Which Equal Protection Standard for Medical Malpractice Legislation?

*By Gail Harper**

During the late 1960's and early 1970's, medical malpractice insurers began to claim that, due to a complex of factors, chief among them the rising number of claims for negligence and the escalating dollar amounts of awards, the insurance companies would no longer be able to provide coverage to doctors at a profit without raising premiums drastically.[1] Members of the insurance and health care industries and legislators talked of tort reform.[2] In 1975, individual insurers either announced huge rate increases for doctors and hospitals or announced their withdrawal from the medical malpractice insurance market. The "crisis" was on.[3]

At the federal and state levels of government, talk of legislation that would alter the means of compensating victims of medical malpractice began in earnest. Federal legislation was introduced in 1975,[4] but it was supplementary to that introduced by the states,[5] and Congress did not express an intent to preempt state regulation of malpractice at that time.[6] Most of the states consid-

* A.B., 1973, University of California, Santa Cruz; M.F.A., 1975, University of Iowa; member, third year class.

1. Charbonneau, *Medical Malpractice Crisis: Fact or Fiction?* 3 ORANGE COUNTY B.J. 139 (1976); Reder, *Medical Malpractice: An Economist's View,* A.B.F. RES. J. 511 (1976) [hereinafter cited as Reder I]; Reder, *An Economic Analysis of Medical Malpractice,* 5 J. LEGAL STUDIES 267 (1976) [hereinafter cited as Reder II]; W. CURRAN, HOW LAWYERS HANDLE MEDICAL MALPRACTICE CASES: AN ANALYSIS OF AN IMPORTANT MEDICOLEGAL STUDY, HEW Pub. No. (HRA) 76-3152, 33-35 (1976). *See* Aitken, *Medical Malpractice: The Alleged "Crisis" in Perspective,* 3 W. ST. L. REV. 27 (1975); Blaut, *Medical Malpractice Crisis—Its Causes and Future,* 44 INS. COUNSEL J. 114, 119-20 (1977)(explanation of the long tail problem); Sheehan, *Medical Malpractice Crisis in Insurance: How It Happened and Some Proposed Solutions,* 11 FORUM 80-88 (1975).

2. Reder II, *supra* note 1, at 267.

3. W. CURRAN, *supra* note 1, at 34.

4. Studley & Nye, *Federal Malpractice Bills,* in HEALTH POLICY CENTER, GRADUATE SCHOOL, GEORGETOWN UNIVERSITY, A LEGISLATOR'S GUIDE TO THE MEDICAL MALPRACTICE ISSUE 22 (1976) [hereinafter LEGISLATOR'S GUIDE].

5. *Id.*

6. *Id.*

ered or passed some medical malpractice legislation in 1975.[7] A common measure was the formation of joint underwriting associations that forced insurers to provide malpractice coverage and to share losses.[8] More controversial were the revisions in licensing of health care providers,[9] creation of mandatory prescreening or arbitration of claims,[10] shortening of statute of limitations periods,[11] modification or elimination of the collateral source rule,[12] limitation of attorney contingency fees,[13] provisions for periodic payment of damages,[14] and limits on recovery of damages.[15]

In 1976, challenges to this new legislation began to appear in the courts. Most of the challenges have been based on Fourteenth Amendment guarantees of equal protection and due process,[16] and the results have varied considerably, depending upon choice of standard by the reviewing court.[17]

This note begins with a discussion of the medical malpractice insurance "crisis." The second section describes the American concept of representation, which places a duty upon the judiciary to intervene when the legislature fails to represent adequately a minority, and discusses the enforcement of equal protection guarantees by the Supreme Court in recent years. The focus then shifts to equal protection challenges in the state courts to some of the legislation passed in response to the "crisis," and the standards used by the reviewing courts. A discussion of status distinctions as a barrier to suit in tort law and the trend toward elimination of some of those barriers follows. The note concludes with the recommendation that the United States Supreme Court take advantage of the next opportunity to grant certiorari to hear one of these cases, and scrutinize the medical malpractice legislation and its purported basis, using a heightened standard of review.

For convenience I have focused in this note on a common pro-

7. Grossman, *State-by-State Summary of Legislative Activities on Medical Malpractice*, in LEGISLATOR'S GUIDE, *supra* note 4, at 12-21.

8. Grossman, *An Analysis of 1975 Legislation Relating to Medical Malpractice, in* LEGISLATOR'S GUIDE, *supra* note 4, at 4-6. Passed by 24 states as of 1976.

9. *Id.* at 7. Very few states significantly upgraded health care quality controls.

10. *Id.* at 8.

11. *Id.* at 9.

12. *Id.*

13. *Id.* at 10.

14. Grossman, *supra* note 7, at 12-21 (Alabama, California, Wisconsin).

15. *Id.* (California, Idaho, Illinois, Indiana, Louisiana, Ohio, Wisconsin).

16. White & McKenna, *Constitutionality of Recent Malpractice Legislation*, 13 FORUM 312 (1977).

17. *Id.* at 329.

vision of medical malpractice legislation: the limit on recovery of damages.

The Crisis

Is there, or was there, a crisis? The question is not frivolous. One would expect that a legislature convened in extraordinary session[18] to consider comprehensive legislation[19] in response to the crisis of organized medicine and the insurance companies—both wealthy and powerful industries—that they were trapped by a "crisis" would demand strong substantiation of that "crisis." One would also expect that the legislature would not pass such legislation without obtaining that substantiation. But the passage of AB1XX in California and the passage of similar legislation in other states[20] raises questions about the legislature's adherence to notions of democracy and fairness,[21] and raises questions generally about the legislative process where, as one economist said: "events can be exploited by an alert and well-organized pressure group to manipulate legislative behavior."[22]

Throughout the states, legislative activity regarding the "crisis" was marked by a scarcity of reliable information about the malpractice insurance underwriting system;[23] confusion prevailed as physicians and insurers demanded fundamental changes in the tort liability system without providing the information necessary to determine the need for such changes.[24] Some took the same data and used it to support opposite conclusions,[25] while others pleaded for more information and better analysis.[26]

---

18. Keene, *California's Medical Malpractice Crisis,* in LEGISLATOR'S GUIDE, *supra* note 4, at 31.

19. *Id.* at 33.

20. Grossman, *supra* note 8, at 3-11.

21. Although the struggle between rich and poor in America has not abated, *see* J. MILLER, ORIGINS OF THE AMERICAN REVOLUTION 497-505 (1943), the United States was founded upon egalitarian ideals, and not upon the notion of government by the rich. In the Declaration of Independence, "Jefferson gave his countrymen a new goal toward which to strive: a republican system of government in which human rights would take precedence over property and privilege." *Id.* at 493.

22. Reder I, *supra* note 1, at 512.

23. Aitken, *supra* note 1, at 34-36.

24. Czerwinski, *Wisconsin's Medical Malpractice Crisis,* in LEGISLATOR'S GUIDE, *supra* note 4, at 55.

25. *Compare* California Assemblyman Keene's statements regarding the report of the State Auditor General, Keene, *supra* note 18, at 32, *with* Charbonneau's statements regarding the same report, Charbonneau, *supra* note 1, at 140.

26. Jones v. State Bd. of Medicine, 97 Idaho 859, 874-76, 555 P.2d 399, 414-16 (1976),

A few voices raised objections to the legislatures' failure, under the pressure of the medical and insurance industries, to discover the facts.[27] Participants in the 1975 hearings before the California Assembly Select Committee on Medical Malpractice asked repeatedly for an analysis of the premium dollar,[28] yet despite assurances from the Chair and from various assemblymen that testimony revealing this information was forthcoming,[29] the figures were never

cert. denied, 431 U.S. 914 (1977); Reder I, *supra* note 1, at 512; Czerwinski, *supra* note 24, at 55. *See Transcript of Hearing, Assembly Select Committee On Medical Malpractice*, Feb. 18, 1975 and Feb. 21, 1975.

27. The Chairman of the Health Committee in the Wisconsin House of Representatives said:

"I can't help but believe that the crisis in Wisconsin may have been artificially developed. The sudden momentum is highly suspect. . . . [W]e suddenly found ourselves faced with a "deadline" imposed by the insurance industry and medical profession. We were pressured to respond immediately under great pressure from all sides, including the many patients filled with anxiety by the public threats of the physicians to cease practice if the Legislature didn't enact S.B.299. . . . It appears that on a national basis the insurance industry was prepared to go the final mile in developing a crisis. Perhaps they were convinced that if such a crisis could be created, legislators would respond by passing legislation which would combine the liability limitations of a 'no-fault' system, and a requirement of proof of fault with changed legal doctrines to make that proof more difficult with the result that malpractice suits would be discouraged. It appears that in some states they succeeded." Czerwinski, *supra* note 24, at 55.

28. *See Transcript of Hearing*, Feb. 18, 1975 and Feb. 21, 1975, *supra* note 26.

29. The following testimony illustrates:

"*Mr. Werchick* (a plaintiff's attorney): I certainly hope this committee will demand that information [regarding the premium dollar] from the insurance carriers, because they've got it.

"*Assemblyman Keene:* Certainly we will." *Transcript of Hearing*, Feb. 18, 1975, *supra* note 26, at 100.

"*Mr. Werchick:* I submit . . . that this committee has not yet, in its entire existence, gotten a balance sheet, an income statement, a profit and loss statement, or a list of assets from the insurance companies that are supposed to file these things with the State at least on a triennial basis, but manage never to file complete information, in any case, to determine what the real cost of this system is. I have heard every speaker get up so far and say, "Well somebody told me by the telephone last week that if we abolish the tort system they can afford to provide coverage." Now where is the hard data so that we can see what this system costs . . . ?

"*Chairman Berman:* We are going to have representatives of the industry here, and that is one of the hardest things to find out, I agree with you on that." *Id.* at 110-11.

"*Mr. Shore* (a Doctor of Medicine and trial attorney): [A]ll day long I have been hearing the shell game. Nobody has mentioned what is happening to all of the money. Where is it going? . . . There is certainly a great deal more . . . money going into premiums than there is going out in verdicts and in settlements in the State of California." *Transcript of Hearing*, Feb. 21, 1975, *supra* note 26, at 134. ". . . [The crisis] is imposed upon the public and the physician by some person who is not even telling us why it is a crisis, not giving us the numbers. What happens to the interest on their reserves during the five-year period while cases are pending before a resolution of a case? What happens to the interest on the premium dollar that they don't ever refer to when we are talking about losses?

produced. When finally a representative of the Argonaut Insurance Company appeared before the Committee, his testimony was evasive,[30] particularly when he was asked to provide figures.[31]

The Supreme Court of Idaho questioned the existence of a malpractice insurance "crisis." The court refused to rule on equal protection and due process questions raised by Idaho's malpractice legislation until Idaho's Director of the Department of Insurance presented the court with something more than the conflicting information contained in his affidavit and his conclusion that "the Act was a 'response to the medical malpractice insurance crisis'. . . ."[32] The court was "troubled" by the inference arising from the Director's affidavit that "the 'crisis' in response to which the subject Act was adopted results in part from economic fluctuations and resultant unsuccessful investment practices."[33] The Director, in defending Idaho's malpractice legislation, may have revealed inadvertently what some assert is the true cause of the "crisis"—a combination of greed, economic fluctuations and stock market losses.[34]

In Nebraska, the one state where challenged medical malpractice legislation has been upheld, the Director of Insurance had to be sued before he would implement the law.[35] He objected that the Act was special legislation, that it denied an injured party due process and equal protection, and that it denied the rights of access to courts and trial by jury.[36]

Whether or not there was a crisis,

> [l]egislators soon found that under existing liability rules there was no chance of finding premium rates acceptable to both doc-

"*The Chairman:* Very legitimate questions, in my opinion, and hopefully in the course of all this, we can get some answers to those questions." *Id.* at 153-54.

30. *See* testimony of Lawrence C. Baker, *id.* at 156-74.

31. For example, three years after the Committee had been formed to study this problem, the representative of the insurance company was still promising the Assembly that "we are still working on the figures, that we expect to have the figures to the medical society probably on Monday. As far as other figures as to the company's overall results on medical malpractice countrywide and California, that will be available when we file our annual statement at the end of February." *Id.* at 171-72.

32. Jones v. State Bd. of Medicine, 97 Idaho 859, 872, 555 P.2d 399, 412 (1976), *cert. denied,* 431 U.S. 914 (1977).

33. *Id.* at 873, 555 P.2d at 413.

34. *Transcript of Hearing,* Feb. 18, 1975, *supra* note 26, at 116. *See* Herman, *Damage Insurers Hit by Losses on Stocks, Rise in Claim Amounts,* Wall St. J., Jan. 20, 1975, at 1, col. 6; Sansweet, *Teledyne Takes Drastic Steps in an Effort to Salvage Its Argonaut Insurance Unit,* Wall St. J., Jan. 30, 1975, at 26, col. 1.

35. Prendergast v. Nelson, 199 Neb. 97, 256 N.W.2d 657 (1977).

36. *Id.* at 100, 256 N.W.2d at 662.

tors and insurers. A legislature had to choose between a protracted struggle with doctors and insurance companies to keep health care available, under continuing threat of job actions by doctors and withdrawal of malpractice coverage by the insurers, and changing the legal arrangements governing malpractice legislation. As the forces opposed to these changes had little capacity to exert pressure and offered no solution to the problem of keeping the health care system in operation, it is not surprising that some legislatures (chose) to "solve" the problem by amending the law.[37]

In Search of a Standard: When and to What Extent May a Court Scrutinize Legislation?

A. The Concept of Representation

John Hart Ely, a leading commentator on constitutional law, has described brilliantly the development of the concept of representation in America.[38] According to Ely, the framers of the Constitution envisioned a representative democracy—a government whose representatives would be " 'of' the people," and who would live under the regime of the laws they passed and not exempt themselves from their operation.[39] The theory was that the identity of interests between ruler and ruled would operate against oppressive legislation.[40] If the elected rulers deviated from their duties, the ruled would turn them out of office.[41] The flaw in the system was the lack of protection of minority interests.[42]

Recognizing that " 'the people' were [not] an essentially homogeneous group whose interests did not vary significantly,"[43] James Madison proposed a separation of powers so that "although at a local level one 'faction' might well have sufficient clout to be able to tyrannize others, in the national government no faction or interest group would constitute a majority capable of exercising control."[44] Ultimately the Constitution provided for a separation of powers not only between the state and federal governments, but

37. Reder I, *supra* note 1, at 515.

38. Ely, *Toward a Representation-Reinforcing Mode of Judicial Review*, 37 MD. L. REV. 451 (1978). This article provides an excellent discussion of political process as understood by the Framers of the Constitution and as it functions in this country today.

39. *Id.* at 457.

40. *Id.*

41. *Id.*

42. *Id.* at 458.

43. *Id.* at 459.

44. *Id.* at 460.

among the legislative, judicial and executive functions of the national government.[45] Even this separation of powers was not enough to protect minorities; the framers understood that the interests of minorities had to be tied to the interests of the majority in order to ensure representation of the politically weak:[46]

> The framers of the Constitution knew, and we should not forget today, that there is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally. Conversely, nothing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected. Courts can take no better measure to assure that laws will be just than to require that laws be equal in operation.[47]

By the early nineteenth century, the idea of representation had developed to the point that two distinct duties toward minorities were understood to exist

> [A] duty on the part of representatives "virtually" to represent the politically powerless, and even a sometime duty on the part of constitutional courts to compel such virtual representation by insisting that the majority tie its interests to those of the powerless and by intervening specially when it had not done so.[48]

The Fourteenth Amendment, ratified in 1868, made these duties law.[49]

B. Enforcement of the Fourteenth Amendment Guarantee of Equal Protection

> No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.[50]

Equal protection is "the most chaotic, least thoughtfully considered, and least adequately justified area of constitutional law."[51] The doctrinal confusion has spread into the area of substantive due process as the Court has borrowed from it in shaping equal

45. *Id.*

46. *Id.* at 462.

47. *Id.* at 463 (quoting Railway Express Agency, Inc. v. New York, 336 U.S. 106, 112-13 (1949) (Jackson, J., concurring)).

48. Ely, *supra* note 38, at 469.

49. *Id.*

50. U.S. CONST. amend. XIV, § 1.

51. *Forum: Equal Protection and the Burger Court,* 2 HASTINGS CONST. L.Q. 645, 655 (1975) [hereinafter cited as *Forum*] (remarks of Gerald Gunther).

protection;[52] in fact, the two are sometimes difficult to distinguish, partly because the Court has used equal protection and due process standards interchangeably.[53] The basis of the confusion seems to be the Court's inability to decide when, and to what extent, it may challenge the judgment of the legislature.[54]

The Court has used three standards[55] in reviewing legislation on equal protection grounds. Traditional equal protection analysis employs two of these standards, which are usually called "rational basis" on the one hand and "strict scrutiny" or "compelling state interest scrutiny" on the other.[56] The problem with the two-tier equal protection analysis is its rigidity:

> [T]he lenient "rational basis" scrutiny applied to most statutes almost never results in voidance of the legislation, though the heightened "compelling state interest" scrutiny almost invariably will. [The analysis] is rigid because in theory it permits only two widely variant levels of scrutiny with no gradations for rights of intermediate importance. It is deficient because, as Professor Freund once remarked, this world does not move on a "binary principle."[57]

Dissatisfied with traditional two-tier analysis, the Court recently has moved tentatively into that intermediate area,[58] using what Professor Gunther, of Stanford University, has called "intensified means scrutiny" or "means inquiry."[59]

1. *Rational Basis and Strict Scrutiny*

The legislature must be able to classify persons in order to legislate, and citizens may be treated differently according to the pur-

52. *Id.* at 647-49 (remarks of William R. Forrester).

53. *Id.* at 648.

54. *See* Gunther, *The Supreme Court, 1971 Term—Foreward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection,* 86 HARV. L. REV. 1 (1972); Nowak, *Realigning the Standards of Review Under the Equal Protection Guarantee—Prohibited, Neutral, and Permissive Classifications,* 62 GEO. L.J. 1071 (1974); Wilkinson, *The Supreme Court, the Equal Protection Clause, and the Three Faces of Constitutional Equality,* 61 VA. L. REV. 945 (1975); *Forum, supra* note 51.

55. Scholars disagree as to the number of standards that have been used in equal protection analysis. Gunther says there are two currently being used, *see Forum, supra* note 51. Forrester says there are five (lectures by William R. Forrester, Professor of Law, Hastings College of the Law (1979-1980)).

56. For a lengthy discussion of the traditional two-tier analysis, see *Developments in the Law—Equal Protection,* 82 HARV. L. REV. 1065 (1969) [hereinafter cited as *Developments in the Law*].

57. Wilkinson, *supra* note 54, at 948 n.15.

58. Gunther, *supra* note 54, at 17.

59. *Id.* at 33.

pose of the legislation in question.[60] In theory, any classification could be challenged as a denial of equal protection.[61] In fact, however, a classification in the area of general economic and social welfare legislation "will not be set aside if any state of facts reasonably may be conceived to justify it."[62] This standard, as it has been used traditionally, is extremely deferential to the judgment of the legislature; if the Court is able to conceive of *any* rational relationship to a legitimate state interest, the law must stand, even absent proof of rationality.[63] The Court will, however, subject to strict scrutiny any law that sets up a suspect classification, or that interferes with the exercise of a fundamental right, and if the government is unable to show a "compelling governmental interest" in making the classification, the law will not stand.[64] The traditional indicia of "suspectness" are: whether "the class is . . . saddled with such disabilities, or subjected to such a history of purposeful or unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process."[65] Classifications based on race,[66] national origin,[67] and alienage[68] have been found suspect. Under the traditional analysis, a right may be deemed fundamental only if the Constitution implicitly or explicitly guarantees it.[69] The right to travel[70] and the right to vote[71] are among the rights that have been declared fundamental by the Court.[72]

2. *The Middle Tier*

The Warren Court, working within the two-tier analysis, sought, nonetheless, to take a more active role in reviewing legisla-

60. *Developments in the Law, supra* note 56, at 1076.

61. *Id.*

62. McGowan v. Maryland, 366 U.S. 420, 426 (1961).

63. Nowak, *supra* note 54, at 1073.

64. San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1 (1973). *See* note 54 *supra.*

65. 411 U.S. 1, 28. *But see* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978).

66. *See* Loving v. Virginia, 388 U.S. 1, 11 (1967); McLaughlin v. Florida, 379 U.S. 184, 191-92 (1964).

67. *See* Oyama v. California, 332 U.S. 633, 644-46 (1948); Hirabayashi v. United States, 320 U.S. 81, 100 (1943).

68. *See In re* Giffiths, 413 U.S. 717, 721-22 (1973); Graham v. Richardson, 403 U.S. 365, 372 (1971).

69. San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 33-34 (1973). *See* note 54 *supra.*

70. Shapiro v. Thompson, 394 U.S. 618 (1969).

71. Dunn v. Blumstein, 405 U.S. 330 (1972).

72. *See* note 54 *supra.*

tion.[73] The Court used the strict scrutiny test, justifying its analysis by finding suspect classifications without explanation or by enlarging the list of fundamental rights.[74] The Burger Court, with the exception of Justice Rehnquist,[75] has not in philosophy abandoned the trend started by the Warren Court, but it has slowed the momentum.[76] The Burger Court has also deviated from the traditional analysis, although nominally adhering to it.[77] The Court has subjected classifications based on sex,[78] illegitimacy[79] and indigency[80] to an "unspecified level of heightened review"[81]—a practice that has prompted legal scholars such as Professor Jesse Choper to remark that "one cannot discern or predict any really meaningful doctrine, so far as the Court's equal protection decisions go."[82] Other observers of the Court have remarked that it has been erratic in its application of its own standards, "particularly in those difficult cases where an egalitarian result seems desirable, but without far-reaching doctrinal consequences."[83]

The Court has been particularly inconsistent in its application of the rational basis test.[84] Professor Gunther noted the Burger Court's use of the rational basis test in his 1972 Harvard Law Review *Foreward* and sketched a model for future decisions:

> The model suggested by the recent developments would view equal protection as a means-focused, relatively narrow, preferred ground of decision in a broad range of cases. Stated most simply, it would have the Court take seriously a constitutional requirement that has never been formally abandoned: that legislative means must substantially further legislative ends. . . . Putting consistent new bite into the old equal protection would mean that the Court would be less willing to supply justifying rationales by

73. *See* Gunther, *supra* note 54.

74. *Forum, supra* note 51.

75. *See* Trimble v. Gordon, 430 U.S. 762, 777 (1977) (Rehnquist, J., dissenting); Craig v. Boren, 429 U.S. 190, 217 (1976) (Rehnquist, J., dissenting); Gunther, *supra* note 54, at 10-11. *But see* Weinberger v. Wiesenfeld, 420 U.S. 636, 655 (1975) (Rehnquist, J., concurring).

76. San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1 (1973) (those who reside in comparatively poor school districts not a suspect class); *See* Jefferson v. Hackney, 406 U.S. 535 (1972) and Richardson v. Belcher, 404 U.S. 78 (1971) (allocation of welfare not subject to strict scrutiny); Lindsey v. Normet, 405 U.S. 56 (1972) (housing not a fundamental right).

77. *See* Reed v. Reed, 404 U.S. 71 (1971).

78. *See* Frontiero v. Richardson, 411 U.S. 677 (1973).

79. *See* Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164 (1972).

80. *See* Douglas v. California, 372 U.S. 353 (1963).

81. Wilkinson, *supra* note 54, at 951. *See* note 54 *supra.*

82. *Forum, supra* note 51, at 655.

83. Wilkinson, *supra* note 54, at 951. *See* Nowak, *supra* note 54, at 1073.

84. *See* Nowak, *supra* note 54, at 1073.

exercising its imagination. It would have the Court assess the means in terms of legislative purposes that have substantial basis in actuality, not merely in conjecture. Moreover, it would have the Justices gauge the reasonableness of questionable means on the basis of materials that are offered to the Court, rather than resorting to rationalizations created by perfunctory judicial hypothesizing.[85] . . . The means-oriented scrutiny of this model would be applicable to a wide range of statutes, including the social and economic regulatory legislation that has been the most characteristic context for expressions of the hands off attitude of the last generation.[86]

Gunther had hoped that the Court would consistently apply the rational basis test with more "bite," even in cases involving neither fundamental rights nor suspect classifications;[87] however, in 1975 he commented that, although elements of his argument had appeared in various opinions,[88] the "minimal-rationality-with-bite" approach was still "being applied in an ad hoc manner."[89]

Gunther argued that the Court should "concern itself solely with means, not with ends,"[90] but after he formulated his model, the Court proceeded to examine legislative ends.[91] Another prominent scholar, John Nowak, suggested a new standard of review based partly on review of legislative ends:

Under this standard, the Court must first ask if there is any theoretically rational relationship between the classification and a state interest capable of withstanding analysis; if none can be hypothesized, a further inquiry is not required because the classification violates the minimal standard of review. If the Court can imagine a theoretically rational government interest, the Court then must determine whether the classification is in fact arbitrary. Only by requiring that the asserted basis of the classification be capable of withstanding analysis can the Court insure that the classification is not being used arbitrarily to burden persons having a common personal status.[92]

Professor Nowak named this standard the "demonstrable basis"

85. Gunther, *supra* note 54, at 20-21.

86. *Id.* at 23.

87. *Forum, supra* note 51, at 657.

88. *Id.* at 658.

89. *Id.* at 659. *See* Nowak, *supra* note 54, at 1073; Wilkinson, *supra* note 54, at 950-51.

90. Gunther, *supra* note 54, at 21.

91. Nowak, *supra* note 54, at 1077-79; Stone, *Equal Protection in Special Admissions Programs: Forward from Bakke*, 6 HASTINGS CONST. L.Q. 719, 736-42 (1979). *See, e.g.*, Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978); Craig v. Boren, 429 U.S. 190 (1976).

92. Nowak, *supra* note 54, at 1081.

standard.[93] He recognized a loophole in Gunther's reasoning: if a court were unable to scrutinize legislative ends, only means, then there could be cases where a classification would be a rational means of furthering an *apparently* legitimate state interest, but the court would be unable to examine the stated basis of the law to see if it could *in fact* withstand analysis.[94]

Nowak's model specifies three legislative categories and three corresponding standards of review.[95] His "suspect-prohibited classifications," which include racial classifications only, are to be reviewed under what he calls the "prohibited" standard, which is like the strict scrutiny standard in effect.[96] "Permissive classifications" are those whereby the legislation "treats classes in a dissimilar manner but does not employ a 'prohibited' or a 'neutral'[97] classification as the basis of dissimilar treatment."[98] These classifications are to be reviewed under the "conceivable basis" standard—in other words, the traditional rational basis test.[99] The intermediate standard is the "demonstrable basis" test described above, which is to be invoked only when the classification in question is "neutral." Nowak defines a classification as "neutral" if "it treats persons in a dissimilar manner on the basis of some inherent human characteristic or status (other than racial heritage), or limits the exercise of a fundamental right by a class of persons."[100] Nowak summarizes the problems with the current system of review as follows:

> The Court has recognized that fundamental rights may be limited and that some groups defined by personal characteristics may be distinguished from other segments of the population for non-discriminatory purposes. In these cases, the Court is confronted with legislation which may be factually justifiable despite appearing on its face to be a denial of equal protection. These classifications, when based on personal status or limitations of fundamental rights, are not clearly forbidden, but neither are they entirely within the legislative prerogative. Thus, they are constitutionally "neutral" classifications. . . . Rigid adherence to the Court's traditional two-tiered approach in such cases would not be appropriate. If the Court sustained neutral classifications whenever they had a conceivable rational relationship to a legitimate end

93. *Id.*
94. *See id.*
95. *Id.* at 1093-94.
96. *Id.* at 1093.
97. The definition of "neutral" follows in the text below.
98. Nowak, *supra* note 54, at 1094.
99. *Id.*
100. *Id.* at 1093-94.

> without testing the factual foundations of that basis, it, in effect, would abdicate its role as the interpreter of basic constitutional principles. A legislature would be able to contravene these principles whenever it could assert a theoretical basis for its actions even though no such basis was demonstrable. Nor should the Court apply to these cases the standard which it uses to review racial classifications. If it applied such a test, it, in effect, would forbid legislatures from making rational distinctions between classes of persons or restrictions upon the exercise of rights which serve sufficient state interests.[101]

Equal protection doctrine is in a state of flux, applied by a Court that is reaching for more egalitarian results without committing itself to firmly articulated standards.[102] Commentators have tried to articulate standards for the Court, but they disagree among themselves as to how equal protection analysis should proceed, and particularly as to which elements of the legislative process the Court may examine.[103] Nearly all concerned agree that the traditional two-tier approach is inadequate and should be modified to allow for more judicial intervention in support of constitutional principles.[104] The intermediate standard of review, which gained widespread recognition in cases of gender-based discrimination,[105] has been extended to classifications based on illegitimacy.[106] Equal protection doctrine may continue to evolve in the direction suggested by Professors Gunther and Nowak, that is, toward closer scrutiny of legislative means and ends in a broader range of discriminatory classifications, with much less deference to legislative judgment.[107] If this evolution persists, there may be a proliferation of "suspect" or "neutral" classifications, or an extension of the list of fundamental rights.[108] The Court may become increasingly activist, giving effect to our system of checks and balances and separation of powers. Critics who object to increased intervention as a hindrance upon the legislature and interference by the Court

---

101. *Id.* at 1096.

102. *See* note 54 *supra.*

103. *Id.*

104. *Id.*

105. Reed v. Reed, 404 U.S. 71 (1971). The court, by way of a standard, stated that statutory classifications that distinguish between males and females are "subject to scrutiny under the Equal Protection Clause." *Id.* at 75. A classification "must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." *Id.* at 76, (quoting Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920)).

106. Trimble v. Gordon, 430 U.S. 762 (1977); Mathews v. Lucas, 427 U.S. 495 (1976).

107. *See* note 54 *supra.*

108. *Id.*

might consider the admonition that:

> [t]his "separation of powers" was obviously not instituted with the idea that it would promote governmental efficiency. It was, on the contrary, looked to as a bulwark against tyranny. For if governmental power is fractionalized, if a given power can be implemented only by a combination of legislative enactment, judicial application, and executive implementation, no man or group of men will be able to impose its unchecked will.[109]

C. Equal Protection and Medical Malpractice Legislation

1. The Limit on Recovery of Damages: California Civil Code section 3333.2 and a Summary of the Treatment of Similar Provisions in Other States

With the passage of AB1XX in California, section 3333.2 was added to the Civil Code:

> (a) In any action for injury against a health care provider based on professional negligence, the injured plaintiff shall be entitled to recover noneconomic losses to compensate for pain, suffering, inconvenience, physical impairment, disfigurement and other nonpecuniary damage.
> (b) In no action shall the amount of damages for noneconomic losses exceed two hundred fifty thousand dollars ($250,000).[110]

This provision has not yet been tested in the California courts.[111]

Similar provisions in other states have been challenged; the courts in those states chose different standards for evaluating the statutes' constitutionality and reached different results. The Nebraska Supreme Court upheld that state's $500,000 limit on all damages in medical malpractice cases,[112] using the rational basis test.[113] The Illinois Supreme Court struck down the Illinois statute limiting all damages in medical malpractice cases to $500,000 without stating which equal protection standard it was using.[114] The Idaho Supreme Court refused to rule on the merits of the constitutional challenges to Idaho's complex damages limitation provision; that court adopted the "means focus" or "means scrutiny" test as

109. United States v. Brown, 381 U.S. 437, 443 (1965).

110. CAL. CIV. CODE §3333.2 (West 1975).

111. For a detailed study of the entire Act and a proposed model for equal protection analysis in the California courts, *see* Note, *California's Medical Injury Compensation Reform Act: An Equal Protection Challenge*, 52 U.S.C. L. REV. 829 (1979).

112. Prendergast v. Nelson, 199 Neb. 97, 256 N.W.2d 657 (1977).

113. *Id.*

114. Wright v. Central Du Page Hosp. Ass'n, 63 Ill. 2d 313, 347 N.E.2d 736 (1976).

set out by the United States Supreme Court in *Reed* v. *Reed* as the appropriate standard, but remanded the case to the district court for additional findings.[115] Two state courts in Ohio invalidated damages limitations, in dicta, on equal protection and due process grounds.[116] The equal protection analysis was unclear, as it borrowed language from the strict scrutiny and means scrutiny tests.[117] Most recently, the Supreme Court of North Dakota invalidated a $300,000 limit on all damages in actions against health care providers, using as its standard a "close correspondence between statutory classification and legislative goals."[118] These cases will be treated in more detail below.

2. *The Cases on Damages Limitations*

a. Prendergast v. Nelson

In *Prendergast v. Nelson,*[119] a fragmented Nebraska Supreme Court found the Nebraska Hospital-Medical Liability Act constitutional. The defendant was the Director of Insurance, who provoked the action by refusing to implement the law.[120] The court rejected the defendant's argument that the law "operates to single out a class of people for special treatment, but bears no rational relationship to the legitimate purposes of the legislation."[121] Although some of the language in the opinion resembles "means scrutiny" language,[122] and although the court itself designates adequate medical care a "fundamental right,"[123] the court apparently intended to follow the traditional restrained standard of review. The opinion cites *Dandridge* v. *Williams*[124] for the proposition that classifications in the area of economics and social welfare are to be left to the discretion of the legislature, and that " ' it is enough that the State's action be rationally based and free from invidious discrimi-

115. Jones v. State Bd. of Medicine, 97 Idaho 859, 555 P.2d 399 (1976), *cert. denied,* 431 U.S. 914 (1977).

116. Simon v. St. Elizabeth Medical Center, 355 N.E.2d 903 (Ohio C.P. Montgomery County 1976); Graley v. Satayatham, 343 N.E.2d 832 (Ohio C.D. Cuyahoga County 1976).

117. Simon v. St. Elizabeth Medical Center, 355 N.E.2d 903 (Ohio C.P. Montgomery County 1976); Graley v. Satayatham, 343 N.E.2d 832 (Ohio C.P. Cuyahoga County 1976).

118. Arneson v. Olson, 270 N.W.2d 125 (N.D. 1978).

119. 199 Neb. 97, 256 N.W.2d 657 (1977).

120. *Id.* at 100, 256 N.W.2d at 662.

121. *Id.* at 112, 256 N.W.2d at 667. The classification in this case was medical malpractice victims as distinguished from the victims of tortfeasors other than doctors or hospitals.

122. *See id.* at 112, 115, 256 N.W.2d at 667, 669.

123. *Id.* at 114, 256 N.W.2d at 668.

124. 397 U.S. 471 (1970).

nation.' "[125] The Nebraska court predicated its decision solely upon the existence of a malpractice insurance "crisis": "The classification does have a reasonable basis. The Legislature acted to meet a crisis situation."[126]

The dissenting opinions indicate some confusion and doubt. Justice White of Nebraska wrote:

> I agree that it was within the power of the Legislature to determine that a medical malpractice crisis exists although the record before us does not reflect the existence of such a crisis. If there has been an explosion in malpractice claims, the resulting inundation has not reached this court. . . . Were it within the province of this court to determine whether a sufficient emergency exists to warrant the separate and differing treatment of medical malpractice from the remainder of the body of tort law, I would unhesitatingly suggest that no such evidence has yet been presented us.[127]

Justice White's assessment of the standard used in the majority opinion suggests means scrutiny: "The test is, as the majority opinion points out, that of the reasonable relationship of the means utilized to the purpose to be achieved."[128] Yet the majority appears to employ the rational basis test: "We will not set aside a statutory discrimination if any state of facts reasonably exists to justify it."[129] Based on his means scrutiny analysis Justice White finds unconstitutional those provisions of the Act that restrict the liability of tortfeasors in medical malpractice cases: "This is a significant deviation from the total concept of restitution in that a negligent party may escape paying for a portion of the damage he causes.[130] . . . [T]he burden is shifted not to a collateral source, but to the malpractice victim himself."[131] White notes the relative powerlessness of patients and discusses it in the context of the statute's provision that allows a patient to elect not to come within the provisions of the Act:[132]

> Such an election provision ignores the inequality of bargaining power. The very nature of a person's status as a patient places

125. 199 Neb. at 113, 256 N.W.2d at 668 (quoting Dandridge v. Williams, 397 U.S. 471 (1970)).

126. 199 Neb. at 113, 256 N.W.2d at 668.

127. *Id.* at 127, 256 N.W.2d at 674 (White, J., dissenting in part). Judges Clinton, McCown and Boslaugh agreed with White on this point.

128. *Id.* at 129, 256 N.W.2d at 675.

129. *Id.* at 115, 256 N.W.2d at 669.

130. *Id.* at 129, 256 N.W.2d at 675.

131. *Id.* at 130, 256 N.W.2d at 676.

132. *Id.* at 101, 256 N.W.2d at 662. Part of the court's justification for upholding the constitutionality of the Act was this election provision.

him in a position which makes effective bargaining difficult. A right to elect not to be covered, from which might result a denial of service from the only hospital or physician in a geographical area, can hardly be said to be without implicit coercion.[133]

b. Wright v. Central Du Page Hospital Association

In *Wright v. Central Du Page Hospital Association,* the Illinois Supreme Court affirmed in part the judgment of the state appellate court, which held in part that: "the monetary limitation on a medical malpractice recovery constituted special legislation in violation of . . . the Illinois Constitution, denied plaintiff equal protection and due process of law under the Federal and Illinois constitutions and denied her a full remedy for injuries to her person in violation of . . . the Illinois Constitution."[134]

The segment of the majority opinion pertaining to damages limitations addresses the arguments of the parties, starting with the plaintiff's argument that the Illinois legislature "has arbitrarily classified, and unreasonably discriminated against, the most seriously injured victims of medical malpractice, but has not limited the recovery of those victims who suffer moderate or minor injuries."[135] After defining the allegedly discriminatory classification and stating that the basis for it is what the defense calls "the 'medical malpractice crisis,' "[136] the court ceases to discuss equal protection, analyzing instead Illinois common law and statutory rights to compensation.[137] The court considers the Illinois Constitution, but ignores the United States Constitution,[138] and concludes that "limiting recovery only in medical malpractice actions to $500,000 is arbitrary and constitutes a special law in violation of . . . the [Illinois] Constitution . . . ."[139]

Justice Underwood, concurring in part and dissenting in part, is more precise; he assumes that there is enough of a "crisis" to warrant the $500,000 limitation and cites *McGowan* v. *Maryland* to support the court's use of the rational basis standard.[140]

133. *Id.* at 132, 256 N.W.2d at 676-77. At least one other commentator has mentioned the same problem in relation to medical malpractice arbitration provisions. *See* Sulnick, *Medical Malpractice Reform Act (1975): The Failure of AB1XX (Keene) to Deal With Medical Malpractice—A Constitutional Tragedy,* 1976 CAL. TRIAL L.J. 17.

134. 63 Ill. 2d at 325, 347 N.E.2d at 741.

135. *Id.*

136. *Id.* at 326, 347 N.E.2d at 741.

137. *Id.* at 326-29, 347 N.E.2d at 741-43.

138. *Id.*

139. *Id.* at 330, 347 N.E.2d at 743.

140. *Id.* at 335, 347 N.E.2d at 746 (Underwood, J., concurring in part and dissenting in

The court's reasoning is confusing, but evidences a belief that a privilege is being created on behalf of doctors and insurance companies,[141] and that seriously injured plaintiffs in medical malpractice cases as a result stand to lose their right to full compensation without receiving anything in return.[142]

c. Jones v. State Board of Medicine

The 1975 Hospital-Medical Liability Act of Idaho provided a limit on recoverable damages against physicians of $150,000 per claim and $300,000 per occurrence.[143] A similar limit was placed upon damages in actions against acute care hospitals: $150,000 per claim and $300,000 per occurrence or the amount of $10,000 multiplied by the total number of beds in the hospital.[144] In addition, recovery was restricted to compensatory damages not satisfied from collateral sources.[145]

The district court found the Act unconstitutional under the Idaho Constitution as a violation of the fundamental right "of citizens to seek redress for a breach of duty."[146] On appeal, the Idaho Supreme Court clarified the standard to be used in evaluating the constitutionality of the Act, but declined to rule on the merits.[147] The court remanded the case for further findings.[148]

The court defined the classification as one that "distinguishes between those who are damaged as a result of medical malpractice in amounts exceeding $150,000 as contrasted with others likewise damaged by medical malpractice but whose damages are less than $150,000."[149] The classification denied full recovery to those damaged in excess of the statutory limitation. The court rejected the respondents' argument that this classification was suspect or that it contravened a fundamental right,[150] and rejected also the appellants' argument that the standard to be used was the rational basis

part).

141. *See id.* at 329, 347 N.E.2d at 743.

142. *Id.* at 328, 347 N.E.2d at 742.

143. IDAHO CODE §39-4204.

144. *Id.* at §39-4205.

145. *Id.* at §39-4210.

146. Unreported opinion of the District Court, Fourth Judicial District, Ada County, *cited in* Jones v. State Bd of Medicine, 97 Idaho 859, 863, 555 P.2d 399, 403 (1976), *cert. denied*, 431 U.S. 914 (1977).

147. Jones v. State Bd. of Medicine, 97 Idaho 859, 555 P.2d 399 (1976), *cert. denied*, 431 U.S. 914 (1977).

148. 97 Idaho 859, 555 P.2d 399.

149. *Id.* at 870, 555 P.2d at 410.

150. *Id.*

test as set forth in *McGowan* v. *Maryland*.[151] The court chose instead to use the standard enunciated in *Reed* v. *Reed*,[152] that the classification be substantially related to an important governmental interest.[153] The court noted that: "[t]hat test scrutinizes the *means* by which the challenged legislation is said to affect [sic] its articulated and otherwise legitimate purpose."[154] Justifying its choice of standard, the court stated:

> [W]here the discriminatory character of a challenged statutory classification is apparent on its face and where there is also a patent indication of a lack of relationship between the classification and the declared purpose of the statute, then a more stringent judicial inquiry is required beyond that mandated by *McGowen [sic]*. That common thread runs through all the cases in which the *Royster-Reed* test has been applied by this Court.
>
> . . . .
>
> Here it is apparent from the face of the Act that a discriminatory classification is created based on the degree of injury and damage suffered as a result of medical malpractice. Rather obviously although the Act is said to be designed to insure continued health care to the citizens of Idaho it cannot do other than confer an advantage on doctors and hospitals at the expense of the more seriously injured and damaged persons.[155]

Because the appellants had presented their case in terms of the *McGowan* standard and, accordingly, had not offered evidence as to how the disputed classification related to the articulated purpose of ensuring the availability of medical care to the people of Idaho, the court remanded the case for further proceedings.[156]

d. Graley v. Satayatham and Simon v. St. Elizabeth Medical Center

Two Ohio state courts, in dicta, found damages limitations unconstitutional under the Ohio and United States Constitutions, on equal protection and due process grounds.[157] The *Simon* Court adopted the *Graley* Court's equal protection analysis.[158]

151. *Id.* at 871, 555 P.2d at 411.

152. 404 U.S. 71 (1971).

153. 97 Idaho at 871, 555 P.2d at 411. *See* Reed v. Reed, 404 U.S. 71, 76 (1971).

154. 97 Idaho at 871, 555 P.2d at 411.

155. *Id.*

156. *Id.* at 871-72, 555 P.2d at 411-12.

157. Simon v. St. Elizabeth Medical Center, 355 N.E.2d 903 (Ohio C.P. Montgomery County 1976); Graley v. Satayatham, 343 N.E.2d 832 (Ohio C.P. Cuyahoga County 1976).

158. 355 N.E.2d at 906.

In *Graley*, as in *Prendergast*[159] and *Wright*,[160] the standard upon which the court based its decision is not clearly articulated; some of the language the court cites hints at strict scrutiny, some is drawn from means scrutiny. For example, the court states: "This is not to say that separate classifications are, in all cases, constitutionally infirm; it is to say that separate classifications are invalid in circumstances where it is not demonstrable that 'a compelling governmental interest' exists."[161] This statement is misleading; the compelling interest component is drawn from the strict scrutiny test, which applies only when a challenged classification infringes upon the exercise of a fundamental right or appears to be suspect.[162]

In the very next sentence the court states: "In other words, a statutory classification cannot be tolerated unless a legitimate legislative objective is furthered by the classification."[163] This language, which seems to require an examination of the means and end of the legislation, suggests means scrutiny. Such confusion of standards belies the court's familiarity with equal protection analysis, later demonstrated in its synopsis of traditional equal protection tests.[164]

Nonetheless, without clearly stating the standard the court declared that the law was discriminatory and that there was no compelling government interest to justify it in the face of equal protection requirements:

> There is no satisfactory reason for this separate and unequal treatment. There obviously is "no compelling governmental interest" unless it be argued that any segment of the public in financial distress be at least partly relieved of financial accountability for its negligence. To articulate the requirement is to demonstrate its absurdity, for at one time or another every type of profession or business undergoes difficult times, and it is not the business of government to manipulate the law so as to provide succor to one class, the medical, by depriving another, the malpracticed patients, of the equal protection mandated by the constitution.[165]

159. 199 Neb. 97, 256 N.W.2d 657 (1977).
160. 63 Ill. 2d 313, 347 N.E.2d 736 (1976).
161. 343 N.E.2d at 836.
162. San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1 (1973).
163. 343 N.E.2d at 836 (citing McGowan v. Maryland, 366 U.S. 420 (1961)).
164. 343 N.E.2d at 837.
165. *Id.*

e. *Arneson v. Olson*

In August of 1978, the Supreme Court of North Dakota upheld a trial court finding that the $300,000 total liability limit of North Dakota's Medical Malpractice Act was unconstitutional.[166] The court, after discussing rational basis, strict scrutiny, and a third level of equal protection review that requires "a 'close correspondence between statutory classification and legislative goals,' "[167] followed the example set by the Idaho court in *Jones v. State Board of Medicine*,[168] and independently examined the legislative justification of the Act.

Noting that "no state court of last resort has upheld a limitation so low," the court noted that the legislative purposes, articulated in the preamble to the statute, included: "assurance of availability of competent medical and hospital services at reasonable cost, elimination of the expense involved in non-meritorious malpractice claims, provision of adequate compensation to patients with meritorious claims, and the encouragement of physicians to enter into practice in North Dakota and remain in such practice so long as they are qualified to do so."[169] The court concluded that "the limitation of recovery does not provide adequate compensation to patients with meritorious claims;"[170] and that the Act "does nothing toward the elimination of non-meritorious claims."[171] The court also determined that, although restrictions on recovery might encourage physicians to practice in North Dakota, that result would be obtained "only at the expense of claimants with meritorious claims."[172] The court then examined the alleged "crisis" and found that none existed. Evidence presented to the trial court indicated that "the incidence of malpractice claims in North Dakota is far lower than the average in the United States" and that a major insurance company accepted applications for malpractice insurance in North Dakota at rates lower than the national average.[173]

Significantly, the court objected strongly to an election provision similar to the one Justice White of Nebraska condemned in his dissent in *Prendergast v. Nelson*:[174]

166. 270 N.W.2d 125 (N.D. 1978).
167. *Id.* at 133.
168. *Id.*
169. *Id.* at 135.
170. *Id.*
171. *Id.* at 135-36.
172. *Id.* at 136.
173. *Id.*
174. *See* notes 130-31 and accompanying text *supra*.

> The Legislature attempted to meet some of the anticipated constitutional objections to (the Act) by providing that it applied only to patients who "consented" to its provisions. . . . It is provided that "In the event a patient does not consent pursuant to this section, the physician shall decide whether he will or will not provide services to the patient." It is further provided that "In the event emergency treatment is required, such person is subject to the terms and provisions of this chapter." Thus it is conclusively presumed that an unconscious patient or other patient requiring emergency care consents to treatment, but in the absence of consent by a nonemergency patient, the physician is under no obligation to provide any care at all. The only choices available to the patient who is refused care apparently are to suffer or die of his ailment or to travel outside the State to obtain medical attention.[175]

The harshness of this provision was one of the factors the Court considered in determining the constitutionality of the statute.[176]

After finding that several provisions of the Act were unconstitutional, the North Dakota Supreme Court concluded that the legislature would not have enacted it without those voided provisions, particularly not without the damages limitation. Having so determined, the court invalidated the entire Act.[177]

3. *A Question of Status*

The opinions of the courts in the above cases differ not only in choice of standard of review, but in analysis of the classification made and the manner in which it discriminates. The court in *Prendergast* v. *Nelson* defined the classification as patients injured in the course of medical treatment and the discrimination as between such patients and other tort victims.[178] The *Wright* Court defined the class as "the most seriously injured victims of medical malpractice" and the discrimination as between them and "those victims who suffer moderate or minor injuries."[179] The *Jones* Court defined the classification as patients damaged in an amount greater than $150,000, and the discrimination as between those patients and patients damaged in a lesser amount.[180] The *Graley* Court drew distinctions between "medical malpractice defendants"

---

175. 270 N.W.2d at 133-34.

176. *Id.* at 134.

177. *Id.* at 137-38.

178. *See* 199 Neb. at 114, 256 N.W.2d at 668.

179. 63 Ill.2d at 325, 347 N.E.2d at 741. The *Arneson* Court adopted this definition, 270 N.W.2d at 136.

180. 97 Idaho at 870, 555 P.2d at 410.

versus defendants in other tort actions,[181] medical malpractice victims versus victims of other tortfeasors,[182] and doctors versus other professionals.[183]

Although none of these definitions is "wrong," at least one commenator[184] would shift the focus to the status distinction between doctors and patients to show how medically injured patients are singled out from other tort victims for adverse treatment. Professor Robert Sulnick, of Loyola School of Law in Los Angeles, objected to California's AB1XX:

> AB1XX . . . interfere[s] with the common law process by: (1) discriminating against classes of persons, who because of their *status* as patients have limitations imposed upon their ability to exercise their common law right to sue one who negligently provides them with health care services; and (2) by preventing said litigation from being carried to its logical conclusion—i.e., jury verdict, unrestricted by a statutorily imposed ceiling.[185]

Arguing that AB1XX is irrational and therefore unconstitutional, Sulnick offers the following hypothetical situation:

> Even if a jury were to decide . . . that based on a calculated per diem, [a medical malpractice] Plaintiff's pain and suffering translated into the sum of . . . $300,000, the Plaintiff could only be awarded . . . $250,000. The irrationality of such a circumstance is that the only reason such a Plaintiff could not recover the . . . $300,000 is because he/she was a patient and the Defendant was . . . a health care provider. . . .[I]f that same highly trained professional negligently ran his/her automobile into the same Plaintiff, and a jury assessed the Plaintiff's noneconomic loss to be . . . $300,000, the Plaintiff would be allowed the full recovery.[186]

While a court using the traditional rational basis test might find such a result justifiable, Sulnick's opposition to the law is founded in part upon his doubt as to the existence of a malpractice insurance "crisis,"[187] and his feeling that even if a "crisis" could be found, the system of loss allocation should be changed before the common law right to sue for negligence is impaired.[188] According to Sulnick, California's malpractice legislation runs counter to the common law trend toward removing barriers of status that prevent

181. 343 N.E.2d at 836.
182. *Id.*
183. *Id.* at 837.
184. Sulnick, *supra* note 131.
185. *Id.* at 19.
186. *Id.* at 20.
187. *Id.* at 51-53.
188. *Id.* at 53-54.

damaged persons from suing certain classes of people.[189] As Justice Mathew O. Tobriner of the California Supreme Court has said:

> In the nineteenth century, when government became anxious to encourage entrepreneurs, the courts, abandoning the older strict rules, developed a series of legalisms to protect the favored owner of factory or land from possible damages for tortious conduct. To prevent plaintiffs from presenting emotionally-charged cases to juries, courts invented such barriers as proximate causation, the Puritan concept of contributory negligence, the fellow-servant doctrine, and the idea of "duty". . . . Today, perhaps the law of torts may be in the process of another swing. It is discarding many of the nineteenth century barriers imposed to protect factory owners and landlords. . . .[190]

These changes are primarily a result of the development of a society in which individuals depend upon bureaucratized institutions for goods and services.[191] Sulnick argues that the malpractice problem must be viewed in the context of a society that, by its nature, breeds malpractice:

> The industrial revolution produced a bureaucratized, mass society which, in turn, will inevitably produce institutional "malpractice" . . . [B]ureaucratic institutions can, and do as a matter of course, malfunction. In other words, they function to service their own ends, as opposed to the needs of the "mass" they were designed to service. The "elite" are guilty of malpractice. Thus, what we see, from this perspective, is a society wherein the individual is literally in an inferior position to communicate with the institutionalized, bureaucratized, elitest [*sic*] providers of the goods and services necessary to (1) subsist, and (2) exist with a degree of quality.[192]

According to Sulnick's theory, organized medicine is no less of an elite, bureaucratized industry than the automotive industry or banking.[193]

The most effective way, Sulnick feels, to attack institutional malpractice is to force the culprit to pay:

> Money, while a symbol, is also the lifeblood of an institutionalized society. Funds are essential to buy bureaucrats; bureaucracies cannot be run without bureaucrats. If one can force an institution to expend funds, one can curtail its ability to function

189. *Id.* at 20-24.

190. Tobriner, *The Changing Concept of Duty in the Law of Torts*, 1970 CAL. TRIAL L.J. 18.

191. *Id.* at 17; Sulnick, *supra* note 131.

192. Sulnick, *supra* note 131, at 26-27.

193. *Id.* at 27.

> according to its internal policy. Thus, forcing an institution to pay out funds, through the instrument of a damage award, creates institutional frustration which becomes the catalyst to coerce policy changes.[194]

If damages provide the catalyst for positive change in the behavior of an elite, institutional tortfeasor, then legislation that inhibits a plaintiff's ability to sue for damages is, according to Sulnick, "irrational."[195] Sulnick is not alone in this view. The court in *Graley* said:

> The extending of special litigation benefits to the medical profession certainly cannot be considered as relating to protection of the public health. On the contrary, the quality of health care may actually decline. To the extent that in tort actions of the malpractice type . . . the medical profession is less accountable than formerly, relaxation of medical standards may occur with the public the victim.[196]

Conclusion

Proponents of medical malpractice legislation in the various states assume that the legislation is for economic regulation and social welfare, that the reforms fall within the legitimate health, safety and police authority of the state, and that the proper standard for evaluating the legislation under the state and federal constitutions is the "rational basis" standard. Proponents point to the insurance "crisis," directing attention and logic away from the antithetical interests of politically weak patients on the one hand, and doctors and their insurers, who enjoy the advantages of organized power and wealth, on the other.

The courts are being asked to review medical malpractice legislation but are not being provided material information. Have the interests of the class of potential medical malpractice claimants been adequately represented? Have the members of the legislature

194. *Id.* at 29.

195. *Id.* at 29-30.

196. 343 N.E.2d at 838. The California Court of Appeal recently expressed the same viewpoint, quoting *Graley* in American Bank & Trust Co. v. Community Hosp. of Los Gatos-Saratoga, Inc., 104 Cal. App. 3d 219, 163 Cal. Reptr. 513 (1980). In that case the California court, using the rational basis standard, found unconstitutional section 667.7 of the California Code of Civil Procedure, which provides, *inter alia*, for periodic payments by tortfeasor health care providers of future damages in excess of $50,000. The court concluded: "[T]o find that the protection and special dispensation given to health delivery tortfeasors by the challenged legislation is in the best interest of public health is illogical to the point of irrationality." *Id.* at 235, 163 Cal. Rptr. at 522. *American Bank & Trust* is currently on appeal before the California Supreme Court.

identified their interests with those of the class whose rights they have limited by passing this legislation? Has a status distinction of the variety described by Justice Tobriner[197] been imposed upon patients so that doctors and their insurers may protect their profits? Was there a "crisis," or did the insurance industry seize upon events in order to create a panic among doctors and their patients so that legislation favorable to them might be passed? Answers to these questions bear upon the nature and legitimacy of the government's interest, and must therefore affect the outcome of the courts' equal protection analyses.

The cases that have dealt with medical malpractice damages limitations indicate considerable doubt as to the adequacy of representation of potential malpractice victims. Only one of the six cases discussed above upheld the legislation outright, and even in that case four judges dissented, questioning the existence of a "crisis" and objecting to the reduction of plaintiff's rights. The other five opinions found objectionable what the courts felt was a privilege being created on behalf of doctors at the expense of their patients. All five chose a higher standard of review than the rational basis test.

If, as Professor Nowak has pointed out, a court sustains a questionable classification under the rational basis standard, refusing to test the factual foundations of the purported basis, then that court "abdicate[s] its role as the interpreter of basic constitutional principles."[198] The courts, were they to sustain the classifications here in issue, might allow shrewd and organized industries to do violence to our system of separation of powers and thereby seize unwarranted privileges. An industry could create a "crisis," use its lobbying power to have legislation favorable to it passed, withhold evidence of its machinations from its opposition and the public at large, and then depend on the reviewing courts to uphold the legislation under a minimal standard of review. To prevent such abuses, the court, when dealing with wealthy and powerful industries that provide essential services or products to a politically weak clientele, should heighten its scrutiny of the means and the end of the law in question.

The court should look closely at the relationship of the parties. For example, though some argue that medically injured patients are sufficiently represented by the legislators who passed the law because those legislators are also potentially affected by that

197. See note 176 and accompanying text *supra*.
198. Nowak, *supra* note 54, at 1096.

law, if one considers the nature of the problem and the political context in which its resolution takes place, the illusion of adequate representation precluding judicial review vanishes. A healthy person ordinarily does not consider the possibility that he or she might become the victim of medical malpractice; a legislator succumbing to political pressure from the medical and insurance industries might not identify with those whose rights he signs away. The doctor's power over the patient is increased by his threats to discontinue practice if malpractice premiums are not reduced, and by the godlike status society confers upon him. Until that patient or that legislator suffers injury at the hands of a doctor and seeks redress, he or she is unlikely to understand the ramifications of the law.

Nor should the court be deceived by the apparently great effort the legislature made to study the malpractice problem. Although the California legislature began studying the "crisis" in the Fall of 1972, in hearings before an Assembly Select Committee, by February of 1975, three years later, the Committee had not obtained financial data from the insurance companies that would support the existence of a crisis.

One could argue that liberty comprehends freedom from disease and that each individual, therefore, has a fundamental right to medical care. And even if a court does not wish to declare a new fundamental right, an informed court would have to see the injustice of allowing the legislature, under the influence of doctors and insurance companies, to isolate patients and destroy their rights. The court should contemplate the relationship of the parties and consider the words of Professor Ely:

> [I]n every legislative balance one of the competing interests loses to some extent; indeed usually . . . they both do. On some occasions the Constitution throws its weight on the side of one of them, indicating the balance must be restruck. And on others . . . it is at least arguable that, constitutional directive or not, the Court should throw *its* weight on the side of a minority demanding in court more than it was able to achieve politically. . . . [This suggestion] should be reserved for those interests which, *as compared with the interests to which they have been subordinated,* constitute minorities unusually incapable of protecting themselves.[199]

Clearly this legislation requires more than minimal review if justice is to be done. If the state supreme courts fail to consider

199. Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade,* 82 YALE L.J., 920, 934 (1973).

the context in which medical malpractice legislation developed and scrutinize it accordingly, then the United States Supreme Court should grant certiorari at the next opportunity and examine these laws and their purported basis, using Professor Nowak's demonstrable basis standard.