE CONSTITUTIONAL?

Plaintiffs have attempted to challenge Massachusetts’ minority provision under the due process and equal protection clauses embodied in the State and Federal Constitutions. The following sections analyze each

52 See id. at 721 (citing lack of evidence as reason relationship between statute and goal not substantial).
53 706 S.W.2d 7 (Mo. 1986).
54 See *Mominee*, 503 N.E.2d at 724 (Celebrezze, C.J., concurring) (quoting *Strahler v. St. Luke’s Hosp.*, 706 S.W.2d 7, 12 (Mo. 1986)).
55 See *Strahler v. St. Luke’s Hosp.*, 706 S.W.2d 7, 11-12 (Mo. 1986) (overturning statute because it makes minors dependent on others to assert claims, thereby requiring minors to forfeit such claims if not brought within statutory period).
56 424 A.2d 825 (N.H. 1980).
57 See *Carson v. Maurer*, 424 A.2d 825, 833 (N.H. 1980) (holding statute invalid because it distinguishes between cases that involve foreign objects and those that do not, and makes discovery rule unavailable to plaintiffs without foreign object claims).
58 See id. at 830-31 (stating right to recover for injuries not fundamental, but important). The court evaluated the statute under a two-part analysis: the classifications “must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation.” Id. at 831 (italics in original) (applying more rigorous judicial scrutiny than allowed under rational basis test).
59 See id. at 834 (ruling statute unconstitutional because no basis for denying discovery rule to minors without foreign object claims, given that number of claims brought by them relatively small).
60 See *Harlfinger v. Martin*, 754 N.E.2d 63, 66 (Mass. 2001) (challenging statute under federal and state due process and equal protection provisions); *Plummer v. Gillieson*, 692 N.E.2d 528, 530 (Mass. App. Ct. 1998) (challenging statute under federal and state due process and equal protection provisions); *supra* notes 23-42 (citing cases in which plaintiffs...
issue separately and argue that Massachusetts’ minority provision should continue to survive due process and equal protection challenges brought under both State and Federal Constitutions.  

A. Due Process

When conducting a due process analysis, a court must first determine whether to apply the rational basis test or a higher standard of review based on whether the legislation is of an economic matter. The Supreme Judicial Court has correctly identified Massachusetts’ minority provision as economic legislation and thus within the police power of the state. Therefore, Massachusetts courts have correctly employed the rational basis test to determine the minority provision’s validity under the Due Process Clause.

A court must uphold economic legislation under the Massachusetts Constitution if it bears a “real and substantial relation to the public health, safety, morals, or some other phase of the general welfare.” Under the United States Constitution, however, the Supreme Court hasphrased the test differently, mandating that a court uphold a statute if it bears a “reasonable relation to a permissible legislative objective.” Because public

have challenged section 60D under state and federal due process and equal protection); see also Plummer, 692 N.E.2d at 532 (challenging Massachusetts statute under right to remedy provision embodied in Declaration of Rights).

61 See infra notes 62-95 and accompanying text.

62 See Harlfinger, 754 N.E.2d at 68 n.7 (explaining due process analysis occurs within area of economic regulation); Plummer, 692 N.E.2d at 531 (determining first that statute represented economic legislation, then applying rational basis test).

63 See Foley & LaFontaine Statement, supra note 13 (describing bill as addressing cost and availability of insurance); supra note 38 (identifying purpose as addressing cost and availability of medical malpractice insurance); supra note 62 (citing cases describing statute as being within area of economic regulation); infra text accompanying notes 69-70 (articulating reasons statute falls within state’s police power).

64 See Harlfinger, 754 N.E.2d at 68 (applying rational basis test to challenged economic legislation that does not infringe on any fundamental right); Plummer, 692 N.E.2d at 531 (stating plaintiff must satisfy rational basis test to prove due process violation); supra notes 62-63 and accompanying text (recognizing minority provision as economic legislation and applying rational basis test).


health, safety, morals, or some other phase of the general welfare are permissible legislative objectives, the key language in these tests is the relationship that the statute must bear to those objectives: a “real and substantial relation” under the Massachusetts Constitution and a “reasonable relationship” under the Federal Constitution. As a practical matter, in the area of economic regulation, there is little difference between the state and federal standards.

The Massachusetts Legislature passed the “Act Relative to Medical Malpractice” in an effort to address the nationwide medical malpractice crisis during the 1970s that caused insurance companies in Massachusetts to threaten to withdraw from the medical malpractice market. As such, the Legislature maintains that the Act’s objectives are to reduce the cost of medical malpractice insurance and to ensure the continued availability of health care to Massachusetts’ citizens. These objectives are legitimate. The statute passes the constitutional test because limiting the time in which a medical malpractice action can be brought reduces the actual number of medical malpractice claims absorbed by insurance companies, thereby easing the cost of medical malpractice insurance for physicians.

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67 See supra notes 65-66 and accompanying text (articulating separate rational basis tests under State and Federal Constitutions); supra note 30 & infra note 71 and accompanying text (ensuring availability of health care is a permissible legislative objective); see also Blue Hills Cemetery, Inc. v. Bd. of Registration in Embalming and Funeral Directing, 398 N.E.2d 471, 475 (Mass. 1979) (emphasizing presumption of constitutionality).

68 Harlfinger, 754 N.E.2d at 68 n.7 (quoting Klein, 437 N.E.2d at 519 n.6) (applying one rational basis standard because of similarity between federal and state standards); see Chebacco Liquor Mart, Inc. v. Alcoholic Beverage Control Comm’n, 711 N.E.2d 135, 138 (Mass. 1999) (applying same minimal standard for both federal and state due process provision challenges); Blue Hills Cemetery, Inc., 398 N.E.2d at 475 n.8 (explaining any difference between two standards within area of economic regulation narrow); Plummer, 692 N.E.2d at 531 (quoting Klein, 437 N.E.2d at 519 n.6) (stating there exists little difference between two standards).

69 See Foley & LaFontaine Statement, supra note 13; see also supra notes 13, 14 & 15 and accompanying text (introducing Act and its purposes); infra note 70 and accompanying text.

70 See Harlfinger, 754 N.E.2d at 69 (stating purposes to limit cost of medical malpractice insurance and sustain its availability and affordability); Plummer, 692 N.E.2d at 531-32 (same); Foley & LaFontaine Statement, supra note 13; see also supra text accompanying notes 14, 30 & 38 (articulating purposes of Act).

71 See Harlfinger, 754 N.E.2d at 69 (holding objectives “surely permissible”); Plummer, 692 N.E.2d at 532 (declaring state interests legitimate); see also Mominee v. Scherbarth, 503 N.E.2d 717, 721 (Ohio 1986) (holding Ohio’s goals, which are identical to Massachusetts’ goals, are proper).

72 See Harlfinger, 754 N.E.2d at 69 (declaring establishing definitive endpoint to time in which minors can bring medical malpractice actions bears rational relationship to curbing cost of medical malpractice insurance); see also supra notes 1-6 and accompanying text (proclaiming section 60D limits time in which minor can bring medical malpractice action); supra note 70 and accompanying text (stating one legislative objective to reduce cost of medical malpractice insurance to physicians).
thermore, if physicians can afford the cost of medical malpractice insurance, they will be more likely to continue practicing, and ensure the availability of their services to the community.\footnote{See Harlfinger, 754 N.E.2d at 69 (declaring statutes of limitation and repose effectively ensure availability of health care in Massachusetts); see also supra notes 1-6 and accompanying text (specifying statutes of limitation and repose embodied within section 60D); supra note 70 and accompanying text (stating legislative objective of ensuring that health care is available and affordable).}

Courts in other states have struck down similar statutes on due process grounds by either applying a higher standard of review or by asserting that limiting the time during which a minor can bring a medical malpractice action does not rationally relate to the respective legislature’s objectives.\footnote{See Mominee, 503 N.E.2d at 721 (holding no evidence to prove rational relationship and therefore statute violated due process); Sax v. Votteler, 648 S.W.2d 661, 665 (Tex. 1983) (overturning minority provision by applying open courts-due process test, not rational basis); supra notes 45, 50 & 51 and accompanying text (elaborating on cases in which Texas and Ohio Supreme Courts held statutes unconstitutional).} One court cited the absence of legislative findings on the number and effect of minors’ medical malpractice claims as evidence of its decision to hold the state’s minority provision unconstitutional.\footnote{See Mominee, 503 N.E.2d at 721 (citing lack of evidence as reason constitutional test failed and statute violated Due Process Clause); supra note 52 and accompanying text (same).} In cases concerning economic legislation, however, a court must accord significant deference to the legislature in solving the problem at hand.\footnote{See Blue Hills Cemetery, Inc. v. Bd. of Registration in Embalming and Funeral Directing, 398 N.E.2d 471, 475 (Mass. 1979) (explaining statute justifiable by any conceivable set of facts or findings); id. (noting legislative deference not a result of judiciary abdicating its responsibility, but rather respect for policy decisions of popularly elected legislature); Pinnick v. Cleary, 271 N.E.2d 592, 609 (Mass. 1971) (applying rational basis test to equal protection challenge and noting legislative findings unnecessary).} A court must not exceed its boundaries and question the legislature’s judgment, especially where the law furthers an economic end.\footnote{See Dandridge v. Williams, 397 U.S. 471, 485-86 (1970) (asserting federal courts do not possess power to impose upon states their views of economic policy); Williamson v. Lee Optical, 348 U.S. 483, 488 (1955) (concluding Supreme Court cannot use Fourteenth Amendment’s Due Process Clause to strike down state laws regulating business and industry because they may be “unwise, Improvident or out of harmony with a particular school of thought”); Harlfinger, 754 N.E.2d at 69 (quoting Klein v. Catalano, 437 N.E.2d 514, 519 (Mass. 1982)) (articulating principle “whether [the statute is] wise or effective is not, of course, within the province of [courts]”).}

\section*{B. Equal Protection}

The constitutional analysis for an equal protection challenge varies significantly from a due process inquiry, although the test's language re-
In an equal protection case, a court must first determine whether a distinction or classification embodied in the statute involves a suspect class or a fundamental right, whereas the initial inquiry in a due process context is whether the legislation as a whole, not a classification within it, represents economic legislation. After the court answers the initial question in an equal protection case, it applies the appropriate constitutional test: rational basis scrutiny if the statute does not burden a suspect class or a fundamental right, strict scrutiny if it does, or middle-tier scrutiny if the statute distinguishes on the basis of gender or illegitimacy.

The Massachusetts minority provision neither involves a suspect class nor a fundamental right. The statute does distinguish on the basis of age, the nature of the claim, and whether a doctor leaves a foreign object in the patient's body. None of these distinctions, however, require a court

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78 See infra note 79 and accompanying text (explaining similarities and differences between due process and equal protection analyses).

79 See Harlfinger, 754 N.E.2d at 72 (identifying preliminarily that distinction at issue involves neither suspect classification nor fundamental right); Chebacco Liquor Mart, Inc. v. Alcoholic Beverages Control Comm'n, 711 N.E.2d 135, 136 (Mass. 1999) (noting plaintiff not member of suspect group nor burdened by fundamental interest, then analyzing statute under rational basis test); Plummer v. Gillieson, 692 N.E.2d 528, 532 (Mass. App. Ct. 1998) (determining first that statute burdens neither suspect group nor fundamental interest, then applying rational basis); see also supra note 62 and accompanying text (describing due process inquiry as first determining whether statute represents economic legislation, and if so, applying rational basis).

80 See supra note 79 (providing examples where courts applied rational basis test because statute did not burden suspect class or fundamental interest). The rational basis test imparts the lowest level of scrutiny and affords the most deference to the state legislature's decision. See infra text accompanying note 84 (denoting rational basis test). In contrast, strict scrutiny allows the least amount of deference to the legislature and provides that a statute will be held unconstitutional unless it is narrowly tailored to effectuate a compelling state interest. See Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 357 (1978) (explaining statute distinguishing on basis of race is subject to strict scrutiny); see also Carson v. Maurer, 424 A.2d 825, 830 (N.H. 1980) (stating suspect classifications include race, alienage or nationality). Statutes involving gender-based classifications are subject to middle-tier scrutiny, which the Supreme Court applies with more vigor than rational basis, but with less than strict scrutiny. See United States v. Virginia, 518 U.S. 515, 523-24 (1996) (quoting Miss. Univ. for Women v. Hogan, 458 U.S. 718, 724 (1982)) (holding gender classification must serve "important governmental objectives" and discriminatory means employed must be "substantially related" to achieving objectives); see also Carson, 424 A.2d at 831 (applying middle-tier scrutiny under State Constitution for classification based on medical malpractice and other tort plaintiffs even though United States Supreme Court restricted its use to gender and illegitimacy cases).

81 See supra note 79 (describing Massachusetts cases in which Supreme Judicial Court held section 60D does not involve suspect class or fundamental right).

82 See Harlfinger, 754 N.E.2d at 72 (recognizing statute distinguishes between cases involving foreign objects and those that do not); Plummer, 692 N.E.2d at 532 (noting statute singles out medical malpractice claimants from plaintiffs in all other tort actions); see also infra note 89 and accompanying text (arguing various classifications within section 60D pass equal protection rational basis test).
to raise the level of review above rational basis. Therefore, the Supreme Judicial Court correctly employed the lowest level of scrutiny in Harlfinger and Plummer, where it examined whether the minority provision’s classifications are “rationally related to the furtherance of a legitimate [s]tate interest.” The rational basis test assumes a strong presumption of validity, and a statute will fail only if it is wholly irrational.

The Legislature intended to address two issues in passing the Act Relative to Medical Malpractice: controlling the cost of medical malpractice insurance and ensuring the uninterrupted delivery of health care to Massachusetts citizens. The Supreme Judicial Court recognized a third state interest as establishing some definitive endpoint for medical malpractice claims, but the court misunderstood the difference between the state’s interests and the means by which the legislature addressed those interests. Establishing a definitive endpoint, by enacting a statute of limitation and a statute of repose, is exactly how the Massachusetts Legislature addresses the two above interests; it is not an additional interest. Notwithstanding the Supreme Judicial Court’s third purpose, the statute satisfies the rational basis test because the classifications at issue rationally relate to the legislature’s objectives of reducing the cost of medical malpractice insurance and ensuring continued availability of health care in Massachusetts.

83 See supra notes 79 & 82 and accompanying text (explaining such classifications do not involve suspect groups or fundamental interests, so no need for strict scrutiny).
85 See Pinnick v. Cleary, 271 N.E.2d 592, 609 (Mass. 1971) (stating Equal Protection Clause only prohibits legislature from making “arbitrary or irrational” classifications); see also Cundiff v. Daviess County Hosp., 656 N.E.2d 298, 302 (Ind. 1995) (ordering courts to exercise deference to legislature when conducting equal protection analysis of minority provision).
86 See Foley & LaFontaine Statement, supra note 13; see also supra text accompanying note 30 (describing statute’s objectives); supra note 70 and accompanying text (same).
88 See supra notes 1-6 and accompanying text (describing operation of section 60D); supra text accompanying note 14 (introducing statute of limitations to ensure availability of medical malpractice insurance); supra note 21 and accompanying text (introducing statute of repose to further limit time during which minors allowed to bring medical malpractice actions).
89 See Plummer, 692 N.E.2d at 532 (explaining distinction between medical malprac-
The state supreme courts that have held minority provisions unconstitutional have properly done so because the corresponding state legislatures did create irrational classifications in the respective statutes. For example, in Schwan, the Ohio statute outlined a system whereby a minor under age ten had until age fourteen to bring a medical malpractice action, but anyone older than ten, including adults, had only one year to do so. Massachusetts’ minority provision, unlike Ohio’s, does not provide for different statutes of limitations depending on a child’s age, but rather a three year statute of limitations for everyone, including adults, and until age nine for those younger than age six.

In addition, the Carson court properly struck down New Hampshire’s minority provision on equal protection grounds because applying the discovery rule to some cases and not to others did not at all relate to reducing the cost of medical malpractice insurance. The Massachusetts statute, however, does not create this distinction because the discovery rule applies to all medical malpractice cases. Furthermore, the New Hampshire Supreme Court applied a middle-tier scrutiny to the statute because it considered the right to recover for injuries an important substantive right, although not a fundamental one requiring strict scrutiny.

See infra notes 91-95 and accompanying text (describing reasons for irrational classifications).

See Ohio Rev. Code Ann. § 2305.11(A), (B) (1975) (denoting one year statute of limitations for minors older than ten, but at least four years to bring action if minor younger than ten); Mominee v. Scherbarth, 503 N.E.2d 717, 719-20 (Ohio 1986) (outlining specifics of statutory scheme); Schwan v. Riverside Methodist Hosp., 452 N.E.2d 1337, 1338 (Ohio 1983) (describing statute).

See Mass. Gen. Laws ch. 231, § 60D (2000) (denoting three year statute of limitations and same three year difference between ages six and nine); Ohio Rev. Code Ann. § 2305.11(A), (B) (1975) (specifying one year statute of limitations for minors older than ten, but four or more years to bring action for minors younger than age ten); see also McGuinness v. Cotter, 591 N.E.2d 659, 663 (Mass. 1992) (clarifying purpose of ninth birthday provision to afford younger plaintiffs additional time to bring action).

See Carson v. Maurer, 424 A.2d 825, 834 (N.H. 1980) (denying constitutionality of minority provision because statute did not substantially further statute’s objectives); see also supra notes 57-59 and accompanying text (describing New Hampshire Supreme Court’s reasoning in Carson).

See Harfinger, 754 N.E.2d at 73 (explaining discovery rule applicable whether malpractice based upon foreign object exception or not).

See supra notes 57-59 and accompanying text (describing Carson); see also supra notes 80 & 93 (describing reasons for New Hampshire’s statute failing middle-tier scrutiny and those for not applying strict scrutiny).
V. CONCLUSION

Times have changed. In 1975, the sponsors of the Act Relative to Medical Malpractice determined that insurers' apprehension about providing coverage in Massachusetts was due to a national trend of high jury awards and settlements. The trend had not yet materialized in Massachusetts at that time, but today high jury awards and settlements in the Commonwealth are placing significant pressure on insurers. *Massachusetts Lawyers Weekly* reported that in 2003, juries awarded damages of $3.18 million and $1.8 million. In addition, the article reported eighteen settlements: one each for $3.75 million and $3.25 million, eight between $2 million and $3 million, and eight between $1 million and $2 million. During 2004, one of the medical liability insurers in the state, Medical Liability Mutual Insurance Company (MLMIC), discontinued insurance policies of more than 1,600 physicians in Massachusetts. The pressure on insurance companies remains a critical problem.

The Massachusetts Legislature attempted to resolve this issue thirty years ago. It enacted the current statute, including the statutes of limitations and repose, to allow physicians to continue providing health care to the public. Should the Massachusetts Legislature decide to reexamine the Act in light of the recent changes in the medical malpractice liability market and in response to pressure from the medical community and others lobbying in favor of tort reform, it should not materially alter the minority provision. The American Medical Association does not suggest that limiting a minor's right to sue for medical malpractice would significantly affect the medical liability crisis. Rather, the Massachusetts Legislature

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should modify other statutes governing medical malpractice that would have a greater impact on the desired outcome. Section 60D provides stability for insurers and physicians by reducing the risk of expensive litigation and excessive jury awards and settlements many years after a minor's injury occurs.

The minority provision of the Act Relative to Medical Malpractice is constitutional. Due process and equal protection challenges have been unsuccessful because the statute is an economic regulation that does not burden a suspect class or fundamental right. Accordingly, the Massachusetts Supreme Judicial Court has appropriately applied the respective rational basis tests and has properly decided the cases before it. Therefore, future patients who wish to increase the time that they have to bring medical malpractice actions may find a more sympathetic audience in the Legislature than in the courts.

Natalie H. Mantell