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Equal Protection Challenges To Legislative Abrogation Of The Collateral Source Rule

EQUAL PROTECTION CHALLENGES TO LEGISLATIVE ABROGATION OF THE COLLATERAL SOURCE RULE

In the mid-1970s the frequency and severity of medical malpractice awards began to rise rapidly and, accordingly, medical malpractice insurance either became unavailable or significantly more expensive.[1] In addition, the

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1. *See* Danzon, *The Frequency and Severity of Medical Malpractice Claims: New Evidence*, 49 LAW & CONTEMP. PROBS. 69, 69-70 (1986) (citing rising frequency and severity of malpractice claims as causing increased malpractice insurance premiums); Learner, *Restrictive Medical Malpractice Compensation Schemes: A Constitutional "Quid Pro Quo" Analysis to Safeguard Individual Liberties*, 18 HARV. J. ON LEGIS. 143, 144-45 (1981) (acknowledging increasing number of medical malpractice claims as cause of medical malpractice crisis). While some commentators have labelled the tumultuous events of the 1970s a "crisis," other commentators have rejected this label. *See* Sanderson, *Medical Practice and Malpractice: 1981*, LEGAL ASPECTS OF MEDICAL PRAC., June 1981, at 1 (crisis existed only in professional liability insurance market); *see also* Robinson, *The Medical Malpractice Crisis of the 1970's: A Retrospective*, 49 LAW & CONTEMP. PROBS. 5, 7 n.13 (1986) (malpractice insurance costs total less than 1% of total health care expenditures). Reasons for the increasing number of medical malpractice claims filed include a breakdown in patient trust and admiration for the physician, increased litigiousness as the public became more aware of legal rights, publicity of high jury awards in medical malpractice cases, and lawyers' contingency fee schemes. *See* L. LANDER, DEFECTIVE MEDICINE: RISK, ANGER AND THE MALPRACTICE CRISIS 36-56 (1978) (modern doctor-patient relationship has shifted from healing relationship to market transaction resulting in commodification of healing); D. LOUISELL & H. WILLIAMS, MEDICAL MALPRACTICE § 5.02, at 137-38 (1977) (breakdown in patient trust and admiration for physician has resulted in more medical malpractice claims filed); D. LOUISELL & H. WILLIAMS, *supra*, at § 20.07 (public has growing awareness of legal rights); U.S. DEP'T OF HEALTH, EDUC. & WELFARE, Pub No. (OS) 73-88, *Report of the Secretary's Commission on Medical Malpractice* 6-12 (1973) [hereinafter *HEW Report*] (high jury awards in medical malpractice cases have gained extensive media attention); *HEW Report*, *supra*, at 32 (many physicians attribute increase in medical malpractice claims to lawyers' contingent fee system). *But see* Robinson, *supra*, at 14 (contingent fee system encourages attorney to invest in cases promising highest returns but fails to explain why attorneys suddenly focused disproportionately on malpractice cases). Another suggested cause of the rising cost of medical malpractice insurance is that insurance companies are unable to determine accurate rates because of the uncertainty arising from the recent volatility in the malpractice insurance market. Learner, *supra*, at 145 (erratic and increasingly higher awards create uncertainty in determining insurance rates). Insurance companies reacted to the erratic and rising awards by imposing artificially high premiums to protect themselves against the uncertainty in the market. *See id.* (insurance companies charge inflated premiums to protect against instability in insurance market). An additional explanation of the increased insurance costs implicates insurance companies as reaping profits from unjustifiably high premiums. *See id.* (insurance companies reaping profits by overcharging); D. LOUISELL & H. WILLIAMS, *supra*, at § 20.07 n. 56 (implicating insurance companies as profiting from insurance crisis). A fourth explanation for the higher insurance rates is a combination of a general decline in the standards

insurance industry experienced an exodus of insurance carriers from malpractice underwriting.[2] To combat the rising medical malpractice insurance costs, many state legislatures enacted medical malpractice reform legislation which, in part, abolished the common-law Collateral Source Rule.[3] In

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of medical practice and more frequent mistakes related to complex medical technology. *See* Learner, *supra*, at 146 (noting decline in quality of medical care and complex technology causing more mistakes as reason for medical malpractice insurance crisis); Robinson, *supra*, at 11 (noting possibility that medical procedures and technology increase risk of injury). *But see* Robinson, *supra*, at 11 (dismissing for lack of evidence assertion that declining standards of medical practice caused insurance crisis).

In 1962 a physician paid 0.5 % of the physician's gross income for professional liability insurance. *See HEW Report*, *supra*, at 38-40 (documenting rise in medical malpractice insurance rates). By 1970 a physician paid 1.8 % of gross income for similar coverage. *Id.* Coincident to rising rates, many insurance companies withdrew from underwriting medical malpractice liability insurance. Learner, *supra*, at 144 (documenting insurance industry in mid-70s); Robinson, *supra*, at 5 (noting volatility of insurance market in mid-1970s). Despite the rising costs and fleeing insurance companies, disagreement still arises regarding whether a "crisis" actually existed. *See* D. LOUISELL & H. WILLIAMS, *supra*, at § 20.07 n. 55 (questioning whether medical malpractice insurance crisis existed in mid-1970s); Aitken, *Medical Malpractice: The Alleged "Crisis" in Perspective*, 637 INS. L. J. 90, 96 (1976) (suggesting that insurance industry's refusal to disclose rate calculations renders impossible any accurate conclusion concerning existence of insurance crisis); Oster, *Medical Malpractice Insurance*, 45 INS. COUNSEL J. 228, 231 (1978) (acknowledging claims denying existence of insurance crisis). In the late 1970s premiums remained stable. *See* P. DANZON, MEDICAL MALPRACTICE: THEORY, EVIDENCE & PUBLIC POLICY 97 (1985) (documenting medical malpractice insurance rates from 1975 to 1985). However, medical malpractice insurance rates now are rising again. *Id.*

2. *See* Robinson, *supra* note 1, at 5-35 (documenting mid-1970s insurance crisis). Travelers, Wassau, Hartford, and other major insurance underwriters abandoned the malpractice insurance underwriting business when claims and rates skyrocketed. *Id.* at 9. By 1975 the number of insurance carriers writing medical malpractice insurance had dropped from 85 to 5. *See* Oregon Medical Ass'n v. Rawls, No. 421-496, slip op. at 1 (Ore. Cir. Ct. May 4, 1976) (documenting decrease in malpractice insurance carriers), *rev'd on other grounds*, 276 Or. 1101, 557 P.2d 664 (1976).

3. *See e.g.*, FLA. STAT. ANN. § 627.353 (West 1975) (limiting health care providers' liability by abrogating Collateral Source Rule); IDAHO CODE § 39-4204 (Supp. 1975) (same); IND. CODE ANN. § 16-9.5-2-2(b) (Burns Supp. 1975) (same); *see* Robinson, *supra* note 1, at 5-6 (documenting legislative reaction to increasing insurance rates in 1970s). News coverage of physicians striking to express dissatisfaction with rising medical malpractice insurance rates and hospital administrators expressing anxiety over such rates in 1975 alerted the public to the medical malpractice insurance "crisis." *See* Learner, *supra* note 1, at 143 (documenting visible signs of health care providers discontent with insurance rates in mid-1970s). Criticism of state legislatures' reactions to the medical malpractice insurance "crisis" has developed since the deluge of medical malpractice tort reform legislation in the 1970s. *See* Robinson, *supra* note 1, at 27 (admonishing state legislatures for responding improperly to rising medical malpractice insurance costs in 1970s). The criticism specifically accuses legislators of appearing to respond to the medical malpractice crisis when, actually, the legislators enacted ineffective tort reform measures. *Id.* An example of inconsequential legislative relief to the perceived medical malpractice insurance crisis is that a significant portion of the medical malpractice tort reform legislation comprised a codification, not a modification, of common law. *Compare* FLA. STAT. ANN. § 768.43(a)(3) (West 1985) (defining professional standard of care for health care provider as that level of care, skill, and treatment which is acceptable and appropriate to reasonably prudent similar health care providers); *with* Brooks v. Serrano, 209 So. 2d 279, 280 (Fla. Dist.

abrogating the Collateral Source Rule, legislatures attempted to lower damage awards in medical malpractice litigation and thus induce insurance companies to provide malpractice insurance at lower prices.[4] The Collateral Source Rule requires a tortfeasor to pay a full damage award to a tort victim without deducting from the damage award any payments the tort victim may have received from sources independent of the tortfeasor.[5] Specifically, the Collateral Source Rule permits tort victims to receive third party compensation, such as insurance payments, social security benefits, disability payments, workmen's compensation, and gratuitous payments in addition to a full damage award from the tortfeasor.[6] Thus, the Collateral Source Rule ensures that a wrongdoer will pay in full for the wrongdoer's tortious act.[7]

Ct. App. 1968) (physician's duty to treat and diagnose patient is to use ordinary skills, means, and methods as necessarily and customarily followed in physician's community or similar community); *compare* FLA. STAT. ANN. §768.43(a)(3) (West 1985) (providing health care provider to testify as expert witness if witness is health care provider similar to defendant and possesses sufficient training, experience, and knowledge to provide expert testimony on standard of care); *with* Mitchell v. Angelo, 416 So. 2d 910, 912 (Fla. Dist. Ct. App. 1982) (witness qualified to testify as expert must be health care provider similar to defendant or possesses sufficient training, experience, and knowledge to provide expert testimony on standard of care).

4. *See* Ferguson v. Garmon, 643 F. Supp. 335, 338 (D. Kan. 1986) (recognizing legislature's reasoning that lower damage awards conceivably could result in lower insurance premiums); Doran v. Priddy, 534 F. Supp. 30, 37 (D. Kan. 1981) (determining that legislative intent is to keep down medical malpractice insurance costs by limiting size of medical malpractice verdicts); Rudolph v. Iowa Methodist Medical Center, 293 N.W.2d 550, 558 (Iowa 1980) (inferring that Iowa legislature's purpose in enacting medical malpractice legislation was to reduce malpractice insurance premiums by reducing malpractice verdicts).

5. *See* Beaulieu v. Elliott, 434 P.2d 665, 672 (Alaska 1967) (disallowing mitigation of damages by plaintiff's disability retirement pay); De Cruz v. Reid, 69 Cal.2d 217, ____, 444 P.2d 342, 348, 70 Cal. Rptr. 550, 555 (1968) (refusing to allow evidence of workmen's compensation death benefits settlement to reduce damages payable by tortfeasor); McCullough v. Ward Trucking Co., 368 Mich. 108, ____, 117 N.W.2d 167, 172 (1962) (jury should have no knowledge of plaintiff's workmen's compensation insurance); Ring v. Minneapolis St. Ry., 176 Minn. 377, ____, 223 N.W. 619, 621 (1929) (jury should not consider plaintiff's receipt of pension in determining damages); Healy v. Rennert, 9 N.Y.2d 202, 206, 173 N.E.2d 777, 778, 213 N.Y.S.2d 44, 47 (1961) (disallowing defendant's evidence of plaintiff's receipt of pension payments); Rigney v. Cincinnati St. Ry., 99 Ohio App. 105, ____, 131 N.E.2d 413, 417 (1954) (denying defendant's motion to admit evidence of employer's payment to plaintiff and employer's subsequent credit to plaintiff's accumulated sick leave); Oddo v. Cardi, 100 R.I. 578, ____, 218 A.2d 373, 375 (1966) (barring defendant from deducting gratuitous medical services from damage award); Phillips v. Bennett, 21 Utah 2d 1, ____, 439 P.2d 457, 458 (1968) (denying defendant's request to admit evidence of plaintiff's receipt of Blue Cross-Blue Shield insurance benefits); Burks v. Webb, 199 Va. 296, 304, 99 S.E.2d 629, 636 (1957) (negligent defendant owes full compensation for injuries inflicted on plaintiff and cannot reduce recoverable damages by amount of insurance policy proceeds); Stone v. City of Seattle, 64 Wash. 2d 166, ____, 391 P.2d 179, 183 (1964) (jury instruction properly informed jury to disregard plaintiff's social security payments in calculating damages); RESTATEMENT (SECOND) OF TORTS § 920A (1979) (defining Collateral Source Rule).

6. *See infra* note 7 and accompanying text (discussing scope of Collateral Source Rule).

7. *See* Grayson v. Wilkins, 256 F.2d 61, 65 (10th Cir. 1958) (suggesting underlying

Medical malpractice tort victims contesting legislation that has abolished the Collateral Source Rule have argued that the legislation violates the Equal Protection Clause of the fourteenth amendment to the United States Constitution either because the legislation classifies the medical malpractice tort victim differently from other tort victims, or because the legislation classifies the physician liable for medical malpractice differently from other tortfeasors.[8] The medical malpractice tort victims claim that denying the Collateral

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notion of Collateral Source Rule that tortfeasor should be fully accountable for all harm tortfeasor caused); Note, *Unreason in the Law of Damages: The Collateral Source Rule*, 77 HARV. L. REV. 741, 742 (1964) (Collateral Source Rule permits plaintiff to exceed compensatory limits to insure an impact on defendant). The Collateral Source Rule presents the issue of whether a party at fault should pay less than the damages the party caused, or whether the innocent party should receive a windfall. McDowell, *The Collateral Source Rule-The American Medical Association and Tort Reform*, 24 WASHBURN L.J. 205, 208 (1985). The Collateral Source Rule ensures that any windfall resulting from double recovery accrues to the innocent party. *Id.* Currently, by allowing plaintiffs to recover from independent sources as well as from defendants, courts have attempted to resolve a basic conflict between two principles of tort law. Moceri & Messina, *Collateral Source Rule in Personal Injury Litigation*, 7 GONZ. L. REV. 310, 310 (1972). One principle of tort law is to limit compensation to the amount necessary to make the injured party whole. *Id.* Another principle of tort law is to avoid a windfall to the wrongdoer if a choice must be made between the wrongdoer and the injured party concerning which party will receive the windfall. *Id.*; *see* McDowell, *supra*, at 207-08 (court must decide between two conflicting principles of tort law); Schwartz, *The Collateral Source Rule*, 41 B.U.L. REV. 348, 349-50 (1961) (Collateral Source Rule illustrates penal aspect of tort damages); Note, *supra*, at 741 (acknowledging objective in tort law of burdening tortfeasor with any loss).

The Collateral Source Rule is analogous to a wrongful death claim. *See* Schwartz, *supra*, at 352 (noting similarities between Collateral Source Rule and wrongful death claim). In a wrongful death action, the beneficiaries of a deceased person allege that the decedent's death is attributable to the willful or negligent act of another. *See* Barragan v. Superior Court of Pima County, 12 Ariz. 402, ____, 470 P.2d 722, 724 (1970) (defining wrongful death action). In wrongful death actions courts have held that the remarriage of a beneficiary does not diminish damages payable to the beneficiary. *See* City of Rome, 48 F.2d 333, 343 (S.D.N.Y. 1930) (denying mitigation of widow's damages because of widow's remarriage); Schwartz, *supra*, at 352 (discussing impact of remarriage on wrongful death claim). For example, courts generally will not reduce the amount of damages for which the tortfeasor is liable if the widow remarries after the wrongful death action accrues. *See* United States v. S.S. Washington, 172 F. Supp. 905, 908 (E.D. Va. 1959) (widow's remarriage does not diminish damages defendant must pay); Duffy v. City of New York, 16 Misc. 2d 1015, 1019, 184 N.Y.S.2d 1006, 1009 (N.Y. Sup. Ct. 1958) (refusing to consider widow's remarriage in computing damages). Similarly, compensation from collateral sources should not diminish damages payable by the tortfeasor. *See* Schwartz, *supra*, at 352 (suggesting similar treatment to beneficiaries in wrongful death actions and tort victims collateral payments). If a tort victim marries after the tort victim's injury and before the trial, the damages payable by the defendant will not change. *Id.* A distinguishing factor of the wrongful death analogy is that certain states have enacted statutes characterizing a recovery from a wrongful death action as penal damages. *Id.*; MASS. GEN. L. ch. 229, §§ 1-6E (1983) (assessing damages according to degree of tortfeasor's culpability); *cf. infra* note 21 and accompanying text (suggesting that penal damages rather than compensatory damages more accurately punish tortfeasors for wrongful conduct).

8. *See, e.g.*, Baker v. Vanderbilt Univ., 616 F. Supp. 330, 331 (M.D. Tenn. 1985) (plaintiff claiming that medical malpractice legislation unreasonably classifies physicians guilty of medical malpractice differently than other tortfeasors); Eastin v. Broomfield, 116 Ariz. 576,

Source Rule to the class of medical malpractice tort victims results in lower awards to malpractice tort victims and that all other tort victims continue to receive larger awards because the Collateral Source Rule still applies.[9] Under an equal protection challenge, a court will identify the standard of review appropriate for a legislative classification and apply the standard of review to the classification.[10] Because courts have disagreed on the appropriate standard of review for classifications that medical malpractice legislation has created, the equal protection challenges to such legislation have produced varying and inconsistent results.[11] To alleviate the confusion that exists concerning the applicable standard of review in equal protection challenges to medical malpractice legislation that abolishes the Collateral Source Rule, courts should implement the rational basis test under the traditional equal protection analysis that the United States Supreme Court has reserved for economic and social legislation.[12]

The Collateral Source Rule derives from nineteenth century common law.[13] Courts have applied the rule as both a procedural rule of evidence

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____, 570 P.2d 744, 753 (1977) (plaintiffs contending that Arizona medical malpractice legislation arbitrarily precludes medical malpractice tort victims from recovering expenses that all other tort victims could recover); Fein v. Permanente Medical Group, 38 Cal. 3d 137, ___, 695 P.2d 665, 682, 211 Cal. Rptr. 368, ____(1985) (plaintiff contending that medical malpractice legislation discriminates impermissibly between medical malpractice tort victims and other tort victims). *See generally* Hirsh, *Malpractice Crisis of the '80s: Professional Liability Tort Reform*, 13 LEGAL ASPECTS OF MEDICAL PRAC., Dec. 1985, at 2 (discussing medical malpractice tort victims' classification arguments in equal protection challenges to medical malpractice legislation abolishing Collateral Source Rule). The collateral source tort reform legislation treats medical malpractice tort victims differently than all other tort victims. *Id.* (malpractice reform measures apply only in medical liability cases); *infra* note 25 (citing state statutes that classify medical malpractice tort victims as distinct from other tort victims). Plaintiffs challenging the constitutionality of the reform measures have argued that the legislation violates the Equal Protection Clause of the fourteenth amendment to the United States Constitution because the legislation limits the damages that a malpractice tort victim can recover, but provides no similar limitations to plaintiffs in other lawsuits. *See* Hirsh, *supra*, at 2 (presenting medical malpractice tort victims' equal protection argument). The classifications resulting from medical malpractice legislation segregate victims of medical malpractice torts from all nonmedical malpractice tort victims. *Id.* Classifying malpractice tort victims raises the issue of whether tort reform legislation can withstand constitutional attack under an equal protection analysis. *Id.*

9. *See* Eastin v. Broomfield, 116 Ariz. 576, ____, 570 P.2d 744, 753 (1977) (plaintiffs noting discrepancy in size of recovery between medical malpractice tort victims' awards and other tort victims' awards).

10. *See infra* text accompanying notes 41-50 (discussing importance of determining standard of review in fourteenth amendment equal protection challenges).

11. *Compare infra* text accompanying notes 57-94 (discussing cases applying rational basis test and upholding medical malpractice legislation); *with infra* text accompanying notes 95-135 (discussing cases applying intermediate test and striking down legislation).

12. *See infra* notes 136-64 and accompanying text (supporting notion that rational basis test is appropriate test for medical malpractice legislation abrogating Collateral Source Rule).

13. McDowell, *supra* note 7, at 205. Courts have applied the Collateral Source Rule for at least 100 years. Moceri & Messina, *supra* note 7, at 310. In 1860 the court in *Althorfe v. Wolfe* used the Collateral Source Rule to refuse to reduce damages in a widow's wrongful

to prevent the admission of collateral benefits as evidence at trial and as a substantive rule of law to prohibit a court or a jury from considering the value of collateral benefits in determining damages.[14] An injured party can receive collateral benefits from various sources including insurance proceeds, gratuitous services, and pension or retirement benefits.[15] Generally, defendants may not introduce evidence of any proceeds that the plaintiff may have received from life, accident, or hospitalization insurance.[16] In addition, a majority of jurisdictions apply the Collateral Source Rule to an injured party's receipt of gratuities.[17]

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death action by the amount of the husband's life insurance proceeds. *See* Schwartz, *supra* note 7 at 352 (discussing Althorfe v. Wolfe, 22 N.Y. 355, ____, N.E. ____, (1860)).

14. *See* McDowell, *supra* note 7, at 205 (acknowledging Collateral Source Rule as substantive law and evidentiary rule); Moceri & Messina, *supra* note 7, at 310 (noting dual application of Collateral Source Rule as damages rule and evidentiary rule). A defendant often will attempt to introduce evidence of collateral payments for a purpose other than to reduce the damage award. *See* Moceri & Messina, *supra* note 7, at 324 (examining admissibility for limited purpose of evidence of collateral payments). The arguments to admit evidence of collateral payments for a limited purpose have resulted in a tripartite split of authority. *See id.* (noting judicial incongruity on use of evidence of collateral payments for limited purpose). In the first line of authority, courts have permitted a defendant to admit evidence of collateral payments for a particular purpose and have instructed the jury to consider the payments only in commection with the particular purpose. *See* Fleming v. Mulligan, 3 Wash. App. 951, ____, 478 P.2d 754, 756 (1970) (allowing evidence of collateral payments for limited purpose of testing plaintiff's accuracy concerning time plaintiff was absent from work); Moceri & Messina, *supra* note 7, at 324 (noting that some courts admit evidence of collateral payments for limited purpose). The second line of authority excludes the evidence as prejudicial to the plaintiff. *See* Eichel v. New York Cent. R.R., 375 U.S. 253, 255 (1963) (holding that lower courts erred in admitting evidence of collateral payments for limited purpose of showing plaintiff's motive); Caughman v. Washington Terminal Co., 345 F.2d 434, 435 (D.C. Cir. 1965) (finding prejudicial error in district court's admitting evidence of collateral payments to show plaintiff's intent to malinger); Healy v. Rennert, 9 N.Y.2d 202, 206-08, 173 N.e.2d 777, 779, ____N.Y.S.2d ____, ____(1961) (finding prejudicial effect of evidence of collateral payments strongly outweighed any probative value); Moceri & Messina, *supra* note 7, at 324 (noting that some courts exclude evidence of collateral payments as prejudicial). The third line of authority permits a defendant to admit the evidence for a particular purpose only upon a strong showing that the probative value of the evidence outweighs the prejudicial effect of the evidence to the plaintiff. *See* Hrnjak v. Graymar, Inc., 4 Cal.3d 725, 732-33, 484 P.2d 599, 604, 94 Cal. Rptr. 623, 628 (1971) (allowing evidence of collateral payments for limited purpose only upon persuasive showing that evidence has substantial probative value); Moceri & Messina, *supra* note 7, at 324 (noting that some courts allow evidence upon showing that evidence has substantial probative value).

15. *See* Moceri & Messina, *supra* note 7, at 312 (identifying possible sources of collateral benefits).

16. *See, e.g.*, Roth v. Chatlos, 96 Conn. 282, ____, 116 A. 332, 334 (1922) (evidence of plaintiff's accident insurance is inadmissible); Conley v. Foster, 335 S.W.2d 904, 907 (Ky. Ct. App. 1960) (evidence of plaintiff's hospitalization insurance is inadmissible); Gaydos v. Domabyl, 301 Pa. 523, ____, 152 A. 549, 553 (1930) (evidence of plaintiff's life insurance is inadmissible).

17. *See* Moceri & Messina, *supra* note 7, at 313 (observing that some courts have held that plaintiff's recovery included value of gratuities). Gratuitous payments do not involve any outlay or expense by the tort victim. *See id.* at 312 (explaining nature of gratuitous payments);

Courts have offered several justifications for applying the Collateral Source Rule.[18] The most often cited justification supports the fault concept in tort law.[19] The fault concept in tort law provides that a wrongdoer should

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Note, *supra* note 7, at 746 (nature of gratuitous service is that plaintiff incurs no expense). By contrast to gratuitous payments, other kinds of collateral benefits require a tort victim to incure some cost to receive these other kinds of collateral benefits. *See* Moceri & Messina, *supra* note 7, at 312 (contrasting nature of gratuitous payment with other forms of collateral compensation). For example, an injured party must purchase insurance to receive insurance benefits. *Id.* Similarly, an injured party must take a concession in wages to receive benefits from work-related compensation plans such as disability payments or workmen's compensation. *Id.* Because a plaintiff incurs no expense for a gratuitous payment, but incurs some expense for other collateral benefits, some courts have deducted the value of a gratuitous payment from the damage award. *See* Coyne v. Campbell, 11 N.Y.2d 372, 374-75, 183 N.E.2d 891, 891-92, 230 N.Y.S.2d 1, 2-3 (1962) (court deducted from plaintiff's recovery value of gratuitous medical payments). *But see* Mobley v. Garcia, 54 N.M. 175, ____, 217 P.2d 256, 257 (1950) (court did not deduct value of gratuitous medical payments from plaintiff's damage award). *See generally* Moceri & Messina, *supra* note 7, at 312-13 (some courts treat gratuitous payments differently than other collateral payments). Subtracting the value of gratuitous payments from a plaintiff's damage award might frustrate the intent of the donor. *See id.* at 313 (excluding gratuitous payments from plaintiff's recovery conflicts with donor's intent because donor of gratuitous payment intends to help injured party not wrongdoer). Thus, if a court does not apply the Collateral Source Rule and excludes the value of the gratuitous payment from plaintiff's recovery, the tortfeasor, not the injured party, becomes the true beneficiary of the gratuitous payment. *See* Lambert, *A Case for the Collateral Source Rule*, 524 INS. L. J. 531, 543 (1966) (donor did not intend to benefit wrongdoer); Moceri & Messina, *supra* note 7, at 313 (wrongdoer benefits from gratuitous payment if plaintiff's award excludes value of gratuitous payment); Note, *supra* note 7, at 751 (donor intended to confer benefit on plaintiff and mitigation of damages would shift benefit to tortfeasor). The donor's intent, however, might not be the appropriate basis for determining the applicability of the Collateral Source Rule in excluding gratuitous payments from the damage award. *See* Lorentzen & Rankin, *The Collateral Source Issue: Forging a Middle Ground*, 35 FED'N OF INS. COUNS. Q. 3, 9 (1984) (donor's intent is unimportant in determining applicability of Collateral Source Rule). In addition, the donor would give the gift without considering the donee injured party's chances of recovery from the tortfeasor. *See id.* at 9 (donor provides gratuity without regard for the injured party's legal recourse against wrongdoer). Finally, not excluding gratuitous payments from damage awards would allow the injured party to recover for losses the party has not incurred instead of receiving compensation only for actual losses. *See id.* at 10 (recovery in tort should compensate injured party for actual losses, not for losses injured party has not suffered); Lambert, *supra*, at 544 (Collateral Source Rule allows plaintiff to use third party's generosity to profit from losses not incurred).

18. *See infra* notes 19-24 and accompanying text (discussing justifications for Collateral Source Rule). Commentators generally have agreed that the Collateral Source Rule has not evolved with the tort system and, accordingly, that the Collateral Source Rule is obsolete. *See, e.g.*, KEETON & O'CONNELL, BASIC PROTECTION FOR THE TRAFFIC VICTIM 123-54 (1967) (recommending total abolition of Collateral Source Rule); Fleming, *The Collateral Source Rule and Loss Allocation in Tort Law*, 54 CALIF. L. REV. 1478, 1544 (1966) (advocating elimination of Collateral Source Rule); McDowell, *supra* note 7, at 205-26 (criticizing Collateral Source Rule); Schwartz, *supra* note 7, at 363 (proposing elimination of Collateral Source Rule); Note, *supra* note 7, at 753 (objecting to Collateral Source Rule because Collateral Source Rule does not mitigate damages). *But see* Moceri & Messina, *supra* note 7, at 327-28 (describing Collateral Source Rule as fair and reasonable, and advocating universal application of Collateral Source Rule).

19. *See* Eastin v. Broomfield, 116 Ariz. 576, ____, 570 P.2d 744, 745 (1977) (noting

be responsible for all damages that result from the wrongdoer's actions.[20] The fault concept justification for the Collateral Source Rule is that reducing a plaintiff's recovery by the sum of the collateral payments would weaken the deterrent effect of damage awards on tortious activity.[21] Another justification is that a defendant tortfeasor should not benefit from a plaintiff's foresight in securing insurance.[22] A third justification for applying the Collateral Source Rule is that a plaintiff who receives insurance or other collateral benefits should not receive a lower award than a plaintiff who is not the recipient of any collateral benefits.[23] A fourth justification for the

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deterrent impact of tort actions as one rationale for Collateral Source Rule); *infra* notes 20-21 and accompanying text (discussing fault concept in tort law).

20. *See* McDowell, *supra* note 7, at 226 (basis of Collateral Source Rule is notion that wrongdoer should pay for harm wrongdoer creates); *id.* at 211-13, 226 (tort system should make injured party whole). Commentators have recognized an inconsistency between the Collateral Source Rule and the tort system. *Id.* at 211. As the tort system evolves from a fault-based system to a compensation-based system, the Collateral Source Rule remains firmly grounded in the fault principle. *Id.* Worker's compensation and no-fault automobile insurance exemplify the movement toward a system concerned with compensation rather than fault. *Id.* at 211 n. 17. The Collateral Source Rule provides a striking contrast between a fault-based system and a compensation-based system because the Collateral Source Rule exemplifies the fault-based notion that the defendant should pay for all of the harm the defendant caused even if other sources have contributed to fully compensate the plaintiff. *Id.* at 211.

21. *See* Moceri & Messina, *supra* note 7, at 312 (Collateral Source Rule has deterrent effect in personal injury judgments); Comment, *An Analysis of State Legislative Responses to the Medical Malpractice Crisis*, 1975 DUKE L. J. 1417, 1447 (policy to deter tortious behavior is most common justification for Collateral Source Rule). *But see* Note, *supra* note 7, at 748 (disagreeing with punitive function of Collateral Source Rule). The Collateral Source Rule might not have a deterrent effect if no correlation exists between the actual harm that the wrongdoer's action caused and the wrongdoer's degree of fault. Note, *supra* note 7, at 748. A wrongdoer's liability depends on the harm the wrongdoer causes, not on the wrongdoer's degree of fault. *Id.* at 749. For example, although an intentional tort may result in no damage, an unintentional tort may cause severe damages. *Id.* Punitive damages are a more effective device than compensatory damages for penalizing the wrongdoer because punitive damages do not depend on the fortuitous circumstances on which actual damages depend. *See id.* (recommending punitive damages rather than compensatory damages to punish tortfeasor); Lorentzen & Rankin, *supra* note 17, at 6 (punitive damages punish more effectively than actual damages). In addition, the Collateral Source Rule might not have a significant deterrent effect because the insurer, not the defendant, is the party ultimately responsible to pay damages. Lorentzen & Rankin, *supra* note 17, at 5. An insurance company will respond to damages that the Collateral Source Rule has inflated by passing on the cost to the premium paying public with an insurance premium increase. *Id.*

22. *See* Eastin v. Broomfield, 116 Ariz. 576, ____, 570 P.2d 744, 751 (1977) (acknowledging that defendant should not benefit from plaintiff's foresight in buying insurance as one rationale for Collateral Source Rule); Perrot v. Shearer, 17 Mich. 47, 56 (1868) (plaintiff receives insurance proceeds from contractual agreement to which defendant is not privy and, therefore, defendant should derive no benefit); Moceri & Messina, *supra* note 7, at 315 (policy argument for applying Collateral Source Rule to insurance proceeds is that foresight of insured party should not benefit wrongdoer).

23. *See* Eastin v. Broomfield, 116 Ariz. 576, ____, 570 P.2d 744, 751 (1977) (one rationale for Collateral Source Rule is that plaintiff's purchase of insurance should not penalize plaintiff); Rudolph v. Iowa Methodist Medical Center, 293 N.W.2d 550, 558 (Iowa 1980) (abrogating Collateral Source Rule would penalize tort victim for foresight in purchasing insurance).

Collateral Source Rule is that the portion of the award comprising recovery from collateral sources will offset legal fees, and the net recovery will make the injured party whole.[24]

Despite reasons for retaining the Collateral Source Rule, the rapid rise of malpractice insurance in the mid-1970s prompted state legislatures to examine the feasibility of the continued application of the Collateral Source Rule and, particularly, the Collateral Source Rule's inflationary effect on medical malpractice verdicts.[25] Accordingly, in the last ten years, many state

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24. *See* McDowell, *supra* note 7, at 213 (Collateral Source Rule ensures that plaintiff will not receive less than amount necessary to make plaintiff whole). A plaintiff's attorney often works on a contingency basis. *See id.* (plaintiff pays attorney percentage of plaintiff's recovery). The plaintiff's attorney's fees typically range from 1/3 to 1/2 of the judgment. *Id.* As a result of the contingency fee arrangement, the plaintiff's award diminishes significantly. *See* Hudson v. Lazarus, 217 F.2d 344, 346 (D.C. Cir. 1954) (recognizing substantial reduction in plaintiff's recovery due to attorney's fees); McDowell, *supra* note 7, at 213 (noting diminishing effect of contingency fee to plaintiff's judgment and Collateral Source Rule's ability to ensure adequate judgment to satisfy attorney's percentage fee and plaintiff's full compensation). *But see* McDowell, *supra* note 7, at 213 (claiming that larger damage award resulting from Collateral Source Rule harms plaintiff by increasing base used to calculate attorney's fees); Note, *supra* note 7, at 750 (jury considers attorney's fees in calculating award).

25. *See* Learner, *supra* note 1, at 146 (hoping to alleviate crisis, legislatures adopted reform measures despite lack of statistical information as guide); Robinson, *supra* note 1, at 7 (noting legislative reaction to increased malpractice insurance premiums); *supra* note 26 (discussing statutes resulting from legislative attention to rising medical malpractice insurance rates). Each state adopted a different tort reform scheme. Learner, *supra* note 1, at 146. Typically, a state's tort reform included provisions for screening panels, a shortened statute of limitations, caps on awards, and abrogation of the Collateral Source Rule. *See id.* (specifying provisions of malpractice reform legislation).

Legislative reform directed at malpractice generally has one of two objectives. *See* Robinson, *supra* note 1, at 21 (discussing objectives of medical malpractice legislation). First, the legislation can focus on discouraging the initiation of claims. *Id.* For example, some legislation provides for a shorter statute of limitations in malpractice claims than in other tort claims. *See e.g.*, DEL. CODE ANN. tit. 18, § 6856 (1984) (fixing statute of limitations to two years from injury, unless injury could not have been discovered within two years, in which case three years from injury); IND. CODE ANN. § 16-9.5-3-1 (Burns 1983) (fixing statute of limitations to two years from injury); MICH. COMP. LAWS ANN. § 600.5805(4) (1985) (fixing statute of limitations to two years from discontinuation of treatment or six months from discovery); *see also* Robinson, *supra* note 1, at 21 (anticipating shorter statute of limitations to curtail claim frequency). Another example of legislation aimed at discouraging claims involves regulating lawyers' contingent fees. *See* ARIZ. REV. STAT. ANN. § 12-568 (1982) (upon either party's request, court will determine reasonableness of attorneys' fees); DEL. CODE ANN. tit. 18, § 6865 (1984) (limiting attorneys' fees to 35% on first $100,000 damages, 25% on second $100,000 damages, and 10% on remaining damages); *see also* Robinson, *supra* note 1, at 21 (discussing legislative regulation of lawyers' contingent fees). By controlling attorneys' fees either through judicial determination of reasonable fees or by statutorily prescribed limits on the percentage of the judgment a lawyer could claim, legislatures intended to discourage lawyers from bringing unwarranted lawsuits and from asking for unrealistic damages. *See* Robinson, *supra* note 1, at 22 (contingent fee regulation protects defendants and defendants' insurers against medical malpractice lawsuits). A third example of legislation intended to discourage litigation is eliminating the *ad damnum* clause from medical malpractice complaints. *See* MD. CTS. & JUD. PROC. CODE ANN. § 3-2A-02(b) (1984) (prohibiting *ad damnum* clauses);

legislatures have modified the Collateral Source Rule in medical malpractice actions.[26] Although collateral source reform varies substantively among states, the legislation eliminating the Collateral Source Rule shares two attributes.[27] First, the statutes apply only to medical malpractice actions and, second, the statutes permit the defendant to introduce some evidence of collateral benefits that the plaintiff has received.[28] In addition, the

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MASS. GEN. LAWS ANN. ch. 231, § 60C (West 1985) (eliminating *ad damnum* clauses from medical malpractice complaints); Robinson, *supra* note 1, at 23 (eliminating damages clause facilitates legislative objective of reducing lawsuit frequency). The rationale for prohibiting the damages clause from medical malpractice complaints is to discourage filing claims resulting from the publicity surrounding large damage claim clauses. Robinson, *supra* note 1, at 23.

The second classification of malpractice legislation affects the amount recoverable in a malpractice tort claim. *Id.* at 21. One example of legislation that limits the amount that a plaintiff can recover is creating screening panels as a prerequisite to trial. *See e.g.*, ARK. STAT. ANN. § 34-2603 (Supp. 1975) (party may submit claim before screening panel upon party's request); FLA. STAT. ANN. § 768.133(6) (West 1975) (authorizing civil discovery for screening panel); IND. CODE ANN. § 16-9.5-9-2 (Burns Supp. 1975) (requiring parties to submit malpractice claims before screening panel); Robinson, *supra* note 1, at 25 (discussing screening panels as means of limiting amount recoverable in medical malpractice litigation). The function of the screening panel varies among states, but medical and legal experts typically form the screening panel and review the evidence in the case. *See* P. CARLIN, MEDICAL MALPRACTICE PRE-TRIAL SCREENING PANELS: A REVIEW OF THE EVIDENCE 15-41 (1980) (reviewing different screening panel schemes). Another legislative device that limits a plaintiff's recovery involves a statutory ceiling on amounts recoverable in medical malpractice actions. *See* CAL. CIV. CODE § 3333.2(b) (West 1985) (limiting pain and suffering damages and other noneconomic losses to $250,000); VA. CODE ANN § 8.01-581.15 (1984) (total recovery limit of $1,000,000); Robinson, *supra* note 1, at 25 (discussing limit on amount recoverable as partial cure for medical malpractice crisis). Modifying the Collateral Source Rule is another legislative device intended to lower recoverable damages. *See supra* note 3-4 and accompanying text (discussing legislation modifying Collateral Source Rule). A final legislative reform intended to reduce awards allows for periodic payments in lieu of lump-sum awards. *See e.g.*, CAL. CIV. PROC. CODE § 667.7 (West 1980) (providing for periodic payments instead of lump sum award at either plaintiff or defendant's request); MD. CTS. & JUD. PROC. ANN. § 3-2A-08(b) (1984) (providing for periodic payments at claimant's request); WIS. STAT. ANN. § 655.015 (West 1980) (providing for mandatory periodic payments for judgments exceeding $25,000); Robinson, *supra* note 1, at 26 (discussing legislation providing form periodic payments instead of lump sum award). A rationale for periodic payments of an award instead of one lump sum payment is that the periodic payment provision lowers the cost of the damage award to the defendant by allowing the defendant or the defendant's insurer to invest unpaid damages and to cease payments upon the death of the injured party. *See* American Bank & Trust Co. v. Community Hosp. of Los Gatos-Saratoga, Inc., 36 Cal.3d 359, 374, 683 P.2d 670, 679, 204 Cal. Rptr. 671, 680 (1984) (discussing rationale of periodic payment legislation); Robinson, *supra* note 1, at 26 (noting defendant's preference for periodic payments instead of lump sum payment).

26. *See, e.g.*, DEL. CODE ANN. tit. 18, § 6862 (1974) (abrogating Collateral Source Rule); IDAHO CODE § 39-4210 (1977) (modifying Collateral Source Rule); N.Y. CIV. PRAC. L. & R. 4010 (1977) (abrogating Collateral Source Rule). *See generally* Robinson, *supra* note 1, at 32 (modifying or abolishing Collateral Source Rule is most common reform in medical malpractice legislation). One commentator attributes the widespread abrogation of the Collateral Source Rule to the perception that the abrogation only minimally alters the tort system. McDowell, *supra* note 7, at 216.

27. *See* McDowell, *supra* note 7, at 216 (observing similarities among state legislation modifying Collateral Source Rule).

28. *Id.*

legislation modifying the Collateral Source Rule embodies one of two approaches to allowing evidence of collateral benefits at trial.[29] A statute modifying the Collateral Source Rule either gives the judge or jury the discretion to consider the plaintiff's collateral benefits in determining damages or mandates an offset of collateral benefits against a damage award in a medical malpractice case.[30]

Whether the collateral source legislation permits a court or a jury to decide the impact of collateral benefits on a damage award or mandates offsetting collateral payments against a damage award, available results indicate that the collateral source legislation has reduced the severity and frequency of damage awards in medical malpractice cases.[31] The true impact of the tort reform legislation abolishing the Collateral Source Rule, however, largely remains undetermined.[32] Only a decade has passed since the legislative enactments, and data documenting the effect of the legislation is scarce.[33] Another explanation for the lack of information on the effect of the medical malpractice reform legislation is that some insurers have not relied on the legislation in determining their insurance rates.[34] The insurers have been

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29. *See infra* note 30 and accompanying text (discussing two formulations of Collateral Source Rule).

30. *See* Hirsh, *supra* note 8, at 5 (discussing alternative forms of collateral source legislation). Nine states adopted a form of the Collateral Source Rule allowing a finder of fact discretion in considering a plaintiff's collateral benefits. *See, e.g.*, CAL. CIV. CODE § 3333.1 (West 1985) (allowing jury to decide whether to consider collateral benefits in determining damages award); DEL. CODE ANN. tit. 18, § 6862 (1984) (permitting jury to decide whether to exclude certain collateral benefits from damage award); N.Y. CIV. PRAC. LAW §4010 (McKinney 1984) (allowing jury to determine whether to exclude collateral benefits from damage award); S.D. CODIFIED LAWS ANN. § 21-3-12 (1984) (permitting jury discretion regarding treatment of gratuitous collateral benefits); Hirsh, *supra* note 8, at 5 (citing number of states that have adopted discretionary form of legislation abrogating the Collateral Source Rule). Ten states adopted the form mandating an offset of a plaintiff's collateral benefits against the award. *See, e.g.*, FLA. STAT. ANN. § 768.50 (West 1985) (requiring offset of collateral payments against damage award); OHIO REV. CODE ANN. § 2305.27 (Baldwin 1984) (requiring offset of collateral payments other than collateral payments that employer or claimant paid for); R.I. GEN. LAWS § 9-19-34 (1984) (requiring offset of collateral payments against damage award); *see* Hirsh, *supra* note 8, at 5 (citing number of states that have adopted mandatory form of legislation abrogating Collateral Source Rule); *see also* Danzon, *supra* note 1, at 77 (discussing contradictory statistics on effect of mandatory offset versus discretionary offset).

31. *See* Danzon, *supra* note 1, at 77 (collateral source legislation resulted in 11% to 18% reduction in severity of individual awards); *id.* at 72 (collateral source legislation resulted in 14% reduction in claim frequency). "Severity" refers to the size of the award per paid claim and "frequency" refers to the number of claims filed. *Id.* at 57. The change in the Collateral Source Rule purportedly is one of the most effective methods of tort reform for reducing the size of jury awards and settlements. *See* Hirsh, *Malpractice Crisis of the 80's-Did the Reforms Help?*, 14 LEGAL ASPECTS OF MEDICAL PRAC., Jan. 1986 at 4 (noting effectiveness of legislation modifying Collateral Source Rule).

32. *See* Robinson, *supra* note 1, at 27 (noting unavailability of accurate data on legal reforms of 1970s).

33. *Id.*

34. *See infra* note 35 and accompanying text (discussing insurers' reluctance to rely on medical malpractice legislation).

reluctant to rely on laws that courts might strike down as unconstitutional.[35] The decisions striking down medical malpractice legislation as violating the Equal Protection Clause of the fourteenth amendment of the United States Constitution support the insurers' doubts regarding the constitutionality of the medical malpractice legislation.[36]

The disparity among courts regarding the standard of review for medical malpractice legislation modifying the Collateral Source Rule raises the question of which standard of review courts should apply. In considering equal protection challenges to medical malpractice legislation, state and federal courts have relied, in varying degrees, on the guidelines that the United States Supreme Court has provided in cases considering challenges to the fourteenth amendment Equal Protection Clause of the United States Constitution.[37] The Supreme Court has not interpreted the Equal Protection Clause of the fourteenth amendment to require absolute equality or similar treatment of things different in fact.[38] Instead, the Supreme Court has developed the Equal Protection Clause of the fourteenth amendment to ensure that those similarly situated receive similar treatment.[39] To determine whether a legislative classification complies with the right to equal protection under the fourteenth amendment, the Supreme Court has developed a model

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35. *See* Hirsh, *supra* note 8, at 2 (predicting how courts will decide equal protection challenges to medical malpractice legislation is virtually impossible); Redish, *Legislative Response to the Medical Malpractice Insurance Crisis: Constitutional Implications*, 55 TEX. L. REV. 759, 762 (1977) (insurers await outcome of constitutional challenges before lowering rates in reliance on statutes); Note, *California's Medical Injury Compensation Reform Act: An Equal Protection Challenge*, 52 S. CAL. L. REV. 829, 858 (1979) (supporting reasonableness of insurers' fear that court will strike down medical malpractice legislation); *see also* Hirsh, *supra* note 8, at 2 (malpractice tort reform, viewed as one-sided and unfair "special legislation" because of benefits to physicians, is unlikely to survive).

36. *See, e.g.*, Coburn v. Agustin, 627 F. Supp. 983, 997 (D. Kan. 1985) (striking down medical malpractice legislation abrogating Collateral Source Rule); Jones v. State Bd. of Medicine, 97 Idaho 859, ____, 555 P.2d 399, 416 (1976) (striking down medical malpractice legislation as violating Equal Protection Clause of fourteenth amendment of United States Constitution), *cert. denied* 431 U.S. 914 (1977); Graley v. Satayatham, 74 Ohio Op. 2d 316, ____, 343 N.E.2d 832, 837 (1976) (striking down medical malpractice legislation as unconstitutional).

37. *See e.g.*, Plyler v. Doe, 457 U.S. 202, 204-08 (1982) (applying strict scrutiny test); Craig v. Boren, 429 U.S. 190, 197-210 (1976) (applying intermediate level of scrutiny); McGowan v. Maryland, 366 U.S. 420, 425-28 (1961) (applying rational basis standard of review).

38. *See* Tussman & tenBroek, *Equal Protection of the Laws*, 37 CALIF. L. REV. 341, 343-44 (1949) (explaining concept of constitutional equal protection). The Fourteenth Amendment to the United States Constitution provides that "[n]o state shall . . . deny to any person within its jurisdiction the equal protection of the laws". U.S. CONST. amend. XIV, § 1, cl. 2.

39. *See* Plyler v. Doe, 457 U.S. 202, 216 (1982) (function of Equal Protection Clause of fourteenth amendment to United States Constitution is to provide similar treatment to similarly situated persons); Tignor v. Texas, 310 U.S. 141, 147 (1940) (defining constitutional meaning of equal protection); U.S. CONST. amend. XIV, §1, cl. 2 (Equal Protection Clause); Tussman & tenBroek, *supra* note 38, at 344 (explaining equal protection under United States Constitution).

for examining a legislative purpose and the means of attaining that purpose.[40] In traditional equal protection analysis, the Supreme Court has constructed a two-tiered standard of review comprised of strict scrutiny and rational basis tests.[41] Courts have applied the rigid test of strict scrutiny to legislative classifications that either concern suspect classes, such as race, alienage, or national origin, or infringe fundamental interests, such as the rights to privacy, interstate travel, and marriage and procreation.[42] Courts applying the two-tiered standard of review historically have upheld legislation under the strict scrutiny test only if the legislature precisely has tailored the

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40. *See* G. GUNTHER, CASES AND MATERIALS ON CONSTITUTIONAL LAW 657-897 (9th ed. 1975) (describing framework for equal protection analysis); *supra* note 37 (noting cases representing three levels of equal protection analysis that United States Supreme Court has developed); *infra* text accompanying notes 41-50 (discussing strict scrutiny, rational basis, and intermediate scrutiny as framework for equal protection analysis).

41. *See* Plyler v. Doe, 457 U.S. 202, 204-08 (1982) (applying strict scrutiny standard of review); McGowan v. Maryland, 366 U.S. 420, 425-28 (1961) (applying rational basis test).

42. Korematsu v. United States, 323 U.S. 214, 216 (1944) ("pressing public necessity" may justify racially based restrictions). Courts apply the strict scrutiny test only when legislative classifications threaten certain suspect classes or fundamental interests. Gunther, *supra* note 40, at 658. Classifications are suspect when the class is so burdened with such disabilities or has such a history of purposeful unequal treatment or occupies such a position of political powerlessness that the class requires extraordinary protection. Plyler v. Doe, 457 U.S. 202, 217 (1982); San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 28 (1973). The United States Supreme Court specifically has identified suspect classifications as the legislative classifications that discriminate against classes of persons on the basis of race, alienage, or national origin. *See* Graham v. Richardson, 403 U.S. 365, 382-83 (1971) (applying strict scrutiny standard of review to classifications threatening alienage); Loving v. Virginia, 388 U.S. 1, 6 (1967) (applying strict scrutiny standard of review to race-based classification); Hernandez v. Texas, 347 U.S. 475, 477-78 (1954) (classifications discriminating against national origin subject to strict scrutiny); Truax v. Raich, 239 U.S. 33, 39-43 (1915) (classifications discriminating against alienage subject to strict scrutiny); Strauder v. West Virginia, 100 U.S. 303, 308 (1880) (classifications discriminating against race subject to strict scrutiny).

In addition to applying the strict scrutiny standard of review to legislation that torments suspect classifications, the Supreme Court has applied the strict scrutiny test when legislative classifications threaten certain fundamental interests. The Supreme Court has limited the category of fundamental rights to those that the United States Constitution explicitly or implicitly guarantees. *See* San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 33-34 (1973) (limiting fundamental interests to interests that United States Constitution explicitly or implicitly guarantees). Fundamental rights that the United States Supreme Court has recognized include interstate travel, privacy, voting in state elections, marriage and procreation, and first amendment rights. *See* Police Dep't of Chicago v. Mosley, 408 U.S. 92, 101 (1972) (fundamental rights include first amendment rights); Dunn v. Blumstein, 405 U.S. 331, 362-63 (1972) (right to vote in state elections is fundamental right); Shapiro v. Thompson, 394 U.S. 618, 630 (1969) (right to interstate travel is fundamental right); Griswold v. Connecticut, 381 U.S. 479, 485-86 (1965) (fundamental rights include right to privacy); Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535, 541 (1942) (fundamental rights include right to marry and procreate). *See generally* Bice, *Standards of Judicial Review Under the Equal Protection and Due Process Clauses*, 50 S. CAL. L. REV. 689, 695-98 (1977) (discussing development of fundamental interest branch of strict scrutiny standard of review. *But see* San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 33-34 (1973) (refusing to recognize access to education as fundamental interest).

classification to serve a compelling governmental interest.[43] The second standard of review in the two-tiered approach is the rational basis test.[44] Courts have reserved the rational basis test for legislation creating economic or social classifications.[45] Under the rational basis test, a court will presume that a contested statute is constitutional and will uphold the statute if the court can conceive of some rational relationship to some legitimate state purpose.[46] While few statutes survive the strict scrutiny standard of review, few statutes fail the rational basis test.[47] In addition to the traditional two-tiered standard of review, the Supreme Court has applied a third, intermediate standard of review to fourteenth amendment equal protection challenges.[48] Under an intermediate standard of review, courts will examine whether the legislative classification bears a substantial relationship to promoting an important governmental objective.[49] The United States Su-

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43. *See* Plyler v. Doe, 457 U.S. 202, 217 (1982) (defining government's burden of proof to uphold legislation under strict scrutiny standard of review). *See generally* Bice, *supra* note 42, at 699 (discussing scope of strict scrutiny equal protection analysis).

44. *See infra* text accompanying notes 45-47 (discussing rational basis test).

45. *See* McGowan v. Maryland, 366 U.S. 420, 425-28 (1961) (applying rational basis test).

46. *See id.* (describing appropriate inquiry under rational basis test).

47. *See* Note, *supra* note 35, at 864 (determining standard of review in fourteenth amendment equal protection challenge dictates whether legislation is constitutional). One commentator has capsulized the strict scrutiny standard of review as strict in theory and fatal in fact. G. GUNTHER, *supra* note 40, at 8. Commentators have criticized the two-tier analysis of equal protection challenges as outcome determinative. *See* G. GUNTHER, *supra* note 40, at 657-897 (noting outcome determinative nature of traditional equal protection analysis); Note, *supra* note 35, at 865 (observing that court will uphold legislation if court applies rational basis test and will strike down legislation if court applies strict scrutiny test); Comment, *"Newer" Equal Protection: The Impact of the Means-Focused Model*, 23 BUFFALO L. REV. 665, 665 (1974) (explaining that traditional equal protection analysis is outcome determinative). Courts applying the strict scrutiny test to contested legislation invariably strike down the legislation, while courts applying the rational basis test to contested legislation invariably uphold the legislation. *See* Note, *supra* note 35, at 851 (discussing outcome determinative nature of traditional equal protection analysis).

48. *See* Craig v. Boren, 429 U.S. 190, 197 (1976) (discussing level of scrutiny under intermediate standard of review); Mathews v. Lucas, 427 U.S. 495, 504-16 (1976) (applying intermediate standard of review); Dandridge v. Williams, 397 U.S. 471, 508 (1970) (Marshall, J., dissenting) (acknowledging existence of intermediate standard of review); G. GUNTHER, *supra* note 40, at 665-73 (discussing intermediate standard of review); Note, *supra* note 35, at 893 (discussing intermediate standard of review). Some commentators question whether an intermediate standard of review ever existed. *See* Redish, *supra* note 35, at 773 (questioning Supreme Court's position on intermediate standard of review). Redish has observed that the Supreme Court never has recognized explicitly a third tier to the traditional two-tiered equal protection analysis. *Id.* Moreover, Redish claims that since 1971 the Supreme Court has applied the rational basis test to virtually all equal protection cases. *Id.* at 774 (noting Supreme Court's widespread application of rational basis test to equal protection challenges but explicitly excluding cases involving gender-based classifications (citing Craig v. Boren, 429 U.S. 190 (1976)).

49. *See* Craig v. Boren, 429 U.S. 190, 197-210 (1976) (applying intermediate standard of review). *See generally* Bice, *supra* note 42, at 702-07 (discussing implications of United States

preme Court has limited the application of the intermediate standard to classifications based on gender, illegitimacy, and the right to privacy.[50]

Uncertainty regarding which standard of review to apply to legislation modifying the Collateral Source Rule in medical malpractice actions has created inconsistent results in both state and federal courts.[51] The courts that have addressed the constitutionality of legislation abrogating the Collateral Source Rule have applied either the rational basis standard of review or the intermediate standard of review.[52] With the exception of the United States District Court of Kansas decision in *Coburn v. Agustin*,[53] in which the court applied a heightened rational basis standard of review, every court ruling on the constitutionality of Collateral Source legislation since 1980 has applied the traditional rational basis test to collateral source legislation.[54] The courts applying the rational basis standard of review defer to the

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Supreme Court's decision in *Craig* on fourteenth amendment equal protection analysis). In *Craig v. Boren* the United States Supreme Court considered the constitutionality of a gender-based classification. *Craig*, 190 U.S. at 197-210. The challenged Oklahoma statute prohibited the sale of beer to males younger than 21 but permitted the sale of beer to females 18 years of age or older. *Id.* at 197; OKLA. STAT. tit. 10, § 1101(a) (Supp. 1976). The state attempted to show that the gender-based classification was rational by introducing statistics indicating that males between 18 and 20 years old more likely will be arrested for driving under the influence of alcohol and for drunkenness than females between 18 and 20. *Craig*, 190 U.S. at 200-01. The state's evidence indicated that in 1973 the state arrested 427 males for driving under the influence and 966 males for drunkenness and, in the same year, the state arrested 24 females for driving under the influence and 102 for drunkenness. *Id.* at 200 n. 8. The United States Supreme Court reasoned that the statistics did not show that the gender-based classification bore a substantial relationship to improving traffic safety. *Id.* at 201.

50. *See Craig*, 429 U.S. at 197-204 (applying intermediate standard of review to classifications based on gender); Mathews v. Lucas, 427 U.S. 495, 504-16 (1976) (applying intermediate standard of review to classifications based on illegitimacy); Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 168-76 (1972) (classifications based on illegitimacy are subject to intermediate standard of review); Eisenstadt v. Baird, 405 U.S. 438, 446-55 (1972) (implying that right to privacy is subject to intermediate standard of review); Reed v. Reed, 404 U.S. 71, 75-77 (1971) (implying that gender-based classifications are subject to intermediate standard of review); Redish, *supra* note 35, at 773 (noting Supreme Court's limited application of intermediate standard of review).

51. *Compare infra* text accompanying notes 57-94 (discussing cases applying rational basis standard of review) *with infra* text accompanying notes 95-135 (discussing cases applying intermediate standard of review).

52. *See infra* text accompanying notes 57-94 (discussing cases in which courts have applied rational basis test to medical malpractice legislation abrogating Collateral Source Rule); *infra* text accompanying notes 95-135 (discussing cases in which courts have applied intermediate test to medical malpractice legislation abrogating Collateral Source Rule).

53. 627 F. Supp. 983 (D. Kan. 1985).

54. *See, e.g.*, Baker v. Vanderbilt Univ., 616 F. Supp. 330, 331-32 (D. Tenn. 1985) (applying rational basis test to uphold statute abrogating Collateral Source Rule); Fein v. Permanente Medical Group, 38 Cal. 3d 137, ____, 695 P.2d 665, 685-86, 211 Cal. Rptr. 368, ____(1985) (applying rational basis test to uphold statute modifying Collateral Source Rule); Rudolph v. Iowa Methodist Medical Center, 293 N.W.2d 550, 557-59 (Iowa 1980) (applying rational basis test to uphold statute abrogating Collateral Source Rule). *See infra* text accompanying notes 57-94 (discussing cases applying rational basis test); *infra* text accompanying notes 66-73 (discussing *Coburn v. Agustin*).

legislatures' identification of issues requiring statutory attention.[55] In addition, courts invoking the rational basis standard of review recognize the legislatures' latitude in developing a solution to a legislatively perceived problem.[56]

The most recent decision on the constitutionality of collateral source legislation upheld the contested legislation under the rational basis test.[57] In *Ferguson v. Garmon*[58] the United States District Court of Kansas considered the constitutionality of legislation that permitted health care providers to introduce evidence of collateral payments in medical malpractice liability actions.[59] The plaintiff in *Ferguson* moved for a pre-trial determination of the constitutionality of the Kansas statute.[60] The plaintiff, Ferguson, claimed that the defendants' negligence caused Ferguson's injuries.[61] Ferguson's insurance paid a portion of Ferguson's medical expenses.[62] Under the Kansas statute permitting health care providers to introduce evidence of collateral payments in medical malpractice actions, the defendants intended to introduce at trial evidence of Ferguson's receipt of insurance benefits.[63] Ferguson contended that the Kansas statute violated the equal protection clauses of the United States and Kansas constitutions because the statute treated medical malpractice plaintiffs differently than other tort plaintiffs.[64]

In determining the appropriate standard of review to apply to the equal protection dispute in *Ferguson*, the *Ferguson* court discarded the strict scrutiny test because the classification did not involve a suspect classification or a fundamental right.[65] Next, the court considered whether to recognize a heightened form of rational basis scrutiny that the United States District Court of Kansas had adopted eleven months earlier in *Coburn v. Agustin*.[66]

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55. *See* Vance v. Bradley, 440 U.S. 93, 112 (1976) (judiciary lacks power to question facts legislature used in determining whether problem required legislative treatment); New Orleans v. Dukes, 427 U.S. 297, 303 (1976) (absent suspect class or fundamental interest, court will not second guess wisdom or necessity of legislation); McGowan v. Maryland, 366 U.S. 420, 425-26 (1961) (state legislatures presumptively act within authority granted under United States Constitution); Carson v. Maurer, 120 N.H. 925, ____, 424 A.2d 825, 831 (1980) (declining to examine factual basis for legislative justification of statute).

56. *See* Williamson v. Lee Optical Co., 348 U.S. 483, 489 (1955) (entitling legislature to proceed step by step in addressing problem).

57. Ferguson v. Garmon, 643 F. Supp. 335, 337-42 (D. Kan. 1986).

58. *Id.* at 335.

59. *Id,* at 337-42; *see* KAN. STAT. ANN. §60-3403 (1985) (permitting health care providers to introduce evidence of medical malpractice victim's collateral source payments).

60. *Ferguson*, 643 F. Supp. at 337.

61. *Id.* Ferguson's injuries included substantial loss of the digestive tract. *Id.*

62. *Id.* at 338.

63. *Id.*; *see supra* note 59 (noting Kansas statute abrogating Collateral Source Rule in medical malpractice litigation).

64. *Ferguson*, 643 F. Supp. at 337.

65. *Id.*

66. *Id.* at 339; *see* Coburn v. Agustin, 627 F. Supp. 983, 991 (D. Kan. 1985) (adopting heightened form of rational basis scrutiny); *see infra* notes 66-73 and accompanying text (discussing *Coburn v. Agustin*).

The district court in *Coburn* adopted a fourth standard of review to equal protection inquiries and labeled it the heightened form of rational basis scrutiny.[67] The *Coburn* court stated that the heightened scrutiny test required the court to balance the significance of the personal rights affected against the significance of the governmental interest.[68] The *Ferguson* court rejected the *Coburn* heightened form of rational basis scrutiny and instead applied the rational basis standard of review.[69] In choosing the rational basis standard of review, the *Ferguson* court noted that the majority of the United States circuit courts of appeals have refused to recognize the heightened form of rational basis scrutiny and instead have applied the rational basis test to equal protection challenges of medical malpractice legislation.[70] In addition, the *Ferguson* court suggested that the United States Supreme Court impliedly affirmed the rational basis test as the appropriate review for equal protection challenges to medical malpractice legislation when the Supreme Court dismissed a request for appeal of a decision in which a lower court had applied the rational basis test to a medical malpractice statute abrogating the Collateral Source Rule.[71]

In both *Coburn* and *Ferguson* the United States District Court of Kansas was examining the same statute.[72] The *Coburn* court struck down the Kansas statute by applying the novel heightened form of rational basis scrutiny.[73] Alternatively, the *Ferguson* court upheld the Kansas statute by following appellate court decisions and applying the rational basis test.[74] Federal and

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67. *Coburn*, 627 F. Supp. at 995. In deciding to apply a heightened form of rational basis scrutiny, the *Coburn* court refused to apply the intermediate standard of review because the United States Supreme Court had limited use of the intermediate standard of review to classifications based on gender, alienage, and illegitimacy. *Id.* at 993; *see infra* notes 95-135 (discussing cases applying intermediate standard of review). In determining the applicability of the heightened form of rational basis scrutiny to the contested legislation, the *Coburn* court credited the United States Supreme Court with developing the heightened scrutiny standard of review. *Coburn*, 627 F. Supp. at 990 (citing City of Cleburne v. Cleburne Living Center, 105 S. Ct. 3249 (1985), Metropolitan Life Ins. Co. v. Ward, 105 S. Ct. 1976 (1985)).

68. *Coburn*, 627 F. Supp. at 991. The *Coburn* court's formulation of the strict scrutiny standard of review included examining the importance of the rights affected, the extent to which the statute impaired the rights affected, and the nature of the class burdened. *Id.*

69. *Ferguson*, 643 F. Supp. at 339.

70. *Id.*; *see* Gronne v. Abrams, 793 F.2d 74, 77-79 (2d Cir. 1986) (applying rational basis test to uphold New York statute requiring pre-trial screening of medical malpractice claims); Montagino v. Canale, 792 F.2d 554, 556-58 (5th Cir. 1986) (applying rational basis test to uphold Louisiana statute reducing statute of limitations for medical malpractice claims); Hoffman v. United States, 767 F.2d 1431, 1435 (9th Cir. 1985) (applying rational basis test to uphold California statute limiting noneconomic losses in medical malpractice actions to $250,000).

71. *Ferguson*, 643 F. Supp. at 340 (citing Fein v. Permanente Medical Group, 38 Cal.3d 137, 695 P.2d 665, 211 Cal. Rptr. 368, *appeal dismissed*, 106 S. Ct. 214 (1985)).

72. *Ferguson*, 643 F. Supp. at 337; *Coburn*, 627 F. Supp. at 986; *see* KAN. STAT. ANN. § 60-3403 (1985) (abrogating Collateral Source Rule in medical malpractice actions).

73. *Coburn*, 627 F. Supp. at 997.

74. *Ferguson*, 643 F. Supp. at 339-41; *see supra* note 70 (citing cases that *Ferguson* court relied on as persuasive precedent).

state courts since 1980 have applied the traditional equal protection analysis that the United States District Court of Kansas adopted in *Ferguson* to equal protection challenges. For example, in 1980 the Supreme Court of Iowa applied the rational basis test in upholding a statute abrogating the Collateral Source Rule.[75] In *Rudolph v. Iowa Methodist Medical Center*[76] a hospital employee's negligence permanently disabled William Rudolph.[77] Rudolph and his wife brought an action for malpractice against the hospital.[78] The trial court allowed Rudolph to introduce evidence of medical bills and salary to reflect economic loss, even though a third party had indemnified the Rudolphs for the loss.[79] In addition, the trial court prohibited the hospital from introducing evidence of insurance payments to Rudolph for Rudolph's medical bills and salary during his absence from work.[80] The trial court held that section 147.136 of the Iowa Code, which provided for excluding the value of collateral benefits from damage awards, violated the equal protection clauses of the United States Constitution and the Iowa Constitution.[81] The jury delivered a judgment for the Rudolphs.[82] On appeal the *Rudolph* court considered whether the trial court erred in allowing William Rudolph to recover for damages that collateral sources had paid.[83] Holding that section 147.136 of the Iowa Code was constitutional, the Iowa Supreme Court reduced William Rudolph's judgment by the value of the collateral benefits Rudolph received.[84]

In upholding the constitutionality of section 147.136, the *Rudolph* court determined the standard of review as the threshold inquiry.[85] The *Rudolph* court noted that the Supreme Court of Iowa historically had applied the rational basis test unless the classification was suspect or involved fundamental rights.[86] The Rudolphs argued that the statute's classification treated

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75. Rudolph v. Iowa Methodist Medical Center, 293 N.W.2d 550 (Iowa 1980).

76. *Id.* at 550.

77. *Id.* at 553. The plaintiff in *Rudolph*, William Rudolph, underwent an anterior cervical fusion in the Iowa Methodist Medical Center. *Id.* The evidence indicated that subsequent to the surgery, a hospital employee permitted Rudolph's head to fall backwards while transferring Rudolph from a hospital cart to Rudolph's hospital bed. *Id.* No one immediately reported the incident to Rudolph's surgeon and Rudolph became partially paralyzed soon after the operation. *Id.* Rudolph's surgeon performed another procedure to alleviate the complications resulting from the post surgical error, and although Rudolph partially recovered, he suffered some permanent disability. *Id.*

78. *Id.* at 553.

79. *Id.* at 557.

80. *Id.*

81. *Id.*; U.S. CONST. amend. XIV, §1, cl. 2; IOWA CONST. art. 1, §6; IOWA CODE ANN. §147.136 (West 1975).

82. *Rudolph*, 293 N.W.2d at 553. The jury awarded William Rudolph $553,725.88 and awarded Rudolph's wife $30,000. *Id.*

83. *Id.*

84. *Id.* at 559-60.

85. *Id.* at 557.

86. *Id.* The *Rudolph* court observed that with few exceptions, most courts that have addressed the constitutionality of medical malpractice legislation have applied the rational basis test to equal protection analyses. *Id.*

victims of medical malpractice differently than victims of other torts by denying medical malpractice victims the benefit of the Collateral Source Rule, which other tort victims could have employed.[87] The Iowa Supreme Court recognized that the rational basis test required the court to determine whether the Rudolphs had met the burden of proving that the legislatively defined classification of medical malpractice tort victims was wholly irrelevant to the state's objective.[88]

In examining the relevance of the classification of medical malpractice tort victims to the statute abrogating the Collateral Source Rule, the *Rudolph* court initially questioned whether the legislature had stated an objective when enacting the legislation.[89] The *Rudolph* court noted that the Iowa General Assembly's records indicated that the General Assembly had determined that the high cost and unavailability of medical malpractice insurance constituted a critical situation.[90] The *Rudolph* court observed that the Iowa legislature enacted section 147.136 as a temporary solution to the critical situation.[91] The *Rudolph* court inferred that the legislature's reasoning in enacting section 147.136 was that barring recovery of the value of collateral benefits would reduce the size of malpractice verdicts.[92] The *Rudolph* court found, accordingly, that medical malpractice insurance carriers would adjust malpractice insurance premiums to reflect the lower verdicts.[93] Noting the heavy burden on a party who challenges a statute on equal protection grounds under the rational basis test, the *Rudolph* court held that the Rudolphs had failed to meet the burden and, accordingly, upheld section 147.136.[94]

In contrast to the courts that have invoked the rational basis standard of review, each court applying an intermediate level of review to equal protection challenges to collateral source legislation has employed different versions of the intermediate standard of review.[95] One construction of the intermediate standard of review is a "means-focus" judicial inquiry of whether the substance of the legislation substantially furthers the goal of the legislation.[96] For example, in *Jones v. State Board of Medicine*[97] the Idaho Supreme Court applied the means-focus test in considering the

87. *Id.* at 558; IOWA CODE ANN. §147.136 (West 1975).

88. *Rudolph*, 293 N.W.2d at 558; *see* McGowan v. Maryland, 366 U.S. 420, 425-26 (1961) (outlining scope of rational basis test).

89. *Rudolph*, 293 N.W.2d at 558.

90. *Id.*; *see* 66th Iowa General Assembly, 1975 Session, ch. 239, § 1 (evaluating availability and cost of medical malpractice insurance).

91. *Rudolph*, 293 N.W.2d at 558; *see* 66th Iowa General Assembly, 1975 Session, ch. 239, § 1 (enacting §147.136 of Iowa Code as provisional solution to insurance unavailability).

92. *Rudolph*, 293 N.W.2d at 558.

93. *Id.*

94. *Id.* at 559.

95. *See infra* text accompanying notes 95-135 (discussing cases applying different interpretations of intermediate standard of review to equal protection challenges).

96. *See infra* text accompanying notes 108-16 (discussing means-focus intermediate test).

97. 97 Idaho 859, 555 P.2d 399 (1976), *cert. denied*, 431 U.S. 914 (1977).

constitutionality of Idaho's 1975 Hospital-Medical Liability Act (1975 Act)[98] under the United States Constitution and under the Idaho Constitution.[99] A group of physicians and hospitals in *Jones* brought an action seeking a declaratory judgment against the State Board of Medicine and the Idaho Department of Welfare to determine the constitutionality of the 1975 Act.[100] Among other provisions, section 39-4210 of the 1975 Act limited a plaintiff's remedies in medical malpractice actions in Idaho against physicians and health care facilities and, specifically, limited a medical malpractice tort victim's recovery to compensatory damages that collateral sources had not satisfied.[101] The plaintiffs in *Jones* claimed that the suspect constitutional validity of the 1975 Act had compelled the plaintiffs to maintain malpractice insurance in excess of the limitations prescribed by the 1975 Act and had increased malpractice insurance rates.[102] The District Court of Idaho struck down the portion of the 1975 Act that placed a ceiling on recoverable damages but declined to decide the constitutionality of section 39-4210.[103] The State Board of Medicine and the Department of Health and Welfare appealed the district court's decision.[104]

On appeal the Idaho Supreme Court in part considered the constitutionality of the section of the 1975 Act that limited a medical malpractice victim's recovery to compensatory damages that collateral sources did not satisfy.[105] In determining the constitutional validity of the 1975 Act, the *Jones* court examined the evolution of the Equal Protection Clause of the fourteenth amendment.[106] The *Jones* court acknowledged the traditional two-tier equal protection analysis and, in addition, examined the newer intermediate standard of review.[107] Instead of applying the rational basis

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98. IDAHO CODE §39-4201 to 4210 (1975).

99. *Jones*, 97 Idaho at ____, 555 P.2d at 403; *see* U.S. CONST. amend. XIV, §1, cl. 2 (Equal Protection Clause of fourteenth amendment); IDAHO CONST. art. I, §2 (equal protection clause of Idaho Constitution).

100. *Jones*, 97 Idaho at ____, 555 P.2d at 402; IDAHO CODE §39-4201 to 4210 (1975) (Idaho's 1975 Hospital-Medical Liability Act). The defendants in *Jones*, the State Board of Medicine and the Department of Health and Welfare, were responsible for hospital and physician licensing as well as general health care regulation. *Jones*, 97 Idaho at ____, 555 P.2d at 403.

101. *Jones*, 97 Idaho at ____, 555 P.2d at 402; IDAHO CODE §39-4210 (limiting relief available to medical malpractice tort victims).

102. *Jones*, 97 Idaho at ____, 555 P.2d at 402-03.

103. *Id.* at ____, 555 P.2d at 403. The District Court of Idaho struck down §39-4204 and §39-4205 of the Idaho Code as violating the Idaho Constitution. *See* IDAHO CODE §39-4204 (1975) (limiting medical malpractice tort victim's recoverable damages against physicians to $150,000 per claim and $300,000 per occurrence); *id.* §39-4205 (limiting medical malpractice tort victim's recoverable damages against hospitals to $150,000 per claim and $300,000 per occurrence or number of beds in hospital multiplied by $10,000).

104. *Jones*, 97 Idaho at ____, 555 P.2d at 402.

105. *Id.*; *see* IDAHO CODE § 39-4210 (1975) (limiting medical malpractice tort victims' recovery to compensatory damages that collateral payments did not satisfy).

106. *Jones*, 97 Idaho at ____, 555 P.2d at 406-07.

107. *Id.* at ____, 555 P.2d at 406.

test, the *Jones* court determined that the means-focus test was the appropriate test because the 1975 Act created discriminatory classifications and because the equal protection analysis required a more stringent standard of review for legislation that creates discriminatory classifications.[108] The Idaho Supreme Court defined the means-focus standard of review as whether a legislative means substantially furthers a specific legislative end.[109] The *Jones* court determined that the means-focus test applied whenever the discriminatory character of legislation is apparent on the legislation's face and no relationship exists between the classification and the legislation's express purpose.[110] The *Jones* court found that applying a means-focus analysis required an inquiry into whether the problem that the legislature had identified, the insurance crisis, actually existed.[111] The *Jones* court maintained that if the court confirmed the legislative determination that an insurance crisis existed, the court would continue its inquiry and examine whether the classification substantially furthered the stated legislative purposes of alleviating skyrocketing malpractice insurance costs and promoting health care.[112]

In applying the means-focus test to the facts in *Jones*, the Idaho Supreme Court determined that the legislation created a discriminatory classification based on the degree of injury and damage resulting from medical malpractice.[113] In addition, the *Jones* court held that although the defendant argued

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108. *Id.* The Supreme Court of Idaho maintained that the United States Supreme Court had set forth the intermediate means-focus standard of review in prior cases. *Id.* The *Jones* court examined two United States Supreme Court cases that departed from the two-tiered analysis. *Id.* at 407; *see* Eisenstadt v. Baird, 405 U.S. 438, 446-55 (1972) (invoking more stringent standard than rational basis test); Reed v. Reed, 404 U.S. 71, 75-77 (1971) (applying higher standard than rational basis test). In *Reed v. Reed* the Supreme Court considered the constitutionality of legislation that established classifications based on gender. Reed v. Reed, 404 U.S. 71, 71-76 (1971). In *Eisenstadt v. Baird* the Supreme Court examined a legislative classification distinguishing between legitimate and illegitimate children. Eisenstadt v. Baird, 405 U.S. 438, 440-55 (1972). In striking down the legislation in both *Reed* and *Eisenstadt*, the United States Supreme Court stated that to meet constitutional standards, the legislative classification had to be reasonable and not arbitrary, and that the distinction which the classification brought out had to have a fair and substantial relation to the aim of the legislation. *Eisenstadt*, 405 U.S. at 447; *Reed*, 404 U.S. at 76. In examining the United States Supreme Court's decisions in *Reed* and *Eisenstadt*, the Supreme Court of Idaho in *Jones* maintained that *Reed* and *Eisenstadt* set forth a "means-focus" standard of review that deviated from the traditional two-tiered equal protection analysis. *Jones*, 555 P.2d at 407. The *Jones* court asserted that *Reed* and *Eisenstadt* proposed a higher standard than the rational basis standard. *Id.* The Idaho Supreme Court in *Jones* professed to have adopted the means-focus standard of review for certain statutes that created obviously discriminatory classifications. *Id.*; *see* Gunther, *In Search of Evolving Doctrine on the Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 6 (1972) (labeling standard that Supreme Court applied in *Reed* and *Eisenstadt* as "means-focus").

109. *Jones*, 97 Idaho at ____, 555 P.2d at 407.

110. *Id.* at ____, 555 P.2d at 411.

111. *Id.*

112. *Id.*

113. *Id.* The *Jones* court identified the discriminatory classification of the legislation in

that the 1975 Act was a necessary legislative response to a medical malpractice crisis in Idaho, the facts on the record did not demonstrate a crisis.[114] Finally, the Idaho Supreme Court terminated the means-focus analysis upon finding no relationship between limitations imposed on recoverable damages and the expressed legislative objective of promoting health care.[115] The *Jones* court remanded the case for additional evidence supporting the existence of an insurance crisis.[116]

While some courts that apply the intermediate standard of review and reject the rational basis analysis concede that a legislature could conclude that health care problems require special treatment, other courts that implement the intermediate standard of review have determined that the right to recover for personal injuries is an important substantive right.[117] Accordingly, courts that construe the right to recover for personal injury as a substantive right measure restrictions imposed upon substantive rights with greater judicial scrutiny than the rational basis test.[118] For example, in *Carson v. Maurer*[119] the Supreme Court of New Hampshire considered the appropriate standard of review for an equal protection challenge under the New Hampshire Constitution for medical malpractice legislation that, in part, abolished the Collateral Source Rule.[120] The *Carson* court determined

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Jones according to degree of injury and damage resulting from the medical malpractice because the primary thrust of the issues on appeal involved the ceiling on recoverable damages imposed by the 1975 Hospital - Medical Liability Act (1975 Act). *See id.* at 402 (identifying issues on appeal). The *Jones* court never identified a discriminatory classification in the provision of the 1975 Act abrogating the Collateral Source Rule. *Id.* at ____, 555 P.2d at 411.

114. *Id.* at ____, 555 P.2d at 412.

115. *Id.* at ____, 555 P.2d at 411.

116. *Id.* at ____, 555 P.2d at 417. On remand the trial court in *Jones* held that the legislation did not violate the fourteenth amendment equal protection guarantee under the rational basis test. Jones v. State Bd. of Medicine, Nos. 55527, 55586 (4th Dist. Idaho 1980). The trial court interpreted the remand order, however, to require the more rigorous "means scrutiny" test. *Id.* Under the means scrutiny test, the trial court found insufficient factual support of an insurance crisis to justify enacting the 1975 Act. *Id.*; *see* Robinson, *supra* note 1, at 21 n. 86 (explaining substantive and procedural history of *Jones*).

117. *See supra* text accompanying notes 95-116 (discussing cases in which courts concede that legislature could reason that health care problems require legislative remedy); *infra* text accompanying notes 119-24 (discussing cases in which courts characterize right to recover as substantive right).

118. *See* Carson v. Maurer, 120 N.H. 925, ____, 424 A.2d 825, 830-831 (1980). The Supreme Court of New Hampshire in *Carson v. Maurer* stated that the right to recover for personal injuries was not a fundamental right, but instead characterized the right to recover as a substantive right. *Id.* at 830. A fundamental right is a right that the United States Supreme Court explicitly or implicitly guarantees. *See supra* note 42 (explaining concept of fundamental rights). A substantive right is a right that the United State Constitution does not guarantee but nonetheless construes as sufficiently important to require more rigorous judicial scrutiny than under the rational basis test. *Carson*, 120 N.H. at ____, 424 A.2d at 830.

119. 120 N.H. 925, 424 A.2d 825 (1980).

120. *Id.* at ____, 424 A.2d at 830-31. In *Carson*, the challenged provision of the statute modifying the Collateral Source Rule permitted the defendant to offer evidence of the plaintiff's compensation from collateral sources. *Id.* at ____, 424 A.2d at 835; *see* N.H. REV. STAT.

that the appropriate test was whether the legislation was a reasonable measure that facilitated the public interest and whether the legislation had a fair and substantial relation to the legislative purpose.[121] The Supreme Court of New Hampshire maintained that although the United States Supreme Court had restricted the substantial relationship test to classifications of gender and illegitimacy, the United States Constitution did not limit the interpretation of the New Hampshire Constitution and the state constitution could grant greater rights than the minimal guarantees of the United States Constitution.[122] The *Carson* court concluded that the statute arbitrarily and unreasonably discriminated in favor of health care providers.[123] In addition, the *Carson* court balanced the individual's interest that the legislation violated against society's interest that the legislation advanced and concluded that the restriction of private rights resulting from the legislation outweighed the benefits of the legislation to the public.[124]

While some courts confine the intermediate test to the boundaries of strict scrutiny and rational basis, other courts combine the intermediate and strict scrutiny standards of review. For example, in *Graley v. Satayatham*[125] the Court of Common Pleas of Ohio considered whether a statute modifying the Collateral Source Rule violated the Equal Protection Clause to the

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ANN. § 507-C:7 I (Supp. 1979) (permitting defendant to introduce evidence of plaintiff's compensation from collateral sources at trial). In addition, the pertinent provision provided that the plaintiff may introduce evidence of costs incurred to secure the compensation. *Carson*, 120 N.H. at ____, 424 A.2d at 835; *see* N.H. REV. STAT. ANN. § 507-C:7 I (Supp. 1979) (allowing introduction of evidence of collateral payments at trial). Finally, the statute provided that the judge instruct the jury to reduce the award for economic loss by the difference between the collateral benefits received and the amount the plaintiff pays to secure the benefits. *Carson*, 120 N.H. at ____, 424 A.2d at 835; *see* N.H. REV. STAT. ANN. § 507-C:7 I (Supp. 1979) (instructing jury to reduce award by value of collateral payments).

121. *Carson*, 120 N.H. at ____, 424 A.2d at 831.

122. *Id.* (citing Lalli v. Lalli, 439 U.S. 259 (1979), Reed v. Reed, 404 U.S. 71 (1971)).

123. *Carson*, 120 N.H. at ____, 424 A.2d at 836.

124. *Id.* at ____, 424 A.2d at 831, 836. The *Carson* court recognized that collateral source legislation might promote the legislative objective of containing health care costs. *Id.* at ____, 424 A.2d at 836. The Supreme Court of New Hampshire noted, however, three detrimental effects of the collateral source legislation to the malpractice tort victim. *Id.* First, the *Carson* court maintained that abolishing the Collateral Source Rule would force the victim's insurer to compensate the victim without remuneration from the tortfeasor. *Id.* at ____, 424 A.2d at 835. Second, the *Carson* court found that the pertinent statute provided that if the collateral benefits include workmen's compensation, the workmen's compensation insurance carrier held a lien on any damages recovered by the plaintiff. *Id.* at ____, 424 A.2d at 836. The *Carson* court observed that if the Collateral Source Rule were abolished, the jury would diminish the award by the amount of the workmen's compensation payments, and the plaintiff would suffer again because of the workmen's compensation carrier's lien on plaintiff's damages. *Id.* The Supreme Court of New Hampshire objected to the possible double deduction from the plaintiff's award of workmen's compensation. *Id.* Finally, the *Carson* court observed that collateral source legislation might create a windfall for the tortfeasor. *Id.* The court noted that, moreover, a tort victim often suffers twice because the tort victim receives the collateral benefits as fringe benefits for which the tort victim has paid through a concession in wages. *Id.*

125. 74 Ohio Op. 2d 316, 343 N.E.2d 832 (1976).

fourteenth amendment.[126] The plaintiffs in *Graley* alleged medical malpractice by the defendants and asked for damages resulting from the malpractice.[127] The defendants filed motions to dismiss the complaints for plaintiffs' failure to comply with section 2307.42 of the Ohio Code, which required plaintiffs to disclose collateral benefits.[128] The plaintiffs contended that the Ohio statute was constitutionally invalid under the equal protection clauses of the United States Constitution and the Ohio Constitution.[129] In addressing the equal protection challenge to section 2307.42, the *Graley* court acknowledged the concepts of strict scrutiny and rational basis as the two tests under traditional equal protection analysis.[130] The *Graley* court was unable to determine an appropriate governmental interest that the classification furthered and, accordingly, the *Graley* court rejected traditional equal protection analysis.[131] Instead, the *Graley* court applied the strict scrutiny standard of review to hold that no compelling governmental interest justified the legislation.[132] In addition, the *Graley* court incorporated the intermediate test into the court's standard of review.[133] The Ohio Court of Common Pleas claimed that unless a classification furthers a legitimate legislative objective, the classification is intolerable.[134] Finding that no satisfactory reason existed for the separate and unequal treatment to malpractice tort victims, the *Graley* court struck down the legislation,.[135]

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126. *Id.* at ____, 343 N.E.2d at 836. The statute amending the Collateral Source Rule in *Graley* required the plaintiff to list in the plaintiff's complaint all collateral benefits that the plaintiff had received. *Id.* at ____, 343 N.E.2d at 834; *see* OHIO REV. CODE ANN. §2307.42 (Baldwin 1975) (providing for disclosure of collateral payments in complaint). The statute also provided for reducing the award by any collateral recovery for medical and hospital care, custodial care, rehabilitation services, and loss of earned income. *Graley*, 74 Ohio Op. 2d at ____, 343 N.E.2d at 835; OHIO REV. CODE ANN. § 2307.42 (Baldwin 1975) (diminishing award by value of collateral payments). The statute also expressly excluded from collateral recovery any benefits paid under an insurance policy. *Graley*, 74 Ohio Op. 2d at ____, 343 N.E.2d at 835; OHIO REV. CODE ANN. § 2307.42 (Baldwin 1975) (excluding insurance payments from collateral recovery).

127. *Graley*, 74 Ohio Op. 2d at ____, 343 N.E.2d at 833. The Ohio Court of Common Pleas in *Graley* joined 2 cases that focused on the constitutionality of § 2307.42. *Id.* at ____, 343 N.E.2d at 833-34.

128. *Id.* at ____, 343 N.E.2d at 834; *see* OHIO REV. CODE ANN. §2307.42 (Baldwin 1975) (requiring plaintiff to list collateral payments in complaint).

129. *Graley*, 74 Ohio Op. 2d at ____, 343 N.E.2d at 834; U.S. CONST. amend XIV, §1, cl.2 (Equal Protection Clause of fourteenth amendment); OHIO CONST. art. 1, §2 (equal protection clause of Ohio Constitution); OHIO REV. CODE ANN. §2307.42 (Baldwin 1975) (contested provision of 1975 Medical Malpractice Act).

130. *Graley*, 74 Ohio Op. 2d at ____, 343 N.E.2d at 837.

131. *Id.*

132. *Id.*

133. *Id.* at ____, 343 N.E.2d at 836.

134. *Id.* (citing McGowan v. Maryland, 366 U.S. 420 (1961)).

135. *Id.* The *Graley* court's disjointed treatment of the equal protection issue has provoked harsh negative commentary. *See* Redish, *supra* note 35, at 774 n. 121 (observing weakness in *Graley* opinion). One commentator has criticized the *Graley* court for failing to explain the application of the compelling governmental est standard. *See id.* (explaining weakness in *Graley*

The appropriate standard of review for equal protection challenges to medical malpractice legislation is the rational basis test. The legislation abrogating the Collateral Source Rule meets the criteria under the fourteenth amendment equal protection rational basis test.[136] The courts that have applied the rational basis standard of review to collateral source legislation have adopted the United States Supreme Court's equal protection analysis applicable to federal equal protection challenges.[137] Specifically, the Supreme Court's equal protection doctrine directs courts to apply the rational basis test to social and economic classifications and the strict scrutiny test to suspect classes or fundamental interests, and to reserve the intermediate test for classifications based on gender, illegitimacy, or privacy.[138] Because the Supreme Court has delineated so clearly the strict scrutiny and intermediate classifications, any classifications not comporting with either a strict scrutiny or intermediate classification are subject to the rational basis test.[139] Collateral source legislation classifying medical malpractice tort victims is subject to the rational basis test by default because the legislation neither qualifies as a strict scrutiny or intermediate classification. Under the rational basis test, legislation is constitutional if a court can conceive of some relevance between the classification and the state's objective.[140] Conceivably, fewer and lower jury awards will lower insurance companies' costs.[141] The insurance companies will then pass the reduced costs on to the physician in the form of lower insurance rates.[142] Thus, collateral source legislation classifying medical malpractice tort victims easily meets the minimal requirements of the rational basis test.

Many lower courts have applied the United States Supreme Court's interpretation of the fourteenth amendment to the United States Constitution to the corresponding equal protection provision of the state constitution.[143] For example, the Supreme Court of Iowa in *Rudolph v. Iowa Methodist*

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court's reasoning). Moreover, that commentator described the *Graley* court's equal protection analysis as woefully superficial and recommended that courts refrain from following the decision. *Id.* Another Ohio Court of Common Pleas, however, adopted the *Graley* court's reasoning to strike down medical malpractice legislation and restored some value to the *Graley* decision. *See* Simon v. St. Elizabeth Medical Center, 74 Ohio Op. 2d 316, ____, 355 N.E.2d 903, 907 (1976) (adopting *Graley* court's reasoning).

136. *See supra* notes 44-47 and accompanying text (discussing rational basis test).

137. *See supra* notes 41-50 and accompanying text (discussing United States Supreme Court's equal protection analysis).

138. *See supra* notes 45-46 and accompanying text (discussing scope of United States Supreme Court's rational basis standard of review).

139. *See supra* notes 42-43, 49-50 and accompanying text (explaining narrow scope of United States Supreme Court's intermediate and strict scrutiny tests).

140. *See supra* notes 44-47 and accompanying text (explaining rational basis test).

141. *See supra* note 4 and accompanying text (explaining reasonable relationship between legislative purpose and classification that statute creates).

142. *See supra* note 4 and accompanying text (discussing rationale of legislation abrogating Collateral Source Rule).

143. *See supra* text accompanying notes 58-94 (discussing courts applying United States Supreme Court's equal protection guidelines).

Medical Center adopted the United States Supreme Court's construction of equal protection guarantees to the equal protection clause of the Iowa Constitution.[144] Accordingly, in Iowa a court either will uphold a challenged classification under the United States Constitution and the Iowa Constitution or a court will strike down the legislation under both constitutions.[145] Similarly, the United States District Court of Kansas in *Ferguson v. Garmon* incorporated the United States Supreme Court's equal protection standards into the equal protection clause of the Kansas Constitution.[146] Courts that parallel the Supreme Court's equal protection doctrine limit the intermediate test to those classifications that the United States Supreme Court has enumerated.[147] Accordingly, under a state's equal protection clause, an individual's rights do not extend beyond those to which the United States Supreme Court explicitly has applied either the intermediate or strict scrutiny test.

Some state courts have elected to expand the intermediate test to classifications to which the United States Supreme Court has not applied the intermediate test.[148] The courts that have applied the intermediate standard of review to collateral source legislation either have extended an individual's rights under a state constitution to include the right to recover for injury or have expanded the intermediate review classifications enumerated by the United States Supreme Court to include the medical malpractice tort victim.[149] The courts that have extended individual rights recognize that the United States Supreme Court guarantees certain rights to all individuals.[150] The courts regard the rights under the United States Constitution as minimal rights and have expanded the rights of the individual under state constitutions.[151] For example, the Supreme Court of New Hampshire in *Carson v. Maurer* recognized the ability to grant greater rights under the New Hampshire Constitution than the United States Constitution requires and, accordingly, found that the challenged New Hampshire statute denied equal protection to medical malpractice tort victims.[152] Alternatively, some courts

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144. *See supra* text accompanying notes 76-94 (discussing *Rudolph v. Iowa Methodist Medical Center*).

145. *See supra* text accompanying notes 85-94 (discussing Iowa Supreme Court's reasoning in applying rational basis test to medical malpractice legislation abrogating Collateral Source Rule).

146. *See supra* text accompanying notes 57-74 (discussing *Ferguson v. Garmon*).

147. *See supra* text accompanying notes 48-50 (discussing Supreme Court's application of intermediate test).

148. *See infra* text accompanying notes 95-135 (discussing courts that have modified Supreme Court's equal protection analysis); *cf. supra* text accompanying notes 58-94 (discussing courts that have adopted Supreme Court's equal protection analysis).

149. *See infra* text accompanying notes 150-56 (discussing method that courts have used to expand Supreme Court's equal protection analysis).

150. *See infra* text accompanying notes 152-56 (discussing courts that have expanded individual's rights).

151. *See supra* note 150 and accompanying text (discussing courts that have expanded individual rights under state constitution); *infra* note 152 and accompanying text (same).

152. *See supra* text accompanying notes 119-24 (discussing *Carson v. Maurer*).

have ignored the United States Supreme Court's limitations on the intermediate standard of review to include the medical malpractice tort victim.[153] For example, the Supreme Court of Idaho in *Jones v. State Board of Medicine* indicated a desire to broaden the United States Supreme Court's intermediate standard classifications.[154] Although the *Jones* court remanded the case and, therefore, never applied a standard of review to the challenged medical malpractice statute, the *Jones* court declared that the statute created an obviously discriminatory classification and that a test more stringent than the rational basis test was appropriate.[155] In adopting the more stringent means-focus test, the Supreme Court of Idaho included the medical malpractice tort victim in the classifications subject to intermediate review.[156]

Whether a state or federal court applies the intermediate test by extending an individual's rights under a state constitution or by explicitly expanding the intermediate review classification that the Supreme Court recognizes, the court has identified discrimination that the court cannot tolerate. A statute may create unfair classifications and still not violate an individual's equal protection guarantees. Specifically, state statutes incidentally may create discriminatory classifications in an effort to develop an incremental solution to an identified problem.[157] For example, legislatures could abrogate the Collateral Source Rule in the isolated area of medical malpractice litigation to provide relief to an identified medical malpractice insurance crisis.[158] The statute might classify medical malpractice victims differently than other tort victims but the statute is constitutional because the legislature should be able to solve problems incrementally.[159] Incrementally solving identified problems permits a legislature to monitor the effects of the legislation on a small scale and to address the most critical areas of a problem.[160] Abrogating the Collateral Source Rule in medical malpractice

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153. *See infra* text accompanying notes 155-57 (discussing courts that have expanded applicable classifications under intermediate test).

154. *See supra* text accompanying notes 97-117 (discussing *Jones v. State Board of Medicine*).

155. *See supra* text accompanying notes 105-16 (discussing *Jones* court's reasoning in applying intermediate test).

156. *See supra* text accompanying notes 114-16 (discussing *Jones* court's application of intermediate test).

157. *See* Williamson v. Lee Optical Co., 348 U.S. 483, 489 (1955) (stating entitlement of legislature to proceed step by step and to address phase of problem that seems most acute to legislature).

158. *See supra* text accompanying note 25 (discussing cases in which legislature enacted statute as relief to medical malpractice insurance crisis).

159. *See, e.g.*, Crowe v. Wigglesworth, 623 F. Supp. 699, 705 (D. Kan. 1985) (justifying state legislature's ability to abrogate Collateral Source Rule solely in medical malpractice litigation as legislature's ability to implement incremental solutions); Eastin v. Broomfield, 116 Ariz. 576, 585, 570 P.2d 744, 753 (1977) (stating legislature's ability to proceed one step at time); Rudolph v. Iowa Methodist Medical Center, 293 N.W.2d 550, 558 (Iowa 1980) (recognizing legislature's ability to approach problem step by step).

160. *See* Williamson v. Lee Optical Co., 348 U.S. 483, 489 (1955) (allowing legislature to incrementally solve problems).

actions allows a legislature to provide immediate relief to the medical malpractice insurance crisis and then to determine whether to adopt a comparable measure in other areas of tort law. Accordingly, whether legislation discriminates in fact inappropriately tests whether a statute violates the equal protection guarantees under a federal or state constitution.

In examining an equal protection challenge to a medical malpractice statute modifying the Collateral Source Rule, federal and state courts have chosen one of three possible approaches in determining the constitutionality of the statute. Courts have upheld such legislation by following United States Supreme Court precedent and applying the rational basis test.[161] Alternatively, courts have applied the intermediate test and struck down this legislation by expanding the individual's rights under a state constitution to include the right to recover for injury.[162] Finally, courts have struck down the legislation by broadening the classifications under the intermediate standard of review to include medical malpractice tort victims.[163] Of the three choices, upholding the statute under the rational basis test most strongly comports with the United States Supreme Court's equal protection doctrine.[164] Because all courts since 1980 that have considered equal protection challenges to medical malpractice abrogating the Collateral Source Rule have applied the rational basis test, the federal and state courts may reason similarly.[165] Until the Supreme Court relaxes the limitations on the intermediate standard of review, medical malpractice legislation abrogating the Collateral Source Rule should survive equal protection challenges.

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161. *See supra* text accompanying notes 44-46 (discussing rational basis test).

162. *See supra* text accompanying notes 149-56 (discussing application of intermediate test by expanding individual's rights).

163. *See supra* text accompanying notes 144-47 (discussing notion of applying intermediate test by expanding applicable classifications).

164. *See supra* text accompanying notes 51-135 (discussing merits of rational basis, intermediate, and strict scrutiny tests).

165. *See supra* text accompanying note 54 (noting that cases decided since 1980 have applied rational basis test).