The Constitutional Dimension of a National Products Liability Statute of Repose

Stephen J. Werber

Follow this and additional works at: https://digitalcommons.law.villanova.edu/vlr

Part of the Torts Commons

Recommended Citation
Available at: https://digitalcommons.law.villanova.edu/vlr/vol40/iss4/1

This Article is brought to you for free and open access by Villanova University Charles Widger School of Law Digital Repository. It has been accepted for inclusion in Villanova Law Review by an authorized editor of Villanova University Charles Widger School of Law Digital Repository.
THE CONSTITUTIONAL DIMENSION OF A NATIONAL PRODUCTS LIABILITY STATUTE OF REPOSE

© STEPHEN J. WERBER*

Editor's Note:

Subsequent to the date that this article was finalized, both Houses of Congress approved a Conference Committee version of H.R. 956 including a fifteen year statute of repose for products liability claims. The Senate approved the Bill, by a vote of 59-40, on March 21, 1996. The House approved the Bill, by a vote of 259-158, on March 29, 1996. President Clinton has indicated that he will veto this Bill. Based on the votes in both Houses, it does not appear that this veto can be overridden.

Table of Contents

I. INTRODUCTION ........................................... 986
II. STATUTES OF REPOSE ..................................... 989
   A. State Concerns ...................................... 989
   B. Federal Concerns .................................... 1001
      1. Background ...................................... 1001
      4. Equal Protection: Application and Overview ...... 1015
         a. Intermediate Scrutiny .......................... 1019
         b. Rational Basis ................................. 1023
   C. Data Fail to Provide a Rational Basis Even Under a
      "Step by Step" Analysis ................................ 1031
         1. The Myths of an Insurance Crisis and Litigation
            Explosion ....................................... 1033

* Professor of Law, Cleveland State University, Cleveland-Marshall College of Law. J.D., Cornell University; LL.M., New York University. The author gratefully acknowledges and thanks Stacey McKinley, his research assistant and second year student at Cleveland-Marshall College of Law, his secretary Holli Goodman, his wife, Joan, and his colleagues at Cleveland-Marshall for their unstinting assistance.

(985)
I. INTRODUCTION

TORT reform legislation, with emphasis on products liability concerns, has been a primary focus of both the defense and plaintiffs' bars since the 1970s. These efforts have been strenuously lobbied, both for and against, by such groups as the Association of Trial Lawyers of America, the American Bar Association, the insurance industry and various manufacturing organizations. Congress has also considered articles and testimony provided by members of various law faculties.¹

From early efforts to legislate various forms of statutes of repose and damages limitations, the thrust has moved to the need for broader based legislation. The current political climate, including the philosophy expressed in the Republican “Contract with America,” makes clear that these efforts will result in national products liability legislation. Pending federal legislation,² which includes a statute of repose, represents the apex of legislative efforts to reduce the impact of strict liability in tort and other perceived excesses of the existing tort compensation system.³

Lost in the overwhelming urge to modify existing law is the apparent absence of legislative concern for the constitutionality of many of the proposed provisions.⁴ Despite the work of a few

---


3. Regrettably, this federal legislation does not provide comprehensive products liability reform. Full reform would, among other things: provide a revised definition of strict liability and defect with focus on risk-benefit analysis, eliminate the hindsight test, create a uniform comparative fault system which rejects joint and several liability, eliminate multiple imposition of punitive damages arising from a single design defect, and modify Rule 407 of the Federal Rules of Evidence to include products liability cases. The Restatement of Products Liability (Tentative Draft No. 2, 1995) addresses some of these concerns.

4. For example, discussion of the constitutionality of the Senate’s Product Liability Fairness Act was limited to the congressional power to legislate and preempt the field and to conclusory statements regarding some specific provisions. Senate
respected authors, relatively little scholarly literature addresses constitutional concerns, especially those centered on a national statute of repose. Little judicial concern was paid to the constitutionality of commerce-based statutes of repose, but this cannot be said of similar tort-based statutes of repose.

Constitutional issues arise in regard to many aspects of tort and products liability reform legislation. This article argues that statutes of repose are unconstitutional, with emphasis on open courts

COMM. ON COMMERCE, SCIENCE, AND TRANSPORTATION, PRODUCT LIABILITY FAIRNESS ACT, S. REP. NO. 69, 104th Cong., 1st Sess. 25-29, 35-41 (1995) [hereinafter S. REP. No. 69]. The Report’s analysis of preemption merely recognized the power of Congress to act. Id. A conclusory discussion of the Supreme Court’s due process analysis in regard to punitive damages was provided. Id. at 35 & n.120. Despite extensive discussion of the Act’s statute of repose, no attention was given to the potential constitutional problems its adoption would create. Id. at 35-41. Discussion of possible constitutional considerations is notably absent from both H.R. Rep. No. 63, supra note 1, and HOUSE COMM. ON RULES, PROVIDING FOR THE CONSIDERATION OF H.R. 956, THE COMMON SENSE LEGAL STANDARDS REFORM ACT OF 1995, H.R. REP. NO. 72, 104th Cong., 1st Sess. (1995) [hereinafter H.R. REP. NO. 72].


6. See U.C.C. § 2-725 (1977). This is a statute of repose for it demands that actions governed by Article 2 of the U.C.C. be brought “within four years after the cause of action has accrued,” but defines accrual as “when the breach occurs, regardless of the aggrieved party’s lack of knowledge of the breach.” Id. at § 2-725(1)-(2). Section 2-725(2) goes on to state:

A breach of warranty occurs when tender of delivery is made, except that where a warranty explicitly extends to future performance of the goods and discovery of the breach must await the time of such performance the cause of action accrues when the breach is or should have been discovered.

Id. at § 2-725(2). By pinning what initially appears as a traditional statute of limitations period to a time-specific event, this section becomes one of repose.

Courts have consistently upheld such provisions against constitutional attack in the commercial context. See, e.g., Basham v. General Shale Prods. Corp., 989 F.2d 491 (4th Cir. 1993) (stating that West Virginia statute of limitation is not violative of Equal Protection Clause); Sheehan v. Morris Irrigation, Inc., 460 N.W.2d 413 (S.D. 1990) (stating that state constitution’s open courts provision is not violated by sales statute of limitations); cf. Davidson Lumber Sales, Inc. v. Bonneville, Inc., 794 P.2d 11 (Utah 1990) (holding section unconstitutional when applied to personal injury action).

7. This is not to say that tort reform, including products liability reform, is not necessary. Reform is necessary and can be accomplished in a manner fully consonant with the Constitution. Most provisions of the pending legislation are constitutional. In subsequent articles the author hopes to address, and support, other provisions of the proposed legislation which raise a constitutional dimension.
or right to remedy (open courts) and equal protection provisions. These issues reflect economic concerns at both federal and state legislative levels that seek to advance strongly perceived public policy. These concerns, in turn, affect substantial substantive rights. Freedom from personal injury, the right to life and safety, reflects more than the mere economic concerns of either the injured party or the product manufacturer. The ability to seek redress for such harm includes a substantive right of considerable magnitude. The influence of these factors could play a significant role in determining the constitutionality of the proposed federal legislation. Posed differently, public policy plays both an express and inherent role in the application of constitutional principles to tort reform legislation. For example, public policy concerns led the Florida Supreme Court to conflicting results as to the validity of a statute of repose.10

8. An "open court" or "right to remedy" constitutional provision, as its name implies, is a mandate that aggrieved parties have a right to access the judicial system to vindicate wrongs. The precise wording differs from state to state. Typical wording includes: "[a]ll courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay." Ohio CONST. art. I, § 16. Similarly, the Rhode Island Constitution states: "[e]very person within this state ought to find a certain remedy, by having recourse to the laws, for all injuries or wrongs which may be received in one's person, property, or character. Every person ought to obtain right and justice freely, and without purchase, completely and without denial; promptly and without delay; conformably to the laws.


9. A due process argument has been utilized by some courts to analyze various statutes of repose, particularly those concerning medical malpractice. See, e.g., Garcia v. La Farge, 893 P.2d 428 (N.M. 1995) (holding statute violated substantive due process rights of persons whose causes of actions accrued shortly before three year statute had run); Gaines v. Preterm-Cleveland, Inc., 514 N.E.2d 709 (Ohio 1987) (holding medical malpractice statute of repose unconstitutional as applied to adult medical malpractice litigants who did not have adequate time to file actions). In regard to statutes of repose, courts have addressed equal protection concerns far more often than due process concerns. The similarity of applicable standards makes it unlikely that a due process attack would succeed where an equal protection argument failed. One observer has commented that "no law regulating social or economic matters has been invalidated by the Supreme Court" on due process grounds since 1937. D. Don Welch, Legitimate Government Purposes and State Enforcement of Morality, 1993 U. ILL. L. REV. 67, 72. For these reasons, discussion of due process issues will be limited.

10. In Pullum v. Cincinnati, 476 So. 2d 657 (Fla. 1985), the court affirmed summary judgment, as to result only, based on the products liability statute of repose. Id. at 659 (citing Fla. STAT. ch. 95.031(2) (1982)). The court receded from the earlier decision in Battilla v. Allis Chalmers Mfg. Co., 392 So. 2d 874 (Fla. 1980), which had ruled that an earlier version of the statute violated the state constitution's open courts provision. Pullum, 476 So. 2d at 659. The court, recognizing the public policy concerns, upheld the twelve year repose period by rejecting an equal protection challenge. Id. The statute of repose was later repealed. Doe v. Shands Teaching Hosp. & Clinics, Inc., 614 So. 2d 1170 (Fla. Dist. Ct. App. 1993).
This article will look to state and federal decisions in an effort to comprehensively review the complex constitutional issues raised.

II. Statutes of Repose

A. State Concerns

A statute of repose is a form of statute of limitations that runs from a point in time which disregards the date of injury. Such statutes often run from the date a product is sold rather than the date that the product’s alleged defect caused injury or death. Such statutes can, at times, cut off a right of action before the injured party is either (a) injured, or (b) becomes aware of the relationship between an injury and its cause. The contrasting nature of these limitations is simply that a true statute of limitations begins to run when a person discovers, or reasonably should have discovered, the existence of a claim through violation of a legal right\(^1\) whereas a statute of repose runs from a fixed date or event.\(^2\) A prerequisite for the validity of both a statute of limitations and a statute of repose is that their specified time periods allow an injured party a reasonable time to commence an action after a statutory period is either shortened or enacted. If the pending national legislation follows the Senate version of the statute of repose, with its one year transitional period, this principle will be met.\(^3\)

The United States Supreme Court made clear that all claimants are entitled to a reasonable period of time in which to bring suit. The logic of Wilson v. Iseminger\(^4\) has been utilized by state courts in support of decisions voiding statutes of repose but has not been considered in the context of federal legislation. In Wilson, the Court stated:

\(^{11}\) This definition assumes the existence of a discovery rule.

\(^{12}\) See, e.g., Spilker v. City of Lincoln, 469 N.W.2d 546, 548 (Neb. 1991) (defining statute of repose). The distinction was recognized and accurately described in Berry v. Beech Aircraft Corp., 717 P.2d 670 (Utah 1985) as:

Statutes of repose . . . are different from statutes of limitations, although to some extent they serve the same ends. . . . A statute of limitations requires a lawsuit to be filed within a specified period of time after a legal right has been violated or the remedy for the wrong committed is deemed waived. A statute of repose bars all actions after a specified period of time has run from the occurrence of some event other than the occurrence of an injury that gives rise to a cause of action.

Id. at 679 (citations omitted). For this and other reasons, the conclusion that statutes of repose are "on balance . . . ill advised" is well taken. Phillips, supra note 5, at 675.

\(^{13}\) H.R. 956, 104th Cong., 1st Sess. § 109(C) (1995) (Senate amended) [hereinafter H.R. 956 (Senate amended)].

\(^{14}\) 185 U.S. 55 (1902).
[i]t may be properly conceded that all statutes of limitation[s] must proceed on the idea that the party has full opportunity afforded him to try his rights in the courts. A statute could not bar the existing rights of claimants without affording this opportunity; if it should attempt to do so, it would not be a statute of limitations, but an unlawful attempt to extinguish rights arbitrarily, whatever might be the purport of its provisions.\textsuperscript{15}

Consistent with the need for a reasonable time, many state statutes of limitations are modified by “discovery” rules which toll the applicable statute of limitations until an aggrieved party either knows, or reasonably should have known, that his or her injury was the result of another’s negligence or defective product.\textsuperscript{16}

Many products, such as asbestos, allegedly cause disease only after the passage of a lengthy incubation or latency period. The ability to determine the cause of teratogenic birth defects may not exist for years after birth and some products, such as diethylstilbestrol (DES), ingested during pregnancy, manifest no actual harm until the child reaches puberty or adulthood. If the cause of action accrues at the time of exposure (direct or in utero), rather than the time of manifestation of the disease, a claim could be barred by either the absence of a discovery rule or by the presence of a statute of repose. In either case, the bar comes into effect before the injured party has the knowledge necessary to file an action.

Typical judicial treatment of repose questions is predicated on a balancing of interests, similar to those that support traditional statutes of limitations, against those of equity and common sense. A frequent starting point is the premise that there is something manifestly unjust, perhaps immoral, in precluding a personal injury cause of action before it can arise. There is relatively little concern

\textsuperscript{15} Id. at 62. For a discussion of the ramifications of this language, see infra notes 91-125 and accompanying text.

with precluding commercial contract-based liability, in part because, at least in theory, the parties can bargain for an appropriate time frame or warranty terms. No such power, theoretical or real, exists when a consumer purchases a retail product.

In *Raymond v. Eli Lilly & Co.*, the Supreme Court of New Hampshire evaluated the competing policy interests at a relatively early time in the development of the discovery rule. This case involved a claim that the use of an oral contraceptive caused the plaintiff to become legally blind. The applicable six year statute of limitations for personal injury actions had run, but the court denied the defendant’s motion for summary judgment. After a review of the competing policies, the court relied upon a traditional support for the imposition of strict liability: the manufacturer is in the better position to control the dangers posed by its products. Despite its emphasis on defendant’s status as a drug manufacturer, the court’s reasoning applies with equal force to a variety of minerals, chemicals and products that cause observable injury only after passage of a substantial period of time. Such substances and products include asbestos, chromium, DES, Agent Orange, various teratogens, estrogens, pesticides and herbicides.

The ultimate rationale for the court’s decision lies in principles of justice, fairness and morality. “It is manifestly unrealistic and unfair to bar a tort suit before the injured party has an opportunity to discover that he has a cause of action, . . . at least in a case in which the defendant has not demonstrated that the delay has been prejudicial to him.”

18. Id. at 176-77.
19. Id. at 171.
20. Id. at 177. New Hampshire law provided that “personal actions may be brought within six years after the cause of action accrued, and not afterwards,” but no definition of “accrued” was set forth in the statute. Id. at 172 (quoting N.H. Rev. Stat. Ann. § 508:4 (Supp. 1975)).
22. E.g., id. at 177 (citation omitted). Similar concerns with basic fairness pervade decisions invalidating other forms of statutes of repose, such as for improvements to real property. Brenneman v. R.M.I. Co., 639 N.E.2d 425 (Ohio 1994); Kallas Millwork Corp. v. Square D. Co., 225 N.W.2d 454 (Wis. 1975). This concern has also arisen in medical malpractice cases. McCollum v. Sisters of Charity of Nareth Health Corp., 799 S.W.2d 15 (Ky. 1990). In *McCollum*, the court recognized:

McCollum could not recover until a cause of action existed. Proof of damage is an essential part of his medical malpractice cause of action. Such proof was not available to him until 1985, when he first discovered his injury. Yet the legislature, through the five-year cap in KRS 413.140(2), would require McCollum to do the impossible—sue before
result. 28

The constitutionality of the discovery provisions contained in Ohio law were challenged in Burgess v. Eli Lilly & Co. 24 where the plaintiff could not proceed with her claim unless the statute's discovery rule was invalid for failure to include DES within its purview. The court found that the two year statute of limitations was triggered when a plaintiff learned that she possibly had a DES related injury. 25 Noting the difference between knowing that one has such an injury and knowing that one may have such an injury, the court concluded that the statute, as applied, violated the open courts clause of the Ohio Constitution. 26

The court observed that the open courts clause “would not allow a plaintiff’s claim to be extinguished before it accrued, that is before the plaintiff had knowledge of her injury.” 27 Further, “it only makes sense that government cannot begin to regulate the time in which a person has to bring a claim for an injury until the potential claimant knows both that she has an injury and the cause thereof.” 28 Thus, the reasoning that demands a discovery rule similarly demands rejection of a statute of repose.

The open courts provisions of state constitutions, found in a

he had any reason to know he should sue. This is antithetical to the purpose of the open courts provision in the Kentucky constitution.

Id. at 19.

23. See, e.g., Perkins v. Northeastern Log Homes, 808 S.W.2d 809 (Ky. 1991). The court in Perkins applied such principles to allow suit against various parties arising from the use of a wood preservative which allegedly led to the onset of non-Hodgkin's lymphoma. In Perkins, exposure began in 1977, but initial symptoms did not appear until 1986. Id. at 810-11.

24. 609 N.E.2d 140 (Ohio 1993). By this date, the applicable Ohio statutes had been amended to include a provision that:

[a] cause of action for bodily injury which may be caused by exposure to diethylstilbestrol . . . including exposure before birth, arises upon the date on which the plaintiff learns from a licensed physician that he has an injury which may be related to such exposure, or upon the date on which by the exercise of reasonable diligence he should have become aware that he has an injury which may be related to such exposure, whichever date occurs first.


25. Burgess, 609 N.E.2d at 144.

26. Id. at 141 (citing Ohio Const. art. I, § 16). For further discussion of the Ohio Constitution, see supra note 8.

27. Id. at 141-42 (citing Hardy v. VerMeulen, 512 N.E.2d 626 (Ohio 1987), cert. denied, 484 U.S. 1066 (1988)).

28. Id. at 142. The court also noted that the statute violated plaintiff’s right to due process. Id. As a result, the court, relying upon O'Stricker v. Jim Walter Corp., 447 N.E.2d 727 (Ohio 1983), applied a common law discovery rule to permit this claim to proceed. Burgess, 609 N.E.2d at 143; see also Liddel v. SCA Servs., 635 N.E.2d 1233 (Ohio 1994) (applying common law discovery rule to claim of chlorine induced cancer).
majority of the states\textsuperscript{29} and having no express federal analog, are a primary focal point for attacks upon the constitutionality of statutes of repose. Perhaps the earliest federal judicial recognition of a similar concept is found in \textit{Marbury v. Madison}\textsuperscript{30} where, in a discussion of executive branch power, Chief Justice Marshall observed that "[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury."\textsuperscript{31} The opinion further stated that "where a specific duty is assigned by law, and individual rights depend upon the performance of that duty, it seems equally clear that the individual who considers himself injured has a right to resort to the laws of his country for a remedy."\textsuperscript{32} The ramifications of this language, when applied to a statute of repose, are discussed below.\textsuperscript{33}

An initial thrust of open courts provision claims is often predicated on the time factor. Several such cases have been brought in regard to medical malpractice repose provisions that call for analysis similar to that which applies to products liability provisions. In one leading case, involving allegedly improper surgical procedures, the court upheld an open courts provision attack by observing that the statute, which limited the rights of minors, "unconstitutionally locks the courtroom door before the injured party has had an opportunity to open it. When the Constitution speaks of remedy and injury to person, property, or reputation, it requires an opportunity granted at a meaningful time and in a meaningful manner."\textsuperscript{34} A statute of repose, by both definition and application, deprives an injured party of any means to bring suit regardless of the substantive validity of the claim. Whether posed in terms of a medical malpractice related injury or an injury caused by a defective product, the result is the same and is equally repugnant to concepts of fair play.

In its discussion of the conflict between statutes of repose and

\begin{itemize}
\item \textsuperscript{29} As noted in \textit{Berry v. Beech Aircraft Corp.}, 717 P.2d 670 (Utah 1985), thirty-seven states had open courts provisions similar to that of Utah in 1985. \textit{Id.} at 674 (citing McGovern, supra note 5, at 615 n.218). By 1992, thirty-nine states were reported as having some form of open courts provision. Schuman, supra note 5, at 1201 and n.25.
\item \textsuperscript{30} 5 U.S. (1 Cranch) 197 (1803).
\item \textsuperscript{31} \textit{Id.} at 163.
\item \textsuperscript{32} \textit{Id.} at 166. Although a manufacturer's duty to provide a reasonably safe product differs from the duty discussed in \textit{Marbury}, the principle remains unchanged.
\item \textsuperscript{33} For a discussion of the implications of \textit{Marbury}, as applied to a statute of repose, see infra notes 92-125 and accompanying text.
\item \textsuperscript{34} \textit{Hardy v. VerMeulen}, 512 N.E.2d 626, 628 (Ohio 1987), \textit{cert. denied}, 484 U.S. 1066 (1988).
\end{itemize}
open courts provisions, the Supreme Court of Utah in *Berry v. Beech Aircraft Corp.* concluded that a six year products liability and tort statute of repose violated the open courts provision of the Utah Constitution. Rejecting the line of state decisions upholding such statutes, the court observed: "the cases holding products liability statutes of repose constitutional under state open courts or remedies provisions have all but read those constitutional provisions out of their respective constitutions, at least insofar as they provide substantive, as opposed to procedural, protections."

The *Berry* court specifically found that the statute did not reasonably and substantially advance its stated purpose. Analytically, the statute was deemed unreasonable and arbitrary in that: (1) the time frame had no correlation to the type of product or its useful life; (2) there was an absence of evidence of a substantial increase in strict liability actions; (3) there was an absence of indicators that such a statute would lower insurance costs; and (4) the effect would likely reduce incentives for the manufacture of safer products.

Other state supreme courts have utilized state due process or equal protection grounds to invalidate statutes of repose. In *Heath v. Sears, Roebuck & Co.*, the Supreme Court of New Hampshire used reasoning applicable to both the open courts and due process clauses. In what may be the most piquant of the decisions, this court observed:

---

35. 717 P.2d 670 (Utah 1985). Another line of cases has upheld other forms of repose statutes against claims of violation of open courts provisions. See, e.g., Blaske v. Smith & Entzeroth, Inc., 821 S.W.2d 822 (Mo. 1991) (en banc); and cases cited in the Appendix.

36. *Berry*, 717 P.2d at 686 (holding that statute of repose violates state constitution's open courts provision). The Supreme Courts of Alabama, Arizona, Rhode Island and South Dakota have reached similar results; however, a majority of state courts have upheld the statutes. See Appendix (setting forth products liability statutes of repose and decisions directly or indirectly addressing their constitutionality).

37. *Berry*, 717 P.2d at 678.

38. Id. at 683. A due process principle is implicit in the court's reasoning and could have served as a basis for the decision.

39. Id. at 681-83.


The unreasonableness inherent in a statute which eliminates a plaintiff’s cause of action before the wrong may reasonably be discovered was noted by Judge Frank in his dissent in *Dincher v. Martin Firearms Co.* . . . in which he condemned the “Alice in Wonderland” effect of such a result:

“Except in topsy-turvy land, you can’t die before you are conceived, or be divorced before ever you marry . . . or miss a train running on a non-existent railroad. For substantially similar reasons, it has always heretofore been accepted, as a sort of logical ‘axiom,’ that a statute of limitations does not begin to run against a cause of action before that cause of action exists . . . .” 42

State courts that have not addressed a products liability statute of repose, either because no such provision exists in that state or because the issue has not yet reached the courts, have often addressed similar statutes in other areas. The Supreme Court of Ohio, after determining that the conversion of an existing facility into a titanium metals plant was an improvement to real property, had to deal with a statutory provision that precluded tort actions against the designers and engineers of such improvements if brought more than ten years after completion of the construction services. 43

In reconsidering the effect of the open courts provision of the Ohio Constitution, the court overruled an earlier decision and held that a statute, which denies a party a reasonable time to enter the courthouse to seek compensation after an accident and deprives a claimant of a right to a remedy before that claimant is aware of injury, violates the terms and meaning of the state constitution. 44 In essence, the government cannot deny claimants an opportunity to present their claims at a “ ‘meaningful time and in a meaningful manner.’ ” 45

42. *Id.* at 295 (quoting *Dincher v. Marlin Firearms Co.*, 198 F.2d 821, 823 (2d Cir. 1952)).


45. *Burgess*, 609 N.E.2d at 142 (quoting *Gaines v. Preterm-Cleveland, Inc.*, 514 N.E.2d 709, 716 (Ohio 1987)). The Supreme Court of Ohio ignored *Gaines* when *Sedar* was decided. *Sedar*, 551 N.E.2d at 644-49. The *Burgess* court also noted a possible ethics problem for lawyers forced to choose between filing an action
This reasoning has considerable merit. Although both courts and lawyers can accept the logic of barring an action before it arises, it can be done only with a somewhat large degree of concern. The inherent unfairness grapples at one's throat. Were the purposes of such statutes supported by empirical data, it would be easier to accept the logic of the legislature as a valid reflection of sound policy. There is logic and fairness in the idea that, somewhere along the continuum of time, liability must end. Together with data to support such a stopping point, a well-drafted statute of repose would have substantial merit.46

Despite this possibility, the problems created by open-ended litigation potential are, nevertheless, outweighed by the benefits and need for such actions. True products liability reform would provide manufacturers with adequate protection and destroy the need for repose provisions.47 Manufacturers are well aware that defects in their products can cause harm until final disposal of the product. No single time frame can accurately reflect the normal use life or safe use life of all products. Defects cause injuries in a random and haphazard manner without regard to the victim or the year. The "long tail" problems of insurance coverage are soluble. Computerized record keeping is available to even small manufacturers so that their design, research, testing, quality control and any other efforts directed toward production of safe products minimizes the threat of lost proofs.

As the practical problems related to claims brought many years after a product has entered into commerce are soluble, the question of the propriety of a statute of repose becomes one of policy. The overall purposes and policies that form the foundation of strict liability law are fostered by allowance of suit within a reasonable time after a defect-caused injury occurs, regardless of product age.48 Both the reasoning and the inherent policy decisions that bar a claim before it arises are deeply flawed. Proper application of

46. Such statutes would incorporate both a discovery rule and a special provision for latent defects that cause immediate harm. For example, a safety device such as an airbag may not be called upon to serve its function until many years after sale of the motor vehicle. Together these provisions would provide relief both for immediate harm caused by latent defects and for situations involving a latent manifestation of illness.

47. Subject areas for true products liability reform are listed at supra note 4.

48. A statute of repose pegged to each manufactured product's useful safe life could overcome this problem provided that the manufacturer gave adequate notice of the designed useful safe life. For some examples of state provisions taking this approach, see infra note 67.
law, reasoning and policy establish that a statute of repose contra-
venes state constitutional open courts provisions and state equal
protection mandates.

It is, nonetheless, true that a number of states have upheld
their state repose statutes against constitutional attack.\textsuperscript{49} Should
federal legislation become law, state constitutional provisions to the
contrary would fall. Thus, it is important to understand the reason-
ing of the courts that have upheld statutes of repose against con-
stitutional attack\textsuperscript{50} and consider how this reasoning could be applied
to federal legislation.

A good indicator of the rationale for upholding such a federal
statute of repose is found in \textit{Alexander v. Beech Aircraft Corp.}\textsuperscript{51} In
\textit{Alexander}, plaintiffs filed personal injury and wrongful death actions
on February 13, 1986 that arose from a plane crash of February 18,
1984.\textsuperscript{52} The actions were filed within the generally applicable two
year statutory period for such claims but well beyond the ten year
repose period, because the aircraft had been manufactured and
sold in 1967.\textsuperscript{53} Relying upon federal decisions and a leading Indi-
ana decision,\textsuperscript{54} the court rejected constitutional challenges to the
statute of repose.\textsuperscript{55}

The primary reasoning of the court was that an unaccrued
cause of action is not a vested property right protected by the Four-
teenth Amendment and, therefore, the Indiana legislature was em-
powered to impose such a limit.\textsuperscript{56} The lessening of the risk of loss

\textsuperscript{49} For a list of such states, see the Appendix.
\textsuperscript{50} \textit{See}, e.g., \textit{Love v. Whirlpool Corp.}, 449 S.E.2d 602 (Ga. 1994) (holding that
\textsuperscript{51} 952 F.2d 1215 (10th Cir. 1991) (relying on Indiana law).
\textsuperscript{52} \textit{Id.} at 1217-18.
\textsuperscript{53} \textit{Id.} at 1222-23 (applying \textit{IND. CODE ANN. § 34-4-20A-5} (1986)).
\textsuperscript{54} \textit{Dague v. Piper Aircraft Corp.}, 418 N.E.2d 207 (Ind. 1981). In \textit{Dague}, as in
\textit{Alexander v. Beech Aircraft Corp.}, 952 F.2d 1215 (10th Cir. 1991), the aircraft had
been manufactured and sold more than ten years prior to the occurrence. \textit{Dague},
418 N.E.2d at 209. Despite concern over the problem of latent defects and the
continuing duty to warn of such defects, the court found no violation of the Indi-
ana open courts provision. \textit{Id.} at 213; \textit{accord Tetterton v. Long Mfg. Co.}, 332 S.E.2d
67 (N.C. 1985) (upholding six year statute of repose contained in N.C. GEN. STAT.
§ 1-50(a)(6) (Supp. 1985) against gamut of constitutional attacks).
\textsuperscript{55} \textit{Alexander}, 952 F.2d at 1225.
\textsuperscript{56} \textit{Id.} at 1224-25. Several states' wrongful death acts require that a plaintiff
commence an action within a set time after death without regard to mitigating
to manufacturers was deemed a legitimate purpose that should not be contravened by the courts.57 The court further noted that prior Indiana and federal decisions upheld the repose statute finding no denial of due process, equal protection or deprivation of access to the courts "in light of policy reasons for the statutes such as avoiding the risks and cost of litigation to manufacturers after a lengthy passage of time."58 Finding a rational basis for the statute, the court held that summary judgment for the defendant manufacturer was appropriate.59

The arguments in favor of statutes of repose begin with the essential premise that they do not bar a claim before injury occurs. Absent an injury prior to the running of the statutory period, there is no cognizable claim.60 Courts have utilized similar reasoning to uphold the repose period of wrongful death acts that often commence upon death without regard to knowledge, or lack thereof, as to the cause of death in relation to a given product.61 The beguiling logic of this approach has an appeal in that it supports what may well be more appropriate reasons for such decisions. First, deference to the separate functions of the judicial and legislative branches is important:

"[P]olicy determinations concerning economic issues are most properly made in the legislative arena where all the factors surrounding a particular problem may be weighed."

57. Alexander, 952 F.2d at 1225 (citing Pitts, 712 F.2d at 280).
58. Id.
59. Id. at 1225 & n.12.
60. A syllogism: personal injury or death, alone, cannot suffice as a basis of recovery. Only the law gives a party the right to recovery. If the law provides no means to recovery, there is no claim. Therefore, the fact of personal injury or death is irrelevant. That the injury or death, if acted upon within the statutory period, would be a basis for recovery is, ipso facto, also irrelevant. Similar circular reasoning can be observed in contract law concepts regarding rescission and pre-existing duty. See 1 Arthur L. Corbin, Contracts § 186 (3d ed. 1952) (discussing court's circular arguments for pre-existing duty and rescission).
61. Alexander, 952 F.2d at 1224-25. Note, however, that a state legislature that creates a wrongful death action can limit the cause of action as it deems appropriate. See Logan v. Zimmerman Brush Co., 455 U.S. 422, 432 (1982) (citing Martinez v. California, 444 U.S. 277 (1980)). Logan recognizes that the State "remains free to . . . eliminate its statutorily created causes of action altogether." Id.

[This page contains legal citations and references, which are not converted into plain text here.]
When the Legislature is properly concerned with balancing competing interests to ensure a stable market for the manufacture of basic products and acts to do so by enacting a statute of repose, our inquiry should end. Our Legislature is at least as competent as this court in making economic policy determinations.\textsuperscript{62}

Second, such statutes shield manufacturers against open-ended liability created by allowing claims for an indefinite period of time. Such statutes, as recognized by the Model Uniform Product Liability Act, create an actuarially certain date after which liability cannot be assessed and eliminate tenuous claims for which evidence of defect may be difficult to produce. Thus, the "long tail" problem is negated.\textsuperscript{63} A final, more questionable, claim is that open-ended liability reduces the development and marketing of new products.\textsuperscript{64}

The Supreme Court of Florida encapsulated the need for certainty and its benefits, a recognized objective of traditional statutes of limitation, in a decision that conflicted with its prior rulings. In upholding a products liability statute of repose against an equal protection claim, the court stated that "[t]he legislature, in enacting this statute of repose, reasonably decided that perpetual liability places an undue burden on manufacturers, and it decided that twelve years from the date of sale is a reasonable time for exposure


\textsuperscript{63} Tetterton, 332 S.E.2d at 73.

\textsuperscript{64} See, e.g., Kochins v. Linden-Alimak, Inc., 799 F.2d 1128, 1138 (6th Cir. 1986) (rejecting equal protection challenge to Tennessee products liability statute of repose, Tenn. Code Ann. § 29-28-103 (1980), because state has rational basis in preventing liability from discouraging product development and marketing). Pharmaceutical companies delayed marketing certain vaccines until they gained a degree of federal protection. See Swine Flu Act, Pub. L. No. 94-380, 90 Stat. 1113 (1976) (codified at 42 U.S.C. § 247(b) (j)-(l) (1976), repealed by Pub. L. No. 95-626, 92 Stat. 3551, 3574 (1978)); The National Childhood Vaccine Injury Act of 1986, Pub. L. No. 99-660, 100 Stat. 3755 (codified at 42 U.S.C. § 300aa-1 to -34 (1988)). However, on a more global basis, this assertion has little, if any, substantiation and appears to rest more on opinion than fact. Moreover, deterrence of the development of unsafe products is a benefit to both manufacturers and society. Products liability concerns may delay marketing to complete adequate research and testing which assures safe products. Such a delay is merited. Delay is not necessarily synonymous with an absence of development. Perhaps the best known example of delay which prevented marketing is the thalidomide disaster. See Myron L. Marlin, Comment, Treatment INDS: A Faster Route to Drug Approval?, 59 Am. U. L. Rev. 171, 177 & n.49 (1989) (noting harmful effects of thalidomide as sedative for pregnant women and Food and Drug Administration (FDA) reluctance and, later, refusal to approve drug). The refusal of the FDA to approve the drug prevented thousands of birth defects in the United States. Id.
to liability for manufacturing of a product."^{65}

Many products do have a useful safe life. Delineating that life would assist courts seeking to dismiss cases where the facts illustrate a use beyond that time. In light of the complexity of useful safe life issues,^{66} including such factors as establishing product specific time frames, the scope of the duty to warn as to its existence and modifications in the state of the art, it is deceptively easy to resolve such issues by a prophylactic approach: the legislature simply imposes a generally applicable time frame that obviates the problem.^{67}

Finally, the immunity conferred by a statute of repose can itself be deemed a legal right. Such reasoning was applied to deny recovery to a plaintiff who was injured after falling into a mixing machine. The action was barred by an applicable products liability statute of repose. In rejecting all constitutional attacks, the court held that "immunity afforded by a statute of repose is a right which is as valuable to a defendant as the right to recover judgment is to a plaintiff, the two are but different sides of the same coin."^{68} Of course, this is a "right" which did not exist until the legislature created it, well after recognition of the underlying right to a remedy.

These arguments, the absence of a constitutionally express federal open courts provision and other factors suggest that enactment of federal legislation may lead to a new and different set of constitutional parameters. These parameters require a true application of equal protection standards without excessive judicial deference to unsupported legislative findings. The principles of equal protection can remain stable while yielding a result different from that anticipated by those seeking a national statute of repose.

---

65. Pullum v. Cincinnati, Inc., 476 So. 2d 657, 659 (Fla. 1985); cf. Battilla v. Allis Chalmers Mfg. Co., 392 So. 2d 874, 874-75 (Fla. 1980) (McDonald, J., dissenting) (supporting proposition that subjecting manufacturers to liability for injury whenever caused by products places "an onerous burden on the industry" so that "liability should be restricted to a time commensurate with the normal useful life" of products).


67. This simplistic solution has a rational basis only if variations in useful safe life are ignored.

B. Federal Concerns

1. Background

After thirteen years of debate, Congress will soon pass a federal products liability law. Although no one can predict the ultimate fate of congressional action, it is likely that federal legislation will preempt products liability law in all states. H.R. 956, entitled The Common Sense Product Liability and Legal Reform Act (Product Liability Act), has been passed in the House. The Senate has passed an amended version of the House Bill in lieu of S. 565, the Product Liability Fairness Act (Product Fairness Act). A joint conference committee will likely approve an act in 1996. Enactment will raise several preliminary questions.

First, federal legislation, pursuant to the Supremacy Clause, is measured only against the mandates of the Constitution of the United States. The decisions of the Supreme Court of the United States and state court application of federal standards will govern the application of the mandates for due process, equal protection and trial by jury. State courts will be precluded from applying more restrictive interpretations based on state constitution analogs.

Second, the Interstate Commerce Clause provides Congress with the authority to enact uniform products liability law. The


71. U.S. CONST. art. VI, § 2. "Having been enacted within the scope of power delegated to the Federal Government, the Internal Revenue statutes are a part of the supreme law of the land. If they are in conflict with State law, constitutional or statutory, the latter must yield." United States v. Dallas Nat'l Bank, 152 F.2d 582, 585 (5th Cir. 1945), rev'd on other grounds, 164 F.2d 489 (5th Cir. 1947); see also Cipollone v. Liggett Group, Inc., 505 U.S. 504 (1992) (holding that state law that conflicts with federal law is without effect); Local 174, Int'l Brotherhood of Teamsters v. Lucas Flour Co., 369 U.S. 95, 102 (1962) (holding that "incompatible doctrines of local law must give way to principles of federal labor law"); Dice v. Akron, Canton & Youngstown R.R., 342 U.S. 359 (1952) (holding that federal law, not Ohio law, governed validity of liability releases under Federal Employers' Liability Act). A state court may apply only federal standards even when considering application of Fourteenth Amendment equal protection to the validity of state law: "when a state court reviews state legislation challenged as violative of the Fourteenth Amendment, it is not free to impose greater restrictions as a matter of federal constitutional law than this Court has imposed." Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 463 (1981) (citing Oregon v. Hass, 420 U.S. 714, 719 (1975)).

72. Nevertheless, a division of reasoning and outcome can be anticipated until specific precedent is set at the federal appellate level and ultimately by the Supreme Court.

73. U.S. CONST. art. I, § 8, cl. 3.
foundation for asserting this right to legislate is both self-evident and statistically valid. Seventy percent of the goods manufactured in a state are shipped out of that state.\textsuperscript{74} The House Bill includes a series of findings and statements of purpose designed to guarantee judicial approval of its power to enact such a bill. This Bill first sets forth eleven findings ranging from an assertion that the civil justice system has been perverted so as to abridge rights, create injustice and destroy liberty,\textsuperscript{75} to recognition that the problems enunciated are national in scope and require the national government to remove barriers to interstate commerce.\textsuperscript{76}

With this foundation, the House then specifies its purposes as based on the need to promote the free flow of goods and services and to lessen burdens on interstate commerce by: (1) creating uniform legal principles to provide a fair balance between users, manufacturers and sellers; (2) placing reasonable limits on damages over and above actual damages; (3) ensuring the fair allocation of liability; (4) reducing the cost of excessive litigation; and (5) providing greater fairness, rationality and predictability to the justice system.\textsuperscript{77} This pattern has been used successfully in past statutes of vast impact.\textsuperscript{78} The findings make clear that products liability law has a significant affect on, and relationship to, interstate commerce. Though perhaps merely reflecting an uncanny grasp of the obvious, the findings are important as they will be laid against the law and reasoning set forth in \textit{United States v. Lopez}.\textsuperscript{79}

Although \textit{Lopez} may represent a dramatic change in the Court's view of congressional power under the Interstate Commerce Clause,\textsuperscript{80} nothing in its language suggests that the courts will

\textsuperscript{74} Product Liability Fairness Act, 1993: Hearings on S. 687 Before the Senate Comm. on Commerce, Science and Transportation, 103d Cong., 1st Sess. 95 (1994) (testimony of Victor E. Schwartz) [hereinafter \textit{Hearings S. 687}]. Congress has adopted this figure. H. Rep. No. 65, \textit{supra} note 1, at 9. No indication is provided as to the proportion of such "exported" goods between foreign and domestic markets.

\textsuperscript{75} H.R. 956, \textit{supra} note 2, § 2(a)(1).

\textsuperscript{76} Id. § 2(a)(9), (10).

\textsuperscript{77} Id. § 2(b).

\textsuperscript{78} For example, the use of Findings and Purpose language has proved highly useful in regard to the validity, application and interpretation of the Americans with Disability Act, 42 U.S.C. §§ 12101-12213 (1990).

\textsuperscript{79} 115 S. Ct. 1624 (1995). In \textit{Lopez}, the Court recognized that "as part of our independent evaluation of constitutionality under the Commerce Clause we of course consider legislative findings, and indeed even congressional committee findings, regarding effect on interstate commerce [the issue before the Court]." Id. at 1631.

\textsuperscript{80} From NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937), until \textit{Lopez}, the Court upheld every congressional act reviewed against a charge that it was insufficiently based on interstate commerce. Similarly, for a period beginning
void the Product Liability Act for lack of a sufficient interstate commerce connection. *Lopez* reiterates the right of Congress to regulate channels of interstate commerce as well as its power to regulate and protect the instrumentalities of interstate commerce. The Court also reiterates the right of Congress to regulate activities having a substantial relation to interstate commerce. A products liability act, unlike the firearms statute voided in *Lopez*, has a substantial and direct impact upon interstate commerce consistent with any of the three recognized approaches. *Lopez* may open some existing federal laws to constitutional challenge, but it should not affect the validity of a national Product Liability Act.

Third, due to the Product Liability Act's express preemption clauses, states will have to excise some existing law and will not be permitted to freely develop their own law of products liability as to any areas governed by the Act. Although the wording of the Senate and House Bills differ, their thrust is similar. To the extent that there is a federal provision in the legislation, it is fully preemptive. The use of express preemption language negates concerns as to congressional intent and implied preemption. This language will

---

82. Id.
83. A respected commentator's suggestion that such a claim may be valid requires too broad a reading of *Lopez*. Nevertheless, it is asserted that "[n]umerous federal regulations might be invalidated as having too remote a relationship to interstate commerce. In fact, the proposed federal legislation now pending in Congress to reform medical malpractice law and products liability law may be constitutionally vulnerable after *Lopez*." Erwin Chemerinsky, *Changing Course: Lopez Limits Congressional Powers*, 31 TRIAL 86, 89 (1995).
84. H.R. 956, section 101 provides, in part, that:
   (a) Preemption: This title governs any product liability action brought in any State or Federal court, on any theory for harm caused by a product.
   (b) Relationship to State Law: This title supersedes State law only to the extent that State law applies to an issue covered by this title. Any issue that is not governed by this title shall be governed by otherwise applicable State or Federal law.

85. Assuming all substantive provisions are enacted, the role of state courts will be highly circumscribed. See H.R. 956, *supra* note 2, §§ 102-104 and 201-203. State law could not conflict with these substantive provisions. Many areas that true reform would address are left to the states. Even where state law remains controlling, many judgments would be substantially reduced due to the federal limitations on damages.
be applied by the federal courts consistent with its scope.86

These foundational points reveal two important core facts: Congress can act in the area of products liability and can preempt state law.87 Any attack upon perceived excesses in the federal act will have to be predicated not on the power to act, but on the manner in which that power is exercised. The focus now turns to the proposed national statute of repose.

Subject to a limited number of exceptions, H.R. 956 contains a statute of repose precluding any products liability action unless commenced within fifteen years of the date of delivery of the product to its first purchaser or lessee who was not engaged in the sale or leasing of the product.88 A limited discovery rule is also pro-


It is unlikely that a successful constitutional attack can be mounted based on the concepts of federalism and the Tenth Amendment. Nevertheless, some, including Professor Neil Vidmar, believe that such an attack will be made. Martha Middleton, A Changing Landscape, 81 A.B.A. J. 56, 60 (1995) (quoting Professor Vidmar). The amendment provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST., art. I, § 3, cl. 3. But see New York v. United States, 505 U.S. 144 (1992) (finding Tenth Amendment violation in take title clause of Low-Level Radioactive Waste Policy Amendments Act of 1985, 42 U.S.C. § 2021e(d)(2)(C) (1985)). The overall reasoning of the case is consistent with congressional preemption of the products liability field pursuant to its power to regulate interstate commerce. Cf. New York v. United States, 505 U.S. 144, 146-47. The Product Liability Act does not appear to present the potential Tenth Amendment issues raised by various National Health Care Plans. See generally Candice Hoke, Constitutional Impediments to National Health Care Reform: Tenth Amendment and Spending Clause Hurdles, 21 HASTINGS CONST. L.Q. 489 (1994) (discussing constitutional problem of national health care reform presented by Tenth Amendment).

Despite the imposition of new and different law upon the states, an attack predicated on the Ninth Amendment is also unlikely to succeed. This amendment provides that: "[t]he enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people." U.S. CONST. amend. IX.


88. As passed by the House, the statute of repose provides:
(a) GENERAL RULE—A product liability action shall be barred unless the complaint is filed and served within 15 years of the date of delivery of
vided. The Senate version contains a more limited provision which provides for a twenty year repose period as to durable goods which do not cause toxic harm. Durable goods are defined as goods with a normal life expectancy of three or more years or those which meet the depreciation allowance provisions of the Internal Revenue Service and other criteria.

The limited nature of the Senate provision, coupled with its one year savings period, has two important effects. First, due to its specific exclusions, it will apply to a substantially reduced number of products such as manufacturing equipment, elevators and heating and cooling systems. Second, limiting the scope of application and providing a reasonable period in which to file claims before the twenty year bar takes effect reduces the likelihood of effective constitutional attack.


The United States Supreme Court will ultimately decide the constitutional validity of a national statute of repose. When that case comes before it, the Court will align itself with one of the competing views recognized in the state courts. One approach could be based on a determination that there is a federal right, equivalent to state open courts provisions, which voids the repose statute. Even

the product to its first purchaser or lessee, who was not engaged in the business of selling or leasing the product or of using the product as a component . . .

(b) EXCEPTION—Subsection (a)-(1) does not bar a product liability action against a defendant who made an express warranty in writing as to the safety of the specific product involved which was longer than 15 years, but it will apply at the expiration of such warranty, (2) does not apply to a physical illness the evidence of which does not ordinarily appear less than 15 years after the first exposure period, and (3) does not affect the limitations period established by the General Aviation Revitalization Act of 1994.

H.R. 956, supra note 2, § 106.

89. H.R. 956, supra note 13, § 109(b) (Senate amended). The Senate version of House Bill 956 provides for a two year statute of limitations with a discovery rule. Id. § 109(a). Paragraph (b)(3) excludes motor vehicles, vessels, aircraft or trains used primarily to transport passengers from the scope of the repose provision as well as goods expressly warranted as to safety for more than twenty years. Id. § 109(b)(3). Paragraph (c) allows a one year savings period. Id. § 109(c)

90. H.R. 956, supra note 13, § 101(6).

91. The absence of an express constitutional provision does not negate the existence of a constitutional right as well established in the judicial development of privacy rights. See, e.g., Roe v. Wade, 410 U.S. 113 (1973) (establishing women’s qualified right to abortion as encompassed in right to privacy despite absence of express constitutional provision); Griswold v. Connecticut, 381 U.S. 479 (1965) (holding right to marital privacy is encompassed in penumbra of Bill of Rights guarantees).
if such an approach is not adopted, the Court should find such a repose statute unconstitutional on equal protection grounds.

There are many reasons for concluding that constitutional rejection is the better reasoned approach. Three reasons stand out. First, the principle that a claim can be negated before it arises, though technically valid, is repugnant to basic concepts of fairness and justice. Second, a prophylactic determination as to the useful safe life of all products is inherently arbitrary. Third, even assuming that there is some degree of insurance crisis, it does not justify a statute of repose when there is little evidence that such a statute either reduces the cost of insurance or makes such insurance more readily available. In addition, for practical and business reasons, the safety incentives of products liability law will prevail with or without a statute of repose.

The potential for finding a federal open courts doctrine began with Marbury v. Madison92 and was further developed a century later in Wilson v. Iseminger.93 In Marbury, Chief Justice Marshall carefully noted that civil liberty requires that every individual possess the right to claim protection of the law when injured.94 The Wilson court specifically held that a statute which bars claims before affording the right to bring such a claim is not a statute of limitations but is an unlawful attempt to extinguish rights arbitrarily.95 In both cases, the broad language relating to rights closely parallels open courts provisions of state constitutions. This language implies an equivalent federal right. The validity of this implication is, however, questionable.

The oft-quoted passage from Wilson, indicating that the law precludes barring an action before a party has the opportunity to bring it,96 must be taken in context. The context does not fully support an open courts approach. The case involved a Pennsylvania law that imposed a twenty-one year statute of repose upon the collection of ground rent and other charges upon real estate with certain exceptions for recorded obligations, including judgments. By its terms, the Act did not take effect until three years

92. 5 U.S. (1 Cranch) 197 (1803). For an introduction to the discussion of Marbury's application to an open courts doctrine, see supra notes 90-33 and accompanying text.
93. 185 U.S. 55 (1902). For an additional discussion of Wilson, see supra notes 14-16 and accompanying text.
94. Marbury, 5 U.S. at 162.
95. Wilson, 185 U.S. at 62.
96. Id. ("A statute could not bar the existing rights of claimants without affording this opportunity; if it should attempt to do so, it would not be a statute of limitations, but an unlawful attempt to extinguish rights arbitrarily.").
after passage. The Court recognized that the theory of this remedial act was "that upon which all statutes of limitation are based—a presumption that, after a long lapse of time without assertion, a claim . . . is presumed to have been paid or released. This is a rule of convenience and policy, the result of a necessary regard to the peace and security of society."97 The Court went on to observe that:

Statutes of limitation are passed which fix upon a reasonable time within which a party is permitted to bring suit for the recovery of his rights, and which, on failure to do so, establish a legal presumption against him that he has no legal rights in the premises. Such a statute is a statute of repose. Every government is under obligation to its citizens to afford them all needful legal remedies; but it is not bound to keep its courts open indefinitely for one who neglects or refuses to apply for redress until it may fairly be presumed that the means by which the other party might disprove his claim are lost in the lapse of time.98

The Court was concerned with a statute of repose, but found that its enactment and effect was a proper exercise of legislative power.99 The issue then became whether the Court's qualifying language, that focused on the equities and the loss of evidence which are traditional statute of limitations concerns,100 applies to a products liability statute of repose. One can readily conclude that products which cause the onset of illness only years after exposure are outside the purview of such limiting language and are within the broader right to remedy aspects of the decision. Due to the absence of neglect or refusal to act, Wilson arguably precludes a repose statute for toxic tort litigation. On the other hand, a repose statute which applies to capital goods or products which simply fail after the passage of many years could be within the purview of the qualifying language even if the defect was latent. The pending federal repose provision, in both Houses, falls within the latter failure mode category.101

Even this view, mandating recourse only for latent illness, may fail in light of the Court's discussion of whether the plaintiff had a

97. Id. at 60-61.
98. Id. at 62 (emphasis added) (citation omitted).
100. Id. at 62.
101. H.R. 956, supra note 2, § 106(a) (providing 15 year statute of repose); H.R. 956, supra note 13, § 109(b)(1) (Senate amended) (providing for 20 year statute of repose).
reasonable amount of time in which to bring suit. In Wilson, the Court stressed that there was no vested right to sue in a contract action any more than there was an unrestricted right to sue and that:

[T]hey have no more a vested interest in the time for the commencement of an action than they have in the form of the action to be commenced; . . . it is well settled that the legislature may change [statutes of limitation] at its discretion, provided adequate means of enforcing the right remain.102

In this context, one can conclude that a fifteen or twenty year period in which to commence an action is reasonable. Congress could then determine that a product which causes no harm within such a time frame is, by conclusive presumption, non-defective.

More recent decisions are consistent with the conclusion that the Constitution does not incorporate an open courts right that parallels the express provisions found in state constitutions. For example, in 1992, the Supreme Court denied standing to conservationists and other environmental organizations in a decision which also found that the injury alleged by these groups was not redressable.103 This declaratory judgment action challenged regulations promulgated pursuant to the Endangered Species Act.104

In its analysis, the Court emphasized the limitations imposed by separation of powers and made manifest that the remedy language in Marbury must be narrowly circumscribed.105 "'The province of the court . . . is, solely, to decide on the rights of individuals.'"106 As there was an absence of concrete injury, no case or controversy existed to permit the action to go forward.107 A broader reading of Marbury could have permitted the Court to determine that the Endangered Species Act carried an implicit right of the people to demand its proper application and, therefore, to find that a remedy had to be provided. Such an approach would have paralleled an open courts provision. The opportunity for such an approach existed through application of the Act's citizen-suit provision.108

102. Wilson, 185 U.S. at 63.
104. Id. at 557-58.
105. Id. at 576.
106. Id. (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 170 (1803)).
107. Id. at 571.
Similarly, in the earlier case of *Jett v. Dallas Independent School District*, the Supreme Court refused to create a damages remedy broader than that provided by 42 U.S.C. § 1983 from the rights declared in 42 U.S.C. § 1981 and held that "the express 'action at law' provided by § 1983 for the 'deprivation of any rights, privileges, or immunities secured by the Constitution and laws,' provides the exclusive federal damages remedy for the violation of the rights guaranteed by § 1981 when the claim is pressed against a state actor." The majority refused to imply an appropriate remedy despite a strong dissent based on the remedies language of *Marbury* and other decisions. Even the dissent, however, relied on the existence of a substantive right. Because a statute of repose is predicated on the absence of such a right, even the dissent's approach could not lead to an implied federal open courts right.

could logically extend to incorporate an open courts right. *Lujan*, 504 U.S. at 606 (Blackmun, J., dissenting) (quoting *Marbury*, 5 U.S. (1 Cranch) at 163). Justice Blackmun stated: "[i]n my view, '[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury.'" *Id.* (Blackmun, J., dissenting) (quoting *Marbury*, 5 U.S. (1 Cranch) at 163).


110. *Id.* at 735. The Court has consistently taken a limited view of its decision in *Bivens* v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971), which granted a civil damages remedy against federal agents for violation of the Fourth Amendment. *Id.* at 397. This constricting approach was illustrated in *FDIC v. Meyer*, 114 S. Ct. 996 (1994), where the Court refused to extend *Bivens*' reasoning to an action against a federal agency despite a claimed violation of the Fifth Amendment's taking clause. *Id.* at 999.

111. *Jett*, 491 U.S. at 742 (Brennan, J., dissenting) (citations omitted). Justice Brennan stated:

> We had good reason for concluding that § 1981 itself affords a cause of action against those who violate its terms. The statute does not explicitly furnish a cause of action for the conduct it prohibits, but this fact was of relatively little moment at the time the law was passed. During the period when § 1 of the 1866 Act was enacted, and for over 100 years thereafter, the federal courts routinely concluded that a statute setting forth substantive rights without specifying a remedy contained an implied cause of action for damages incurred in violation of the statute's terms.

*Id.* (Brennan, J., dissenting).

112. See *id.* To this extent, the dissent is consistent with the Court's observation:

> [a] disregard of the command of the statute is a wrongful act, and where it results in damage to one of the class for whose especial benefit the statute was enacted, the right to recover the damages from the party in default is implied, according to a doctrine of the common law.

*Id.* (quoting Texas & Pacific R. Co. v. Rigsby, 241 U.S. 33, 39-40 (1916)).

113. See *Franklin v. Gwinnett County Public Schs.*, 503 U.S. 60, 65 (1992). In *Franklin*, the Court found an implied right to monetary damages for violation of Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681-1688. *Id.* at 65-66, 76. The holding was predicated, in part, on the importance of providing a remedy as enunciated in *Marbury*. *Id.* at 66. However, the Act involved provided
Nor has *Wilson v. Iseminger*\(^{114}\) been construed to provide an open courts right. The case history is largely limited to the application of the Court's mandate that a party be provided with a reasonable time in which to bring suit after a claim arises and the absence of a governmental duty to keep courts open indefinitely.\(^ {115}\) A United States Court of Appeals for the Fourth Circuit decision provides ample illustration of the limited ramifications of *Wilson*.

In *Barwick v. Celotex Corp.*,\(^ {116}\) the Fourth Circuit was called upon to determine the validity of the North Carolina statute of repose which, if applied, was a bar to plaintiff's action against a key defendant predicated on injury allegedly sustained from asbestos exposure. In upholding the statute against claims that it violated the equal protection and open courts provisions of the North Carolina Constitution, the court recognized that this was a repose statute.\(^ {117}\) The court also recognized that the statute, coupled with an applicable discovery rule, actually extended the time for many plaintiffs to bring suit for injury which had a delayed manifestation.\(^ {118}\) This benefit eased the policy concerns that might otherwise have led to

an underlying statutory right which contained no express limitations as to the nature of the remedy available. *Id.*

The Court specifically observed that "the question of what remedies are available under a statute that provides a private right of action is 'analytically distinct from the issue of whether such a right exists in the first place.' *Id.* at 65-66 (citations omitted).

114. 185 U.S. 55 (1902).

115. See, e.g., Ockerman v. May Zima & Co., 27 F.3d 1151, 1155 & 1157-58 (6th Cir. 1994) (stating that it is necessary to provide plaintiff with reasonable time in which to file suit); Hart v. United States, 910 F.2d 815, 818 (Fed. Cir. 1990) (holding that government is not required to keep its courts open indefinitely for one who neglects to apply for redress); Hanner v. Mississippi, 833 F.2d 55, 57 (5th Cir. 1987) (noting that plaintiff must be given reasonable time before his claim is barred as untimely); Messere v. Murphy, 585 N.E.2d 350, 352 (Mass. App. Ct. 1992) (stating that all persons must be accorded full and ample time to commence suit); Garcia v. La Farge, 893 F.2d 428, 433 (N.M. 1995) (noting that purpose of statute of limitations is to protect defendants from stale claims and to provide adequate time for person of ordinary diligence to pursue lawful claims).


117. *Barwick*, 736 F.2d at 952 (stating that because statute contained "outer limit" provision beyond three year statute of limitation, ten year outer limit is not conventional statute of limitation, but is statute of repose).

118. *Id.* at 955-56 (indicating that "[a]lthough a certain number of plaintiffs will always have a problem with a statute of limitation or repose, this does not mean that they have been denied a constitutional right").
an opposite result.\textsuperscript{119}

The court's decision in \textit{Barwick} relied on \textit{Wilson} for its equal protection analysis that although government has an obligation to provide citizens with needful remedies, it could also establish time limits within which such remedies could be sought.\textsuperscript{120} Thus, no open courts violation existed in \textit{Barwick}, despite the constitution's mandate for "remedy by due course of law."\textsuperscript{121}

Case law establishes that neither \textit{Marbury} nor \textit{Wilson}, individually or collectively, can be used to imply an open courts right. Because precedent fails to provide a sufficient foundation for such a result,\textsuperscript{122} it must be concluded that no such federal right exists. The absence of an express or implied federal open courts right removes the judicial ability to strike down repose statutes on this logical ground so often utilized by those state courts that have struck down such statutes. If repose statutes are to be found unconstitutional, the foundation for doing so will have to be found in equal protection—\	extsuperscript{123}—a foundation erroneously rejected by the ma-

\textsuperscript{119} \textit{Id.} at 956-58 (noting that proper balance was struck between repose in law and plaintiff's expanded rights under statute).

\textsuperscript{120} \textit{Id.} at 955. The court also observed that statutes of limitation "affect the remedy and not the right. They remove the court as a forum for enforcing the right." \textit{Id.} at 957. This reasoning "would preclude application of the \textit{Marbury} remedy language."

\textsuperscript{121} \textit{Id.} at 958 (quoting \textit{N.C. Const.}, art. I, § 18). Because the legislature has the power to define the circumstances under which a remedy may be pursued, the ultimate conclusion was readily achieved.

\textsuperscript{122} A line of Supreme Court cases focusing on due process and the right to a hearing, as illustrated by \textit{Logan} v. \textit{Zimmerman Brush Co.}, 455 U.S. 422 (1982), almost provides such a foundation. In \textit{Logan}, the claimant's right to a hearing on his wrongful termination claim was precluded by a failure of the State Fair Employment Practices Commission to schedule a fact-finding conference within the statutorily prescribed period. \textit{Id.} at 424-25. Plaintiff prevailed because he had filed his claim in a timely fashion and due process mandated that he had a right to be heard. \textit{Id.} at 434. The Court reasoned that the state-created substantive right could not be precluded through application of a procedural rule beyond plaintiff's control. \textit{Id.} at 434-35.

The parallel to a repose bar beyond control of an injured party is obvious. The analog, hence the right of access claim, fails because in theory an injured party has no property right when the injury arises after the repose period and, as recognized by the Court, "the State may erect reasonable procedural requirements for triggering the right to a adjudication, including statutes of limitation." \textit{Id.} at 437 (citation omitted).

\textsuperscript{123} A right founded in due process is untenable. Although the Due Process Clause prohibits forcing a party to take the bitter (procedural rules that lead to a deprivation of property) with the sweet (a state-created substantive right), this principle requires the existence of a vested property right. Cleveland Bd. of Educ. v. \textit{Loudermill}, 470 U.S. 532, 541 (1985). Property interests are "created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law." \textit{Id.} at 538 (quoting Board of Regents v. \textit{Roth},
iority of courts that have addressed the issue. Perhaps the single most important reason that these courts have erred in their analyses is their failure to recognize that the right to seek a remedy is not merely an economic issue. Rather, it is a significant substantive right.

3. Analysis: Introduction—Equal Protection

Traditional equal protection analysis has long been recognized as an improper vehicle for the courts to judge the wisdom or logic of legislative choices or as a means to allow the judiciary to act as a superlegislature. Classifications which do not involve fundamental rights, nor proceed along suspect lines, are accorded a strong presumption of validity and must be upheld whenever there is a rational relationship between the disparity of treatment and some legitimate governmental purpose, even if the legislative body fails to articulate those reasons. If there is any reasonably conceivable set of facts that can provide a rational basis for the classification, that classification is to be upheld unless that basis is overcome by evidence submitted by the party challenging the classification. In addition, the legislation's validity is not negated by the absence of "mathematical nicety" or the existence of an imperfect fit between the ends and the means. Nevertheless, to withstand an equal protection challenge the legislation must have "some footing in the realities of the subject addressed by the legislation."

Recent Supreme Court decisions defining the standards to be

408 U.S. 564, 577 (1972)). For a discussion of other reasons supporting the absence of a due process approach, see supra note 9.


125. The Supreme Court of Utah, relying on Wilson, recognized "the fundamental obligation of government to provide reasonable remedies for wrongs done." Berry v. Beech Aircraft Corp., 717 P.2d 670, 679 (Utah 1985).


127. Id. The court notes that a statute is presumed constitutional, and the burden is on the one attacking the legislative arrangement to negate every conceivable basis that might support it. Id.

128. Id.

129. Id. The court points out that problems of government are "practical" ones which justify, if not require, illogical and unscientific accommodations. Id.

130. Id.
applied in resolution of equal protection claims reveal that the meaning of this basic protection has been undergoing a subtle metamorphosis.\textsuperscript{131} One result has been a substantial body of academic literature dissecting trends, analyzing decisions, drawing definitions and anticipating the Court's future direction.\textsuperscript{132} This article seeks only to identify the proper standards and apply them to products liability statutes of repose. Despite the number of cases holding that equal protection standards are not violated by the application of a statute of repose, the better approach, reflected in the reasoning of a smaller yet significant number of courts, is to find that statutes of repose do violate equal protection.\textsuperscript{133}

Regardless of the applicable standard of review and degree of deference granted to the legislative enactment, the rationale for

\textsuperscript{131} See, e.g., Miller v. Johnson, 115 S. Ct. 2475, 2482 (1995) (noting that while basic principle of Equal Protection Clause is straightforward, its application raises difficult issues); Sandin v. Conner, 115 S. Ct. 2293, 2300 (1995) (recognizing that states may, under certain circumstances, create liberty interests which are protected by Due Process Clause); Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097, 2117 (1995) (adhering to strict scrutiny standard of review, but emphasizing that standard is strict, not fatal); J.E.B. v. Alabama ex rel. T.B., 114 S. Ct. 1419, 1421 (1994) (holding that under Equal Protection Clause gender is unconstitutional proxy for juror competence and impartiality); Reno v. Flores, 507 U.S. 292, 306 (1993) (holding that release of alien juveniles to close relatives, while detaining those without close relatives does not violate Equal Protection Clause); and the various approaches discussed and distinguished within the majority, plurality, concurring and dissenting opinions of these cases. The precise meaning and application of equal protection has always been murky. "Our opinions in these areas [due process and equal protection] often are criticized, with justice, as lacking consistency and clarity." Logan v. Zimmerman Brush Co., 455 U.S. 422, 443 & n* (1982) (Powell, J., concurring).

\textsuperscript{132} See generally Eugene Doherty, Equal Protection Under the Fifth and Fourteenth Amendments: Patterns of Congruence, Divergence and Judicial Deference, 16 OHIO N.U. L. REV. 591, 591 (1989) (defining equal protection review under Fifth and Fourteenth Amendments and comparing standards of review); Michael Klarman, An Interpretive History of Modern Equal Protection, 90 MICH. L. REV. 213, 215 (1991) (providing historical evolution of modern equal protection in order to facilitate understanding of conceptual shifts that have occurred over time); Richard E. Levy, Escaping Lochner's Shadow: Towards a Coherent Jurisprudence of Economic Rights, 73 N.C. L. REV. 329, 329 (1995) (noting that Supreme Court has become increasingly more conservative over last twenty years and examining Court's economic rights jurisprudence over this period); Jane Rutherford, The Myth of Due Process, 72 B.U. L. REV. 1, 4-5 (1992) (arguing that all due process decisions, whether substantive or procedural, amount to value choice between whether government action is arbitrary or adequately justified); Bernard H. Siegan, Majorities May Limit the People's Liberties Only When Authorized To Do So by the Constitution, 27 SAN DIEGO L. REV. 309, 309-10 (1990) (adhering to originalist interpretation of Constitution and supporting individualist position in doing so).

\textsuperscript{133} At least twenty states have enacted products liability statutes of repose, of which six have been held unconstitutional. Three, including two of the judicially held invalid statutes, have been repealed. The remaining statutes have either been upheld or have not yet been specifically addressed by the courts. See Appendix.
passage of a statute of repose plays the primary role in ascertaining that statute's constitutional validity. Because the proposed new statute of repose is national, the findings of Congress will become a focal point. These findings include: (1) abuse of the civil justice system; (2) an overly litigious nation; (3) arbitrary damage awards and allocations of liability; (4) inconsistent law among the several states; (5) withdrawal of products from the market due to the first four factors plus liability costs which result in higher prices; (6) the adverse impact upon industry and small business; (7) the undermining of America's ability to compete in the international market; (8) increased insurance costs; (9) the inability of state law to address these national problems; (10) a constitutional duty to remove barriers to interstate commerce; and (11) the need to restore rationality, fairness and predictability to the system.134 In addition, repose statutes serve the objectives of traditional statutes of limitations in regard to parties who have slept on their rights, stale claims and related problems of witness availability and loss of evidence. These objectives provide no additional basis for the imposition of statutes of repose. In fact, the traditional objectives contained in findings one through four and nine through eleven apply with equal force to the entire civil justice system and particularly the tort compensation system. Finding eight also applies to the general tort system, but according to Congress has specific products liability application. Yet Congress gives significant attention to only one segment of the civil justice system—products liability.135

Many of these findings are consistent with those proffered at the state level.136 If the congressional findings are either inaccurate or applicable with equal force to other aspects of the tort compensation system, a strong argument of constitutional violation exists. The more specific question, however, is whether a statute of repose, as distinct from the overall legislation, promotes one or more of the proposed legislative purposes.137

134. H.R. 956, supra note 2, § 2(a)(1)-(11).
135. Id. Title III addresses Biomaterials Suppliers, but biomaterials are within the broad purview of products liability law. Id.
136. The primary focus of the state legislatures was on the capacity of manufacturers to gain insurance at a reasonable rate, avoid the long-tail problem, and provide a degree of immunity from litigation that would aid long term corporate planning. It was also theoretically possible that a repose statute would aid corporate solvency and thereby provide a greater likelihood of recovery to claimants who brought suit within the allowed time frame.
137. The purposes, set forth in H.R. 956, supra note 2, § 2(b), are to provide uniform principles of products liability law, place reasonable limits on damages, ensure fair allocation of liability, reduce litigation costs and delay and establish greater fairness and predictability in the civil justice system. Absent the specific
The congressional purposes encompass both products liability and the civil justice system. With the possible exception of cost reduction, they have no direct correlation to statutes of repose. The multiple, indeed schizophrenic, objectives of the proposed bills cannot be met by substantively addressing only the limited portion of torts law encompassed by products liability.

To truly accomplish the stated objectives, a full tort reform, or at least full products liability reform, would be necessary. However, the proposed legislation does not provide even full products liability reform, for it leaves open core issues.\(^{138}\) Had the Act, in either the House or Senate version, addressed the totality of issues appropriate for congressional attention, it could have been viewed as creating a new federal right that would negate virtually all constitutional questions other than those surrounding the question of whether Congress had such authority.\(^{139}\) However, since the legislation addresses only a few specific elements of products liability law, this line of analysis cannot be applied. This nibbling at the corners of products liability reform raises a broader constitutional dimension.

4. Equal Protection: Application and Overview

The broad language of the Fourteenth Amendment, which states that no state shall "deny to any person within its jurisdiction the equal protection of the laws," applies with equal force to both the United States and each individual state.\(^{140}\) Although the Fourteenth Amendment does not directly apply to acts of the United States, reference to products liability law, these purposes are as readily appropriate for general tort reform. See also H.R. REP. NO. 72, supra note 4, at 10-12.\(^{138}\) For further discussion of the issues that are not addressed by proposed federal legislation, see supra note 3.\(^{139}\)

There is no pervasive federal common law of products liability. The Supreme Court has adopted principles of strict liability in tort for resolution of products liability claims arising under admiralty jurisdiction. East River S.S. Corp. v. Transamerica Delaval Inc., 476 U.S. 858, 865 (1986). If the Act created a new right, the Congress would have the power to limit that right just as state legislative bodies have the power to impose a repose limitation on legislatively created wrongful death actions. See supra notes 57 and 62 and accompanying text.

The Ohio Supreme Court in McAuliffe v. Western States Import Co., 651 N.E.2d 957 (1995), reversed the lower court's decision that the Ohio Products Liability Act had created a new cause of action thereby justifying application of the statutory right statute of limitations rather than the shorter personal injury limitation. Id. at 959. The court agreed with the principle of law, but found it inappplicable on the facts. Id. at 960-61. But see Hanson v. Williams County, 389 N.W.2d 319, 325-26 n.14 (N.D. 1986) (finding no distinction between legislatively and judicially created rights).

140. U.S. CONST. amend. XIV, § 1.
States, the Supreme Court has made clear that the Due Process Clause of the Fifth Amendment carries with it equal protection concepts that are indistinguishable from those guaranteed in the Fourteenth Amendment.\textsuperscript{141} Historically, three broad categories of equal protection review have been applied by the Court: (1) strict scrutiny, (2) intermediate scrutiny, and (3) rationality or the rational basis test. Throughout the history of equal protection adjudication, the core principle has been the "simple command that the Government must treat citizens as individuals, not as simply components of a racial, religious, sexual or national class."\textsuperscript{142}

Strict scrutiny provides the most exacting level of review. It applies to either classifications based on a suspect class—race, alienage or national origin—or to fundamental rights.\textsuperscript{143} This standard requires that the classification be necessary to advance a compelling government interest and be narrowly tailored to further that goal. Repose statutes affect members of all races, alienage and national origin and do not limit a fundamental right. For these reasons, strict scrutiny is inapplicable to review the proposed national statute of repose.\textsuperscript{144}

Intermediate scrutiny, on the other hand, developed as a middle ground between the rigid demands of strict scrutiny and the

\textsuperscript{141} See Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097, 2106-08 (1995). The Court applied strict scrutiny to test the validity of a federal law promoting affirmative action in contracting. \textit{Id.} at 2101. The Court ruled that to uphold this racial classification, it, "like those [laws] of a State, must serve a compelling governmental interest, and must be narrowly tailored to further that interest." \textit{Id.} Justice Stevens noted this "congruence," but asserted that the protections offered by the Fifth and Fourteenth Amendments are "not always coextensive." \textit{Id.} at 2125 & n.8 (Stevens, J., dissenting).

\textsuperscript{142} Miller v. Johnson, 115 S. Ct. 2475, 2486 (1995) (utilizing strict scrutiny to void voting district reflecting race-based decision making) (citations and internal quotes omitted).

\textsuperscript{143} See, e.g., City of Richmond v. J.A. Croson, Co., 488 U.S. 469, 494 (1989) (reaffirming highly suspect nature of classifications based on race, alienage or national origin); City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 440 (1985) (stating that general rule gives way when statute classifies by race, alienage or national origin); San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 33, 44 (1973) (holding that because Texas' system of public school finance did not implicate classification of race, alienage or natural origin, it is inappropriate candidate for strict judicial scrutiny); United States v. Carolene Prods. Co., 304 U.S. 144, 152-53 n.4 (1938) (stating that in order for higher judicial standard to be applied, there must be showing that legislative judgment did not rest upon some rational basis).

\textsuperscript{144} At least one court has applied strict scrutiny analysis to a medical malpractice statute of repose based on analysis of its state constitution. Kenyon v. Hammer, 688 P.2d 961, 970-71 (Ariz. 1984) (en banc); \textit{see also} Richardson v. Carnegie Library Restaurant, Inc., 763 P.2d 1153, 1161 (N.M. 1988) (applying intermediate scrutiny test to invalidate statutory cap).
deferential approach of rational basis. This principle of interpretation, requiring that the classification serve an important governmental objective and bear a substantial relationship to that objective, has been applied mainly to gender and illegitimacy claims. From an applications vantage point, the Supreme Court has often utilized some form of intermediate scrutiny in lieu of either rational basis or strict scrutiny to areas outside of gender and illegitimacy. These applications have been murky in defining the basis for using intermediate scrutiny as opposed to either of the other tests, but the cases clearly establish that some form of middle level review was applied.

Intermediate scrutiny was applied to determine the validity of a statute limiting the rights of children of illegal resident aliens to a public education despite the absence of both a suspect class and a fundamental right. The Court’s post-1970s decisions in alienage cases can be viewed as consistent only if the Court had utilized an intermediate scrutiny standard. Similarly, an intermediate standard was applied to strike down a durational residency requirement for voting. A standard short of strict scrutiny, but beyond ra-


Some state courts have applied an intermediate review to statutes of repose. See, e.g., Carson v. Maurer, 424 A.2d 825, 830 (N.H. 1980) (applying standard more rigorous than rational basis to medical malpractice action); accord Heath v. Sears, Roebuck & Co., 464 A.2d 288, 294 (N.H. 1983) (applying more rigid test than rational basis because right to recover for personal injuries qualifies as important substantive right); Hanson v. Williams County, 389 N.W.2d 319, 325 (N.D. 1986) (applying intermediate standard because right to recover for personal injuries constitutes important substantive right).


tional basis, was applied in the review of a state statute that made it a felony for a parent to abandon a child and leave the state but only a misdemeanor when the parent remained in the state.\(^{149}\) This confusing level of scrutiny was applied despite the fact that limitations on interstate travel are traditionally subject to strict scrutiny review.

Statutes of repose apply with equal force to both males and females and involve no aspect of illegitimacy and, therefore, as currently defined intermediate scrutiny is not appropriate for equal protection review of a statute of repose according to the Supreme Court. Some state courts have, however, recognized that the right to recover for personal injury is a significant substantive right requiring application of intermediate scrutiny or an equivalent approach.\(^{150}\) If the Supreme Court concludes that the right to seek redress is one of considerable importance, similar to that of education, alienage, residency requirements for voting or interstate travel, it could readily apply intermediate scrutiny to statutes of repose.

The logic of the state court decisions is compelling for it is consistent with Wilson and with the Supreme Court's apparent willingness to extend the application of intermediate scrutiny. Intermediate scrutiny should be adopted by the federal courts because it is the proper standard of review for determining the constitutional validity of statutes of repose. The standard permits courts to give appropriate deference to the legislature while allowing a more thorough exploration of the relationship of the statute to its purported purposes.

The third approach, that of rational basis, has been almost uniformly applied in both state and federal courts to ascertain the validity of various forms of statutes of repose. This approach mandates only a determination that the legislation be rationally related to a legitimate public purpose.\(^{151}\) Unlike strict scrutiny, ra-

\(^{149}\) See Jones v. Helms, 452 U.S. 412, 422-26 (1981) (finding that when statute does not infringe on individual's fundamental rights, state need not apply least restrictive or most effective means to achieve legitimate ends).


\(^{151}\) See City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 442 (1975) (holding that because mental retardation is not quasi-suspect class legislation, it only has to be rationally related to legitimate government purpose); Parham v. Hughes, 441 U.S. 347, 357-58 (1979) (upholding paternity statute under rationally related test because it did not invidiously discriminate against any class). Some state courts have analyzed cases within this category by application of an
tional basis review does not require the legislature to articulate the purpose or rationale supporting its classification. 152 Despite the likely absence of such a requirement, the findings and purpose language of H.R. 956 is directed to the constitutional imperative of establishing a legitimate public purpose. A statutory classification which “neither proceeds along suspect lines nor infringes fundamental constitutional rights,” is subject to this deferential standard of review. 153 This standard may, regrettably, continue to be viewed as the appropriate measure of repose statute constitutionality.

a. Intermediate Scrutiny

A leading case utilizing intermediate scrutiny to invalidate a statute of repose on state equal protection grounds is Hanson v. Williams County. 154 In Hanson, the plaintiff was injured by an allegedly defective multi-ton earth packer in August 1983, and he filed suit less than one year after the injury was sustained. 156 The machine had been manufactured in November 1968 and sold to an initial purchaser in April 1964. 157 The North Dakota statute of limitations contained a repose provision insulating the machine manufacturer from suit “unless the injury, death, or damage occurred within ten years of the date of initial purchase for use or consumption, or

---

152. Miller v. Johnson, 115 S. Ct. 2475, 2490 (1995) (citing Heller v. Doe, 509 U.S. 312, 315 (1993)). Nevertheless, the Court has reviewed state interests as articulated by the state. In Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307 (1976), the Court observed that a mandatory retirement statute “rationally furthers the purpose identified by the State.” Id. at 314 (footnote omitted). Similarly, in New Orleans v. Dukes, the Court found that “[t]he city’s classification rationally furthers the purpose which . . . the city had identified as its objective in enacting the provision [protecting the French Quarter].” 427 U.S. 297, 304 (1976) (per curiam). This approach does not appear to create an affirmative obligation upon the state to articulate a government objective. But see infra notes 221-22 and accompanying text, for a discussion of the existence of such a duty.

153. FCC v. Beach Communications, Inc., 508 U.S. 307, 309 (1993). Such a statutory classification must be upheld against an equal protection challenge if there is any “reasonably conceivable state of facts that could provide a rational basis for the classification.” Id.


155. Id. at 320.

156. Id.

157. Id.
within eleven years of the date of manufacture of a product.”

The court noted that the supporters of this provision focused on the affordability of products liability insurance while opponents questioned whether the insurance objective could be met on a state level and voiced fairness concerns.

The court proceeded to outline the three traditional standards of review for equal protection noting that the intermediate standard, though less clearly defined than strict scrutiny or rational basis, required a “‘close correspondence between statutory classification and legislative goals.’” The court correctly observed that intermediate scrutiny still required a presumption of legislative validity and that the presumption is conclusive absent a clear showing of constitutional violation that does not exist merely because a statute is not all-embracing. Relying on Heath v. Sears, Roebuck & Co., the court recognized that a statute of repose creates a question significantly more important than mere economic concern. The Hanson court found:

While there are economic consequences for manufacturers and their insurers underlying the legislation in question, we believe our focus must be on the individuals affected. We are unwilling to view human life and safety as simply a matter of economics. Therefore, we agree with the New Hampshire Supreme Court that the right to recover for personal injuries is an important substantive right.

Facing such an important substantive right, the court reasoned that intermediate scrutiny was the appropriate level of review. Turning to whether the statute could withstand such review, the court delineated two key elements. First, the statute created a classification between persons injured by products within the repose

158. Id. at 320 (citing N.D. CENT. CODE § 28-01.1-02 (1991)).
159. Id. at 320-21.
160. Id. at 323 (quoting Arnesan v. Olsen, 270 N.W.2d 125, 133 (N.D. 1978)).
161. Id. at 324 (citing Patch v. Sebelius, 320 N.W.2d 511, 513 (N.D. 1982) (applying intermediate scrutiny standard to question of equal protection)).
163. Hanson, 389 N.W.2d at 325 (emphasis added) (citing Heath v. Sears, Roebuck, & Co., 464 A.2d 288, 294 (N.H. 1983)).
164. Id. In Lankford v. Sullivan, Long & Haggerty, 416 So. 2d 996 (Ala. 1982), a products liability repose statute was reviewed, “more strictly than normal,” a form of heightened scrutiny, in an open courts’ analysis. Id. Similarly, a form of heightened scrutiny was applied when analyzing and voiding the Utah products liability repose provision under an open courts provision. Berry v. Beech Aircraft Corp., 717 P.2d 670, 680 (Utah 1985).
period and those injured by identical products at any later time.\textsuperscript{165} Second, the classification was predicated on specific legislative beliefs and objectives.\textsuperscript{166} For example, the legislature believed that safe use over time was an indicia of non-defect and that difficulties in defending actions brought a substantial time after manufacture or sale had to be obviated.\textsuperscript{167} In addition, the legislature considered resolution of the insurance problem and the need for long term planning of manufacturers' affairs.\textsuperscript{168}

The court concluded, even granting that the legislature believed there was an insurance crisis, that a repose statute had no capacity to meet these goals.\textsuperscript{169} Rather, the court stated that such a statute "arbitrarily den[ied] one class of persons important substantive rights to life and safety which are available to other persons."\textsuperscript{170} Because a close correspondence between the statute and its goals was not present, the statute violated the Equal Protection Clause.\textsuperscript{171}

The court's reliance upon \textit{Heath} was significant and appropriate. \textit{Heath} involved a products liability repose statute enacted largely in response to a perceived insurance crisis.\textsuperscript{172} Despite passage of the statute, the New Hampshire legislature created a special commission to ascertain whether the provisions enacted would im-

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{165} Hanson, 389 N.W.2d at 326-27.
\item \textsuperscript{166} Id. at 327. The court stated that the question therefore becomes, "whether or not there is a close correspondence between th[e] statutory classification [the first key element] and the legislative goals [the second key element] that would justify the classification." \textit{Id.}
\item \textsuperscript{167} Id. (citing Department of Commerce, Model Uniform Products Liability Act, § 110(b)(1) (1979)). The Model Uniform Products Liability Act outlines a threefold rationale in support of products liability statutes of repose:
First, the fact that a product has been used safely for a substantial period of time is some indication that it was not defective at the time of delivery.
Second, if a product seller is not aware of a claim, the passing of time may make it difficult to construct a good defense because of the obstacle of securing evidence . . . . The third rationale is that persons ought to be allowed, as a matter of policy, to plan their affairs with a reasonable degree of certainty.
\item Department of Commerce, Model Uniform Products Liability Act, § 110(b)(1) (1979).
\item \textsuperscript{168} Department of Commerce, Model Uniform Products Liability Act, § 101(c).
\item \textsuperscript{169} Hanson, 389 N.W.2d at 328. The court reasoned that some rational basis, other than mere economic interest, must be advanced for the selection of the period of years. \textit{Id.}
\item \textsuperscript{170} Id. at 328. The court noted that "property rights" may often be affected by arbitrary time periods. When human life and safety is at stake, however, more is required for a justification than mere economics. \textit{Id.}
\item \textsuperscript{171} Id.
\item \textsuperscript{172} Heath v. Sears, Roebuck & Co., 464 A.2d 288, 293 (N.H. 1983). This "products liability law" was enacted to protect manufacturers who supposedly were unduly burdened by rapidly rising insurance rates. \textit{Id.}
\end{enumerate}
\end{footnotesize}
prove insurance availability and affordability. In December 1979, the commission reported the difficulty in estimating the effect of the repose statute on the availability or cost of products liability insurance. The commission also noted that while these problems had eased, “it seem[ed] unlikely that this relaxation [was] attributable to the enactment of RSA 507-D.” The inability to relate the repose statute to the improvement in the insurance market was partly caused by the end of the national “panic” rise in rates, tending to show that state legislation was not a stabilizing influence. With this foundation in place, the court then determined the proper standard of review.

The Heath court’s determination was based on its continued belief that “although not a fundamental right, ‘the right to recover for personal injuries is . . . an important substantive right.’ ” Thus, the court based the statute’s validity on whether the classification was “reasonable” and rested “upon some ground of difference having a fair and substantial relation to the object of the legislation.” This call for a determination of whether the repose provisions were substantially related to resolution of the insurance crisis is an application of intermediate scrutiny.

The Heath court concluded that the statute was neither reasonable nor substantially related to the objective of the legislation and, therefore, that it violated both the state and federal Equal Protection Clauses. Simply, the classification was not supportable in its creation of a class of persons whose right to bring suit was terminated before the right arose, while another class of similarly injured persons could bring suit based on the identical product defect. To focus on when a product was manufactured or introduced into commerce was, and remains, an improper alternative to allowing suit within a proscribed time after injury has been sustained. The court’s analog to the statute creating a “topsy-turvey land” would have been greatly appreciated by Alice as she wandered through Wonderland.

173. Id.
174. Id. at 293-94.
175. Id.
176. Id. at 294.
177. Id. (citation omitted).
178. Id. (citation omitted).
179. Id. at 295-96.
180. Id. at 296.
181. Id. at 295.
182. Id.
There can be no honest debate as to whether a claim predicated on injury caused by a product is any less a common law right of action than a cause of action based in any other tort. The need for legislative reform has arisen not because products liability is a new creature of the law,183 but because the liability theory has evolved from negligence to strict liability with its product oriented focus. The right to bring such an action must be recognized as more than an economic right. To foreclose products liability plaintiffs, a small group within the vast array of tort plaintiffs, from a right of action before that right arises creates an unreasonable classification that violates the Equal Protection Clause.

The most effective means of guaranteeing fairness to products liability plaintiffs, together with all other tort plaintiffs, is to review statutes of repose with a discerning eye rather than abject deference to the legislative will.184 Such a result is attainable by application of intermediate or heightened scrutiny. Such a standard can be invoked at the federal level by the simple expedient of expanding the scope of intermediate scrutiny to include claims predicated on an important substantive right. Gender and illegitimacy claims represent precisely such a categorization. The Supreme Court has, in practice if not in clearly enunciated theory, extended these categories to include groups who suffer from discrimination in aspects of education, alienage or residency. It is time to add personal injury victims to this growing list of persons entitled to the protection of intermediate scrutiny. If Congress is truly concerned with fairness in products liability litigation, it must consider fairness to claimants and manufacturers alike. A statute of repose rejects the balance that fairness demands. Intermediate scrutiny should, and hopefully will, result in a determination that the proposed federal repose provision is constitutionally infirm.

b. Rational Basis

Since 1984, over thirty decisions involving the repose statutes of thirteen states have applied the rational basis test to determine

183. Strict liability had been applied to a variety of products well before its broader application in the 1960s. See Escola v. Coca Cola Bottling Co., 150 P.2d 436, 440-43 (Cal. 1944) (Traynor, J., concurring) (citing numerous cases that applied strict liability). Justice Traynor’s seminal concurrence foreshadowed the first broad-based strict liability decision, Greenman v. Yuba Power Prods., Inc., 377 P.2d 897 (Cal. 1965).

184. The minimal application of “unreasonable, arbitrary or capricious” language within the context of rational basis due process review reflects “extreme deference” to the legislative will. Welch, supra note 9, at 72.
the outcome of challenges based on the Equal Protection Clause.\(^ {185} \)

In each of these decisions the court gave substantial deference, akin to obeisance and homage, to largely conclusory and unsupported legislative assertions that the statutes served to advance legitimate goals such as reduction of insurance costs. Relatively few of the decisions discussed the issue in depth.\(^ {186} \) Nevertheless, the reasoning of the courts that provide a degree of analysis makes it clear that absent either (1) a recognition of the need for intermediate review, or (2) an application of a modicum of realistic demand for proof of the proffered relationship between the repose statute and its objectives, efforts to void a statute of repose on equal protection grounds will fail.

Supreme Court decisions provide the lower courts with the ability to review the factual predicates that allegedly provide the requisite rational basis. Despite the absence of a holding that the basis exists “in fact,” the Court has, when occasion demanded, engaged in an independent evaluation of the underlying facts to reject a proffered rational basis assertion.

Applying the traditional rule in United States Department of Agriculture v. Moreno,\(^ {187} \) the Court found that a congressional “declaration of policy” failed to support a classification made by the Food

---


186. See, e.g., Arsenault, 523 A.2d at 1283 (summarily disposing of case in two paragraphs). Other courts provided either a conclusory holding or relied on prior decisions with no further analysis. See Pullum v. Cincinnati, Inc., 476 So. 2d 657, 659-60 (Fla. 1985) (receding from earlier decision and summarily holding that there was no equal protection violation); Spilker v. City of Lincoln, 469 N.W.2d 546 (Neb. 1991) (holding that plaintiffs failed to show statute was unreasonable or arbitrary); Colony Hill, 320 S.E.2d at 273, 276 (relying on prior decisions to summarily state that revival of suit after defendant believed such right was terminated would violate due process) (citation omitted); Marinelli v. Ford Motor Co., 696 P.2d 1 (Or. Ct. App. 1985) (relying on Davis v. Whiting Corp., 674 P.2d 1194, review denied, 679 P.2d 1367 (1984), to summarily state that there was no violation of equal protection or due process); Jones v. Five Star Eng’g, Inc., 717 S.W.2d 882, 882 (Tenn. 1986) (stating that “[t]he constitutional issues, state and federal, presented in the present appeal [in regard to statute of repose] are almost identical to those which were considered in detail by this Court . . . , and we see no need for repeating those discussions here*).

Stamp Act (Act). After finding no correlation between the stated policy and the provision, the Court reviewed both legislative history and the arguments proffered by the government in support of the "unrelated person" provisions of the Act. This review concluded that the classification established was invalid as it lacked any rational basis to a legitimate governmental interest. The Court held that "[t]raditional equal protection analysis does not require that every classification be drawn with precise 'mathematical nicety.' But the classification here in issue is not only 'imprecise,' it is wholly without any rational basis."189

On occasion the Court has indicated a willingness to reject claims that a particular statute truly advances a legitimate government interest. Five Justices, in two concurring opinions, recognized that an equal protection rational basis analysis was appropriate to reject an Illinois law that barred a claimant's right to a hearing for wrongful termination because the state's Fair Employment Practice Commission failed to schedule a hearing within the time required by statute.190 Though not utilizing an "in fact" analysis as such, these Justices made clear that no factual relationship existed between the classification, which distinguished between those who after timely filing of a claim could proceed and those who could not due to the procedural error of the state, and the objectives of eliminating employment discrimination and unfounded claims of discrimination.191 The true test, consistent with Supreme Court rulings and giving credence to the need for some footing in reality,192 is actually whether the classification is, in fact, rationally related to a legitimate governmental interest. The question is the extent to which the judiciary is willing to utilize this standard of rational basis review.

Recent decisions of the federal circuit courts provide explication of rational basis application.193 The court in Eaton v. Jarvis

188. Id. at 533-38; accord Zobel v. Williams, 457 U.S. 55 (1982) (invalidating Alaska dividend distribution plan based on years of residency).
189. United States Dep't of Agric. v. Moreno, 413 U.S. 528, 538 (citation omitted).
190. Logan v. Zimmerman Brush Co., 455 U.S. 422, 442 (1982) (Blackmun, J., concurring) (stating that "Illinois scheme also deprives him of his Fourteenth Amendment right to the equal protection of the laws"); id. at 443-44 (Powell, J., concurring) (classification created by Illinois statute violated equal protection).
191. Id. at 438-42 (Blackmun, J., concurring); id. at 443 (Powell, J., concurring).
Products Corp., 194 reviewed the Colorado statute 195 before concluding that it posed no violation of equal protection under a rational basis standard of review. 196 After determining that a hydraulic meat cutting device was “manufacturing equipment” within the meaning of the statute and other foundational issues, 197 the United States Court of Appeals for the Tenth Circuit turned to the plaintiff’s constitutional challenge. As with any review of the constitutionality of legislation, a rebuttable presumption of validity undergirded the court’s analysis. 198 Relying on a prior decision of the Supreme Court of Colorado, 199 the Eaton court found that the repose provision involved neither a suspect class nor a fundamental right, and therefore, rational basis scrutiny was appropriate. The court specifically noted that “the right to recover damages in tort is not a fundamental right.” 200 Thus, the standard was simply to determine whether “the classification has a rational basis in fact and bears a rational relationship to legitimate governmental objectives.” 201 This position enabled the court to ignore whether more than an economic right was involved or whether heightened scrutiny was a more appropriate standard of review.

Following a brief digression into the statute’s legislative history, the court set forth a series of related principles to support its ultimate conclusion. The principles relied upon can be summarized as: (1) a statutory discrimination will not be set aside if any set of facts can reasonably be conceived to justify it and (2) the classification at issue was designed to protect certain injured parties, while

---


194. 965 F.2d 922 (10th Cir. 1992).
196. Accord Alexander v. Beech Aircraft Corp., 952 F.2d 1215, 1225 (10th Cir. 1991) (finding Indiana statute of repose constitutional); see also Talley v. Lane, 13 F.3d 1031, 1034-35 (7th Cir. 1994) (upholding tenant selection procedures pursuant to Fair Housing Act through application of similarly cursory in fact analysis).
197. Eaton, 965 F.2d at 926-29 (including in analysis discussion of whether product was manufacturing equipment, whether time period should commence from addition of component part and whether hidden defect exception to statute’s preclusionary effect was applicable).
198. Id. at 929.
200. Eaton, 965 F.2d at 930 (quoting Austin v. Litvak, 682 P.2d 41, 49-50 (Colo. 1984)).
201. Id. at 929.
protecting certain manufacturers from open-ended liability for equipment that would typically reveal defects well before the statutory period ran. The second point paralleled the recited legislative history. On these predicates, the Eaton court concluded:

We cannot say that the legislative determination to limit [the section] to manufacturers of such equipment is irrational. "The Equal Protection Clause does not require that a State must choose between attacking every aspect of a problem or not attacking the problem at all. It is enough that the state's action be rationally based and free from invidious discrimination." We perceive no violation of plaintiffs' equal protection rights under either the federal or state constitutions.

End of story. As in most such decisions, the Eaton court failed to question whether the classification had a rational basis "in fact" despite its inclusion of this element within its statement of law. This essential element of rational basis analysis was treated as excess verbiage lacking substantive value. The court unqualifiedly accepted the legislative determinations. Rational basis analysis does not mandate such total acquiescence to legislative findings. This standard permits a court to at least explore the facts to be sure that there is a modicum of factual basis to support the classification.

In the earlier case of Kochins v. Linden-Alimak, Inc., the United States Court of Appeals for the Sixth Circuit applied principles identical to those utilized in Eaton and came tantalizingly close to true "in fact" analysis consistent with the courts' legitimate

202. Id.
203. Id. (citations omitted).
204. Application of the traditional deferential rules led Justice Brennan to refer to the Court's reasoning as a tautology. United States R.R. Retirement Bd. v. Fritz, 449 U.S. 166, 186 (1980) (Brennan, J., dissenting). Justice Brennan argued that the statute under consideration was upheld without analysis of the rational relationship between the classification and its stated purpose. Id. at 183-88. According to the dissent, the Court's deferential approach "virtually immunizes social and economic legislative classifications from judicial review." Id. at 183. Justice Brennan's approach parallels an "in fact" analysis. Without such review "[a] statute's classifications will be rationally related to such a purpose because the reach of the purpose has been derived from the classifications themselves." Note, Legislative Purpose, Rationality, and Equal Protection, 82 YALE L.J. 123, 128 (1972). A leading scholar's call for a more stringent rational basis review that would place a "consistent new bite into old equal protection." Gerald Gunther, Forward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection, 86 HARV. L. REV. 1, 21 (1972). This suggestion, however, has gone unheeded for almost twenty-five years.

205. 799 F.2d 1128 (6th Cir. 1986).
role.\textsuperscript{206} Regrettably, in the final analysis, the court upheld a Tennessee repose statute on little more than the strength of the statute's preamble, finding that "[w]e cannot say that the legislature's decision to limit [the statute of repose] to those defendants in the manufacturing and distribution chain, who have control over the cost and availability of products, is irrational."\textsuperscript{207}

Unlike \textit{Eaton}, this was not the end of the story. The \textit{Kochins} court summarized the evidence that the plaintiff proffered to support the contention that there was no factual basis upon which to validate the legislative action. The plaintiff presented the commentary to section 101 of the Model Uniform Products Liability Act which stated that individual states could do little to solve the problems caused by products liability.\textsuperscript{208} Another study showed that ninety-seven percent of all product related accidents occurred within six years of their original purchase. Therefore, this ten year statute would not significantly impact the products liability crisis.\textsuperscript{209} The \textit{Kochins} court conceded that these authorities "persuasively suggest that the legislative goals [of the statute of repose] are not likely to be accomplished by the means selected."\textsuperscript{210}

The legislation's lack of efficacy was ignored in favor of the statute's preamble and general policies attributable to any statute of limitations.\textsuperscript{211} Although it has long been recognized that "a foolish

\textsuperscript{206} \textit{Id.} The United States Court of Appeals for the Sixth Circuit also applied an "in fact" analysis to uphold provisions of the Housing Act. Baker v. Cincinnati Metro. Housing Auth., 675 F.2d 836 (6th Cir. 1982).

\textsuperscript{207} \textit{Kochins}, 799 F.2d at 1138.

\textsuperscript{208} \textit{Id.} at 1140 (citing 44 Fed. Reg. 62,714, 62,716 (1979)).

\textsuperscript{209} \textit{Id.}

\textsuperscript{210} \textit{Id.} In contrast, the United States Court of Appeals for the District of Columbia, applying traditional rational basis analysis, actually engaged in an "in fact" analysis to first reject and then accept military regulations, which were applied to the dismissal of a naval officer based on an admission of homosexuality. Steffan v. Aspin, 8 F.3d 57 (D.C. Cir. 1993) (granting rehearing en banc), rev'd, 41 F.3d 677 (D.C. Cir. 1994) (en banc) (reinstating original district court judgment).

\textsuperscript{211} \textit{Kochins}, 799 F.2d at 1140. The outcome of both \textit{Kochins} and \textit{Steffan} may, however, be consistent with precedents of the Supreme Court which normally make no reference to an "in fact" standard. \textit{See} Schweiker v. Wilson, 450 U.S. 221, 234 (1981) (noting that while rational basis standard is "not a toothless standard" . . . it does not allow us to substitute . . . [the Court's] personal notions of good public policy for those of Congress"); McGowan v. Maryland, 366 U.S. 420, 426-28 (1961) (upholding statute because there was no indication of unreasonableness without specifically relying on any indication of legislative findings that the classification was in fact reasonable); \textit{see also} Eaton v. Jarvis Prods. Corp., 965 F.2d 922, 929 (10th Cir. 1992) (relaying on Supreme Court decisions that did not utilize "in fact" standard). \textit{Schweiker} reasoned that a deferential approach was consistent with the democratic process. \textit{Schweiker}, 450 U.S. at 230; \textit{see also} Lyng v. International Union, United Auto. Workers, 485 U.S. 360, 370 (1988) (stressing that "this standard of review is typically quite deferential").
consistency is the hobgoblin of little minds,”²¹² it is hard to accept this inconsistency as anything but foolish. The court admitted that there was no relationship in fact to the objectives sought to be served other than those common to any statute of limitations. The court simply conformed to its belief as to what the Supreme Court of Tennessee would have done and exhibited what it believed to be appropriate deference to the state legislature.²¹³ This reasoning ignored reality and the governing constitutional principle.

It is precisely such lack of factual application that has led the courts to improperly uphold statutes of repose under the rational basis test. Proper application of this minimalist standard, absent evidence to refute the large body of factual data rejecting a rational basis in fact, requires a conclusion that statutes of repose fail to comport with equal protection.

The degree of deference owed to congressional action is certainly less than that traditionally applied through rational basis analysis. Had the Kochins court followed its own finding that the evidence did not support the legislatively announced objectives, it could have decided the case properly. United States Supreme Court decisions and the views of various members of that Court provide ample support for concluding that the Kochins court’s finding was sufficient to negate the subject statute of repose on equal protection grounds.

The plurality opinion in Adarand Constructors, Inc. v. Peña²¹⁴ had no difficulty in taking issue with congressional action and dealt with the merits of the particular affirmative action program before it began its independent analysis of the facts and law. A pervasive element of the dissenting opinion was that the plurality failed to recognize the “large deference owed by the judiciary to ‘Congress’ institutional competence and constitutional authority.”²¹⁵ The deferential approach of the dissenters, regardless of the validity of their ultimate conclusions of law, was neither necessary nor proper to support their conclusions. Several Justices of the Supreme Court have made clear that the determination of rational basis assertions is a judicial rather than a legislative function. Though not utilizing

²¹³ Kochins, 799 F.2d at 1141. The case was before the court through diversity jurisdiction obligating application of the substantive law of Tennessee pursuant to Erie R.R. v. Tompkins, 304 U.S. 64 (1938). Application of federal equal protection standards requires no such reliance upon, or deference to, state law.
²¹⁵ Id. at 2134 (Ginsburg, J., dissenting) (quotation omitted).
the "in fact" language of some circuit courts, these Justices effectively demand precisely such analysis.

Commerce Clause jurisprudence provides a good example of the Court applying an independent analysis of rational basis assertions. Recognizing that broad application of the Commerce Clause could obliterate distinctions between what is deemed national and what is deemed local, the Court recently found that because a warning of this danger was enunciated "the Court has heeded that warning and undertaken to decide whether a rational basis existed for concluding that a regulated activity sufficiently affected interstate commerce." 216 The Court then performed an "independent evaluation" through a comprehensive "in fact" analysis as to whether the subject firearms provision had a rational basis and connection to interstate commerce.217

That the Court, not Congress, is the proper arbiter of such claims was succinctly stated in prior decisions. "Simply because Congress may conclude that a particular activity substantially affects interstate commerce does not necessarily make it so." 218 "Whether particular operations affect interstate commerce sufficiently to come under the constitutional power of Congress to regulate them is ultimately a judicial rather than a legislative question, and can be settled finally only by this Court." 219 Fairness, consistency and logic compel the Court to utilize a similarly realistic approach and exercise of judicial review in ascertaining the

216. United States v. Lopez, 115 S. Ct. 1624, 1629 (1995); cf. Lebron v. National R.R. Passenger Corp., 115 S. Ct. 961 (1995). In Lebron, the Court had to determine whether the First Amendment applied to actions of Amtrak as an agency or establishment of the government. Id. at 964. The Court observed that the enabling statute for Amtrak used language generally found in Interstate Commerce Act based legislation. Id. at 967. Additionally, the Court noted that "[Amtrak's] authorizing statute declares that it 'will not be an agency or establishment of the United States Government.'" Id. at 970. After a thorough factual review of the structure and functions of Amtrak, the Court determined that Amtrak was subject to the obligations of the First Amendment as it was a part of government. Id. at 970-71.

217. Lopez, 115 S. Ct. at 1681 ("[A]s part of our independent evaluation of constitutionality under the Commerce Clause we of course consider legislative findings, and ... congressional committee findings ...") (citation omitted).

218. Id. at 1629 n.2 (quoting Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, 311 (1981) (Rehnquist, J., concurring)). In his concurrence in Hodel, Justice Rehnquist stressed that "there are constitutional limits on the power of Congress to regulate pursuant to the Commerce Clause," and that "Congress must show that the activity it seeks to regulate has a substantial effect on interstate commerce." Hodel, 452 U.S. at 309, 313 (Rehnquist, J., concurring) (second emphasis added).

219. Lopez, 115 S. Ct. at 1629, n.2. (quoting Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 273 (1964) (Black, J., concurring)).
constitutional validity of statutes limiting a party's right to seek re-
dress for product induced injury.

This approach is consistent with principles of federalism:

[I]t would be mistaken and mischievous for the political
branches to forget that the sworn obligation to preserve
and protect the Constitution in maintaining the federal
balance is their own in the first and primary instance. . . .
[S]ome Congresses have accepted responsibility to con-
front the great questions of the proper federal balance in
terms of lasting consequences for the constitutional de-
design. The political branches of the Government must ful-
fill this grave constitutional obligation if democratic
liberty and the federalism that secures it are to endure.220

To assure that the law-making branches of government do not vi-
olate this obligation, it is imperative that the judiciary not renounce
its role. The judicial branch must exercise its proper role as the
final arbiter, reject the automatic conclusion of "since Congress
said so it must be so," and recognize that this is, in fact, a judicial
question.

C. Data Fail to Provide a Rational Basis Even Under a
"Step by Step" Analysis

A legislative body need not address the totality of a given prob-
lem in a single piece of legislation.221 Limited legislation that evi-
dences a step by step approach to problem resolution is
appropriate. Such legislation can be judicially evaluated on its
individual merits. This principle is often applied to uphold economic
or social directed legislative enactments that are under-inclusive.

220. Id. at 1639 (Kennedy, J., concurring) (discussing fundamental aspects of
federalism); see H.R. Rep. No. 63, supra note 1, at 27 (minority views) (arguing that
proposed products liability reform is contrary to interests of federalism); see also S.
Rep. No. 69, supra note 4, at 64-66 (minority views of Sen. Hollings) (asserting that
current system is consistent with principles of federalism and concluding that this
fundamental concept should not be "tinkered" with "as the record [before Con-
gress we have on this issue is insufficient to take such action]."

("[R]eform may take one step at a time, addressing itself to the phase of the prob-
lem which seems most acute to the legislative mind." (citation omitted); Eaton v.
Jarvis Prods. Corp., 965 F.2d 922, 990 (10th Cir. 1992) (stating that legislature is
not required to fix entire problem or none of problem) (citation omitted). The
vast majority of provisions in the pending legislation are rationally related to a
legitimate governmental purpose. However, limited aspects of the Act, in both the
House and Senate versions, are subject to constitutional attack. The analysis that
follows is directed solely to the statute of repose.
One perception of statutes of repose is that they bear upon economic rights rather than broader substantive rights. For purposes of the discussion that follows, this erroneous perception will be accepted. Therefore, an under-inclusive products liability statute of repose is subject to step by step evaluation.

Products liability repose statutes apply to the limited number of persons who sustain product related injury after passage of a specified period of time. The majority of state statutes of repose contain limitations of approximately ten years,\(^{222}\) whereas the proposed national provision will contain either a fifteen or twenty year repose period.\(^ {229}\) Products liability repose statutes have no application to the vastly wider body of personal injury claimants injured by other forms of tortious conduct or to injuries caused by identical products at earlier times. The proposed national products liability statute of repose applies to only a small percentage of possible claims that would come within the purview of a broader statute directed to overall tort reform.

Under-inclusivity is also evident as only a marginal number of products liability claims will be affected by a fifteen or twenty year repose statute. Unlike a party's failure to comply with an applicable statute of limitations, which can be attributed to his or her fault, a party precluded from action through a statute of repose is barred by events beyond that party's control. In this sense, repose provisions are under-inclusive by virtue of their random application.

A statute that represents a proper initial step toward problem resolution is valid provided that this step meets constitutional muster. The proposed national statute of repose, if rationally related to resolution of an economic concern even though it is only a partial answer to that problem, should be upheld under rational basis analysis.

The available data make manifest that the statute of repose under consideration by Congress fails to address any significant aspect of the products liability crisis. The statute of repose concept, as a means to provide adequate insurance to manufacturers and to prevent problems of proof in the defense of products liability claims, rests not on fact but on quicksand and unsubstantiated opinion. This under-inclusive provision violates equal protection.

\(^{222}\) Sixteen states have statutes of repose. S. REP. NO. 69, supra note 4, at 44. Twenty states have enacted products liability statutes of repose of which seven have been repealed or declared unconstitutional. See Appendix.

\(^{229}\) H.R. 956, supra note 2, § 106 contains a fifteen year statute of repose, while H.R. 956, supra note 13, § 109 (Senate amended) contains a twenty year provision.
1. The Myths of an Insurance Crisis and Litigation Explosion

a. The Insurance Crisis

Perception is not necessarily reality. Basic principles of logic dictate that the expression of an opinion as a fact, even a legislative opinion, does not magically transform that opinion into fact. This distinction was judicially recognized as early as 1979 in regard to the insurance crisis and the inability of state reposes provisions to meaningfully address any such crisis. A realistic appraisal of relevant information as to the availability and cost of products liability insurance, the impact of products liability litigation on the civil justice system and other claims supporting imposition of a national statute of reposes reveal that these claims are predicated on perception rather than fact. These gossamer assertions must not be recognized as establishing a rational basis in fact between congressional objectives and the effects of the reposes statute.

That the insurance crisis was founded on perception rather than reality is evident in a highly respected report, the Final Report issued by the Interagency Task Force on Product Liability. As to the causes of the insurance problem, this report stated:

There is a limited statistical basis for setting premiums or establishing coverage limits for a very wide range of products, especially non-consumer products. Such insurance determinations are made on a highly judgmental basis. Because subjective judgement plays such an important role, psychological factors such as the “likelihood of big judgments,” “heightened consumer awareness,” “horror stories,” and “the need to be especially conservative”... are important... This atmosphere of uncertainty, at least in theory, can be reinforced by perceptions that the law is confused... Thus, perceptions of reality become

---

224. Due to the extensive legislative history of H.R. 956 and its predecessors, it is not possible to fairly present the extensive material contained in records of the congressional hearings. See H.R. Rep. No. 63, supra note 1, at 12-14 (providing reports of legislative history and hearings); S. Rep. No. 69, supra note 4, at 14-17 (same). This article, therefore, relies on the respective Committee Reports.

225. In regard to the insurance crisis, a respected commentator more recently observed: "[T]he crisis was not caused by a civil litigation 'explosion'—there was no explosion... It would be inaccurate to say that the tort system had absolutely no effect on the sharp premium increases during the mid-1980's. But the effect was primarily the result of fear." Jerry J. Phillips, Attacks on the Legal System—Fallacy of 'Tort Reform' Arguments, Trial, Feb. 1992, at 106 (citations omitted).

as important as reality when subjective judgments are being made.227

The report further indicated that the insurance availability problem is an isolated situation.228 Responses to the task force surveys indicated that there was no widespread problem in obtaining insurance.229 Perhaps even more important, there was no direct verifiable evidence that products liability insurance had been the cause of any business failure.230 Business failures blamed on products liability are caused by many factors including litigation expense, compensatory liability exposure, punitive damages exposure and other transaction costs including government safety regulation compliance.231 A logic that lumps these factors together with the cost of insurance so as to permit a conclusion that insurance caused the failure would readily be rejected by Mr. Spock. Yet, precisely such logic is reflected in the finding that eighteen companies no longer produce football helmets "due to liability exposure."232 No data is provided to establish the relationship of such exposure to the business failure. No mention is made of the fact that football helmets are currently marketed and that, perhaps, those who still market do so because they produced the better helmet.

Legislative action cannot be predicated on false logic and perception even if this is an accepted practice in the insurance industry. When a legislature predicates its judgments on non-facts, it eliminates any reasonable basis for relying on the legislative deter-

227. Id. at 127-28. Whether there was a crisis regarding products liability availability and cost in the 1980s remains an open question. There is some evidence supporting a link between reform of products liability law and reduction of insurance rates, but there is also substantial reason to be skeptical. See Theodore Eisenberg & James A. Henderson, Jr., Inside the Quiet Revolution in Products Liability, 39 UCLA L. Rev. 731, 792 & nn. 167-71 (1992). Assuming that (1) there was a crisis, and (2) reform was needed to resolve it, no such crisis exists in 1995.


229. Id.

230. Id.

231. Punitive damages is a wild card which can complicate both exposure evaluation and settlement efforts. Calculating the cost of punitive damages as part of insurance rate setting is difficult due to their unpredictable nature and because in a significant number of states, such damages cannot be insured against for public policy reasons. See 15A. George J. Couch, Cyclopaedia of Insurance Law 2d § 56.9 (rev. ed. 1983 & Supp. 1995) (providing analysis of insurability of punitive damages, with extensive case citation); JAMES D. GHIARDI & JOHN J. KIRCHER, PUNITIVE DAMAGES: LAW AND PRACTICE, §§ 7.11-14 (1984 & Supp. 1995) (same); Michael A. Rosenhouse, Annotation, Liability Insurance Coverage as Extending to Liability for Punitive or Exemplary Damages, 16 A.L.R.4th 11 (1982 & Supp. 1995) (same).

1995] CONSTITUTIONAL DIMENSION OF REPOSE STATUTES 1035

dination. Even in the 1980s, at the height of the perceived insurance crisis, those courts that seriously examined the claim found evidence that raised serious doubt as to the legislative perceptions.

The Supreme Court of Alabama, after review of the Final Report of the Federal Interagency Task Force on Product Liability, found that “[e]ven though the Task Force and others have alluded to the ‘long-tail’ claims problem, as far as this Court can ascertain, the problem has not been documented.”283 The opinion also referred to the Analysis to Section 110 of the Model Uniform Product Liability Act which recognized that “[t]he limited available data show that insurers’ apprehension about older products may be exaggerated.”284 Even the Insurance Service Office, the rate-making arm of the insurance industry, found that only 2.7% of products involved in products liability litigation were purchased more than six years prior to the injury-causing event.285

Alabama’s reliance on this data was echoed by the Supreme Court of Utah which also recognized that because insurance rates are based on an “occurrence” basis, the number of cases arising after its state’s six year period took effect “[are] insignificant and, at best, would have a negligible effect on insurance rates generally.”286 A statute of repose, as recognized by these courts, has a de minimis effect on both insurance rate reduction and insurance availability. As the pending repose statute treats claims based on products that are at least fifteen years old, one can rationally and reasonably conclude that this statute would have an even less significant effect than the minimal effect found by these courts.287 Therefore, the

233. Lankford v. Sullivan, Long & Hagerty, 416 So. 2d 996, 1001 (Ala. 1982); accord Berry v. Beech Aircraft Corp., 717 P.2d 670, 683 (Utah 1985) (focusing primarily on insurance issue as it existed in Utah and finding that “[t]he statute of repose effect in that regard is more fanciful than real”) (quoting Malan v. Lewis, 693 P.2d 661, 673 (Utah 1983)). Both courts rejected perception and focused on reality. Lankford, 416 So. 2d at 1002; Berry, 717 P.2d at 683.

284. Lankford, 416 So. 2d at 1002 (quoting Insurance Services Office Survey indicating that over 97% of product related accidents occur within six years of product purchase).

285. Id. (relying on Louis N. Massery, Date-of-Sale Statutes of Limitation—A New Immunity for Product Suppliers, 1977 INS. L.J. 535, 542 which provided study based on review of 7800 claims closed between July 1 and November 1, 1976 by 23 major insurance carriers).

286. Berry, 717 P.2d at 682-83.

287. If we assume that more than doubling the time frame, from six years to fifteen years, will result in a limited reduction of claims to 2%, the actual number of claims affected will be modest. On the federal level, some 13,554 products liability cases were filed in 1985. Michael J. Saks, Do We Really Know Anything About the Behavior of the Tort Litigation System—And Why Not? 140 U. Pa. L. Rev. 1147, 1202 (1992). Applying a 4% growth rate, the number of federal filings would be less than 20,000 in 1995. See S. REP. NO. 69, supra note 4, at 60 (minority views of Sen.
pending repose statute has even less relationship to the congres-
sional objective.

A national repose statute could theoretically have a more sig-
ificant impact than state statutes in that insurance rates are gener-
ally based on national rather than local occurrences. No such
effect is likely. Available data suggests that neither insurance rates
nor availability will be affected by a limitation on the small number
of products liability claims that would be precluded by the pending
legislation. The number of occurrences affected is so small as to
foster no significant change in the insurance picture.

The need for a repose statute precluding products liability ac-
tions, twelve years after sale, was rejected in New Hampshire pre-
cisely because the perceived insurance crisis had abated by 1983,
the year in which the New Hampshire Supreme Court decided
Heath v. Sears, Roebuck & Co.238 The Heath court stated:

Nor do we think that the twelve-year “statute of repose” is
substantially related to a legitimate legislative object. As
previously noted, the crisis in products liability insurance
had abated nationwide independent of RSA chapter 507-D
(Supp. 1979). Nonetheless, persons injured by defective
products are deprived arbitrarily of a right to sue . . . by
virtue of a statute that has become entirely divorced from
its underlying purpose.239

The absence of a national insurance crisis negates the congres-
sional finding that the Product Liability Fairness Act will resolve
the problem of increased insurance cost.240 This essential congres-
sional finding is based on something other than fact. Data accumu-
lated since 1983 establishes that the insurance crisis has abated and
that other foundational beliefs supporting the statute of repose are
misplaced.241

---

239. Id. at 296.
240. See generally H.R. 956, supra note 2, § 2(a)(8) (listing congressional
findings).
241. S. REP. NO. 69, supra note 4, at 66 (minority views of Sen. Hollings). The
1995] CONSTITUTIONAL DIMENSION OF REPOSE STATUTES 1037

The Senate Report's discussion of insurance costs is limited in terms of detail, yet general in terms of conclusions. The most significant discussion appears in the materials directed to the statute of repose.\(^{242}\) The Report correctly observes instances in which machine tools over one hundred years old have been the subject of litigation which, though often won by the manufacturer, carry extensive transaction costs.\(^{243}\) Due to the passage of time, many products are modified by one or more owners, yet the manufacturer can still be targeted.\(^{244}\) Somehow these facts are amalgamated into the concept of total cost distribution that shows that seven dollars are paid in defense costs for every ten dollars paid to claimants.\(^{245}\) The two points are distinct. The first refers to a limited number of claims, while the second is based on all claims. The modification problem is addressed by the alteration and misuse provisions of the proposed legislation.\(^{246}\)

The alteration provision would reduce potential liability but would not eliminate all associated transaction costs.\(^{247}\) Transaction costs, however, would be substantially reduced by a provision encouraging the use of summary judgment procedures, while permitting suits to go forward where a true manufacturing defect is attributable to the manufacturer. Such a provision could rely on a presumption of non-defect, require affirmative proof of a defect that existed and was not created by alteration of the product, and allow application of state law that often results in summary judg-

---

242. S. REP. NO. 69, supra note 4, at 43-44.
243. Id. The Senate Report cites testimony before the House Judiciary Committee by Charles E. Gilbert, Jr., President of Cincinnati Gilbert Machine Tool Company. Id. Mr. Gilbert noted that while such products liability suits are generally not successful, they result in an inefficient appropriation of corporate resources for defense, which hinders job creation and global competition. Id. at 44. Mr. Gilbert further testified that "[f]oreign corporations rarely have machines in this country that are more than 40 or more years old, so they pay less liability insurance than their American competitors." Id.
244. Id.
245. Id. at 43.
246. H.R. 956, supra note 2, § 104; H.R. 956, supra note 13, § 106 (Senate amended).
247. S. REP. NO 69, supra note 4, at 34. The alteration provision would reduce potential manufacturer liability by allowing a reduction of damages proportionate to the claimant's responsibility attributable to product misuse or alteration. Id. The provision, however, would not preclude plaintiff awards even where product alteration substantially caused injury. Id.
The Report also emphasizes an assertion that foreign competitors rarely have products in this country that are forty years old.\footnote{249} No data are provided to support this claim although it is logically correct in that major import of foreign products did not begin until the late 1960s. Yet the repose provision is directed to a fifteen or twenty year period and many foreign products now found in the United States were manufactured more than twenty years ago.\footnote{250}

On these predicates and unstated premises, the Report finds that the repose provision "provides a balanced solution to the problem of 'long tail' liability" and places "a reasonable outer time limit on litigation involving older products used in the workplace."\footnote{251} The Report provides no real support for the existence of a "long tail" problem in terms of actual cost of insurance or production. Further, no attention is paid to the fact that the repose provision is also applicable to products utilized outside the workplace. The shallowness of the Senate Majority Report’s reasoning is exposed in the Minority Report.\footnote{252}

The Minority Report relies initially on data similar to that relied upon by the courts.\footnote{253} In addition, it exposes the absence of a relationship between insurance rates and excessive products liability claims.\footnote{254} Early analysis by Victor Schwartz, then chairman of the Commerce Department’s Task Force on Product Liability, in-

\footnote{248. See, e.g., Woods v. Graham Eng’g Corp., 539 N.E.2d 316, 320 (Ill. App. Ct. 1989) (holding that manufacturer is only liable when manufacturer is responsible for the design of product which caused injury, therefore when product alteration is unforeseeable by manufacturer, manufacturer is not liable as matter of law); Robinson v. Reed-Prentice Div. of Package Mach. Co., 403 N.E.2d 440, 441 (N.Y. 1980) ("We hold that a manufacturer of a product may not be cast in damages, either on a strict products liability or negligence cause of action, where, after the product leaves the possession and control of the manufacturer, there is a subsequent modification which substantially alters the product and is the proximate cause of plaintiff’s injuries."); King v. K.R. Wilson Co., 455 N.E.2d 1282, 1282 (Ohio 1983) (per curiam) (affirming trial court’s grant of summary judgment when "press had been substantially altered and that there was insufficient proof to hold K.R. Wilson liable for an averred design defect in the unaltered portion of machine").}

\footnote{249. S. Rep. No. 69, supra note 4, at 44.}

\footnote{250. Id. at 43. This would seem to refute the legislation’s foundation premise which is “to level the playing field and allow these loyal corporate citizens to compete in the global marketplace.” Id.}

\footnote{251. Id. at 44.}

\footnote{252. Id. at 56-80 (minority views of Sen. Hollings).}

\footnote{253. For a discussion of judicial reliance on such data, see supra notes 299-45 and accompanying text.}

\footnote{254. S. Rep. No. 69, supra note 4, at 66-67 (minority views of Sen. Hollings).}
cated that "no one has ever demonstrated that the huge increases in product liability premiums in recent years were related to the number and/or size of product liability claims." Various other sources are cited to establish that this linkage is not satisfactorily established to the present time.

The core factor is less speculative. "There is ample evidence that the increases in product liability insurance costs were actually the result of the cyclical nature of the insurance industry and . . . underwriting practices, not product liability." These cycles relate to fluctuation between hard and soft insurance markets, the degree of competition for available premium volume and interest rates. Insurance industry data show that even during the purported crisis of the 1980s, the industry was highly profitable. "A compilation of the Institute's annual statistics shows that, between 1984-1994, property/casualty companies had a net after-tax income of approximately $100 billion and an increase in surplus of $63 billion to $190 billion."

If there is a "long tail" problem, it is obviously of limited impact. A statute of repose is not necessary to provide adequate insurance protection at reasonable cost. Any crisis in the cost or availability of insurance to product manufacturers is historical, not current. Nothing suggests that such a problem will emerge in the future. Everything suggests that any untoward increase in insurance rates will be attributed to the practices of the industry with little or no effect based on the limited number of suits that could be barred by the statute of repose.

b. The Litigation Explosion

Invalid perceptions also permeate discussion of the impact of tort litigation on the justice system. Available data mandate the conclusion that a statute of repose represents an overreaction to a perceived explosion of products liability and tort litigation. Although the public and many members of Congress may believe there is a tort based litigation explosion, the litigation growth is realistically attributable to developments in other areas of law coupled with the dramatic impact of cases generated by a few specific

256. Id. at 67.
257. Id.
259. Id. at 68.
260. Id. (relying on statistical data provided by Insurance Information Institute).
products such as Bendectin, asbestos and possibly silicon breast implants.

The pending national products liability statute of repose is an exercise in futility. It will not preclude a primary source of products liability litigation, asbestos claims, nor a substantial body of unethical drug and medical device claims as they will fall within the discovery rule exception or cause harm well within the statutory period. Further, the lengthy time frame will allow over 97% of all products claims even without the discovery rule exemption.

A significant number of products liability cases arise from workplace injuries. This is one of the few areas where the repose statute will have an effect, but it will be limited to something in the range of two percent of all such claims. Manufacturing equipment, such as the punch press, is one category of product that often remains functional beyond fifteen to twenty years. Yet "the number of workplace injuries and deaths are down in both absolute terms and as a population-adjusted rate." Using a statute of repose to address so small a number of possible claims, where the injury rate is already showing a downward trend, is analogous to repairing a Swiss watch with a sledgehammer.

It has been claimed that the cause of this reduction in injuries is unknown and, therefore, attempts at reform are no more than "shots in the dark." The reasons for this reduction in injuries and death can, however, be traced to a number of developments which negate the need for any "shot." Enforcement of worker safety standards through the Occupational Safety and Health Administration (OSHA), combined with similar agencies at the state level, is no doubt having a salutary effect. Improvements in product design and safety warnings are further reducing injuries. Corporate recognition that the cost of workers' compensation claims and overall production costs can be reduced by greater emphasis on providing a safe workplace also plays a significant role in this reduction. On a broader level, the safety inducements theorized when courts adopted the doctrine of strict liability in tort have had a practical effect.

The isolation of products liability actions for imposition of a statute of repose, based on a belief that the number of such actions

261. Id. at 42 (focusing on workplace injury in its discussion of statute of repose while supporting provision which goes well beyond workplace products).
262. Saks, supra note 237, at 1178 (relying on NATIONAL SAFETY COUNCIL, ACCIDENT FACTS 1989 14-15 (1989)).
263. Id.
is rapidly expanding in comparison to overall filings in the federal courts, cannot be substantiated through analysis of federal court statistics. By the mid-1980s, some one-third of all products liability actions filed in the federal courts were predicated on the health hazards of asbestos. Due to the long latency period between exposure and manifestation of either asbestosis or mesothelioma, the discovery rule set forth in the House version of H.R. 956 would allow most of such actions despite passage of the repose period. The exclusion of toxic tort actions from the repose period found in the Senate amended version would have the same effect. Moreover, if pharmaceutical claims are also beyond the purview of the statute of repose as those that cause latent manifestation of disease or other medical problems will be, the growth rate in products liability claims (without asbestos and pharmaceutical) is remarkably similar to the growth rate of tort claims generally. Moreover, pharmaceutical manufacturers are already beneficiaries of state laws that provide substantial protection when such products are properly marketed consistent with federal standards.

The burgeoning case load imposed on the federal judiciary is real. What is not real is the claim that it is largely attributable to products liability actions. Bearing in mind that the number of products affected by the proposed statute is extremely small, the broader figures take on even greater significance. These figures show that from 1976 to 1985, the growth rate in products litigation claims was 267%. While tort claims generally, including products liability claims, were increasing at a 62% rate, non-tort case filings

264. See S. Rep. No. 69, supra note 4, at 59-60 (noting that asbestos claims accounted for substantial increases in product liability filings during 1980s); see also Eisenberg & Henderson, supra note 227, at 734 n.6 (recognizing that asbestos litigation currently comprises more than half of all federal products liability filings).

265. See, e.g., Ariz. Rev. Stat. Ann. § 12-701 (1992) (stating compliance with terms of FDA approval or specified federal Acts bars imposition of punitive damages); Ohio Rev. Code Ann. §§ 2307.75(D), 2307.76(C) (Anderson 1995) (holding unavoidably dangerous ethical drugs and devices are not defective in design or formulation if proper warning is given to physician or other proper party and FDA does not require direct warning to user); Utah Code Ann. § 78-18-2 (1995) (stating compliance with terms of FDA approval or specified federal Acts bars imposition of punitive damages); Restatement (Second) of Torts § 402A cmt. k (1965) (stating standard uniformly followed in states which precludes finding defect for unavoidably unsafe products where adequate warning is provided); see also Grundberg v. Upjohn Co., 813 P.2d 89 (Utah 1991) (holding that FDA approval negates design defect).

266. Saks, supra note 237, at 1203. This finding is based on data accumulated from the Administrative Office of the United States Courts and Tort Policy Report. Id. House Report 63 asserts that from 1973 to 1988, products liability suits in federal courts increased by 1,000% while state court actions increased by between 300% and 500%. H.R. Rep. No. 63, supra note 1, at 9. Much of this data is suspect.
increased by 153%.\textsuperscript{267} Indeed, the data indicates that social security cases increased by 238% and contract-based claims by 117% during this period.\textsuperscript{268}

Utilizing a different approach, other scholars have concluded that if cases predicated on injuries allegedly attributable to Bendectin and the Dalkon Shield are removed from the equation, then presumably overall products liability filings have been declining since 1981.\textsuperscript{269} This methodology establishes that the entire increase in products liability filings from 1981 to 1985 was attributable to these two products. The proposed repose statute would not affect Bendectin or Dalkon Shield litigation.\textsuperscript{270}

It is difficult, however, to attribute the reduction in filings to trends in the incidence rate of products related injuries or death. The number of accidental injuries declined from 1975 to 1982 and the number of accidental deaths declined from 1975 to 1983.\textsuperscript{271} Disabling injuries have remained fairly consistent since 1982 and there has been an overall increase in accidental injuries and deaths since the early to mid-1980s.\textsuperscript{272} It must also be recognized that the number of filings can increase even if a smaller percentage of injured parties file suit as both the number of products and the overall population subject to injury continue to grow. Thus, the decline in filed claims cannot be attributed to a decreasing number of potential suits. It is more appropriate to view the decline as related to changes in legal doctrine\textsuperscript{273} or the current environment regarding

\textsuperscript{1042} See Saks, \textit{supra} note 289, at 1202-04 (challenging statistical veracity of products liability growth estimates).

\textsuperscript{267} Saks, \textit{supra} note 237, at 1198.

\textsuperscript{268} Id. at 1200-01.

\textsuperscript{269} Eisenberg & Henderson, \textit{supra} note 227, at 743. The decline is even more precipitous if asbestos claims are added to the equation. This conclusion is based on a comparison to the Gross National Product for personal expenditures on durable and nondurable consumer goods.

\textsuperscript{270} Bendectin allegedly causes birth defects which are discoverable at, or shortly after, birth. Daubert v. Merrell Dow Pharmaceuticals, 509 U.S. 579 (1993). Dangers associated with the Dalkon Shield, which has been off the market for many years, were evident shortly after its use became widespread. See Walter L. McCombs & James F. Szaller, Note, \textit{The Intrauterine Device: A Criticism of Governmental Complaisance and an Analysis of Manufacturer and Physician Liability}, 24 CLEV. ST. L. REV. 247, 247-53 (1975) (noting inherent hazards of IUD's on female physiology). Further, House Report 63 indicates that despite substantial success in defending Bendectin actions, the manufacturer withdrew the drug from the market after facing nearly 1,700 actions following a 1969 publication possibly linking the drug to birth defects. H.R. REP. NO. 63, \textit{supra} note 1, at 10.

\textsuperscript{271} Eisenberg & Henderson, \textit{supra} note 227, at 750.

\textsuperscript{272} Id.

\textsuperscript{273} Id. at 751. The authors also contend that the decline is not attributable to the influx of cases 10 years ago where the bar was seeking to establish the viabil-
products liability claims.

The small number of cases involving products within the purview of the repose statute will not attain the goal of reducing the number of federal court filings.\textsuperscript{274} To address this problem in a rational manner requires broader based products liability and tort reform and other modifications. Absent an ability to reduce calendar congestion in the state systems, the federal judicial system provides an alternative forum for products liability actions in the substantial number of cases where the necessary diversity exists. Moreover, differences in federal rules of evidence and procedure can encourage the filing of suits in federal court rather than state courts. For example, any products case involving new scientific or medical claims is more likely to be filed in a federal court consistent with the law laid down in \textit{Daubert v. Merrell Dow Pharmaceutical, Inc.}\textsuperscript{275} than in a state court retaining the law of \textit{Frye v. United States}.\textsuperscript{276}

Of course, a national repose statute would bear on both federal and state actions with its major impact on state actions. The vast majority of products liability claims are filed in state courts.\textsuperscript{277} Despite the assertion that state court products liability suits have increased dramatically, other data reveal a vastly different picture. A recent study concludes that products liability cases comprise only \textit{.36\%} of all state civil filings.\textsuperscript{278} More importantly, the number of products liability cases in the federal courts, excluding asbestos actions, declined \textit{36\%} between 1985 and 1991.\textsuperscript{279}

Eisenberg and Henderson's empirical study of products liability of various claims and that, with the success of such suits, the suits left for litigation today are factually weaker. \textit{Id.} at 754-60.

\textsuperscript{274} Congressional findings include assertions that there is abuse of the civil justice system and that the United States is an overly litigious nation. \textit{H.R. 956, supra} note 2, §2(a)(1)-(2).

\textsuperscript{275} 509 U.S. 579 (1993).

\textsuperscript{276} 299 F. 1013 (D.C. Cir. 1925). \textit{Daubert} rejected \textit{Frye}'s "general acceptance" rule for admissibility of scientific evidence as inconsistent with the Rules of Evidence. \textit{Daubert}, 506 U.S. at 917. The Court replaced this standard with a balancing test that allows the trial judge, as the "gatekeeper," to consider "general acceptance" as one of several factors bearing on the trial court's discretionary power to admit or reject evidence. \textit{Id.} In addition, counsel's belief as to the quality of the judiciary, quality of the jury panels, the prestige or ego factor related to federal litigation and relative court congestion can bear on forum selection.

\textsuperscript{277} Saks, \textit{supra} note 237, at 1205 (indicating that \textit{98\%} of filings are in state courts).

\textsuperscript{278} \textit{H.R. Rep.} No. 63, \textit{supra} note 1, at 26 (minority views) (relying on March 1994 report of National Center for State Courts).

\textsuperscript{279} \textit{Id.} Notably, on a national basis, state tort actions have decreased since 1990. \textit{Id.}
ity actions casts substantial doubt on the need for products liability reform and has been described as "[a] bullet in the head of products liability reform." Their more recent study confirms that the need for products liability reform is questionable in light of declining real dollar awards and declining plaintiff success rates. The trends they describe, which minimize the need for products liability reform, are national in scope and contrast sharply with perception. Though comprehensive nationally based products liability reform is necessary to provide uniformity, appropriate modification to the law and to discourage the bringing of frivolous actions, an understanding of the data compels the conclusion that such reform does not require a statute of repose.

A national products liability statute of repose is justified only if it will realistically limit the number of products liability claims filed or somehow reduce the amount of successful litigation. Only such results would justify the various findings and objectives contained in the Product Liability Fairness Act. As previously noted, the number of cases potentially affected by such a statute are minimal and there is no indication of any recent substantial rise in products liability litigation. It is now clear that two other factors suggest the absence of any need for such a statute. First, the percentage of successful cases filed in both federal and state courts has steadily declined. Second, median pretrial awards have shown little steady growth during the 1980s. Indeed, within this period some years have shown a decline in such awards. Utilizing data provided by the Adminis-

281. Id. at 734.
282. Id.
283. Victor E. Schwartz, on behalf of the Product Liability Alliance and the Product Liability Coordinating Committee, testified:

In the past dozen years, over a dozen states have passed some form of product liability legislation. All this legislation is different and it has continued the Tower of Babel style product liability law we have in the United States. In spite of arguments to the contrary, product liability in the United States is not uniform. Nevertheless, products are uniform, and standards of and for safety should have uniformity.... In the United States, over 70 percent of goods that are manufactured in a state are shipped out of the state. For that reason, state product liability legislation has less than a 30 percent "effectiveness" standard.

Hearings S. 687, supra note 74, at 120-22.

284. Eisenberg & Henderson, supra note 227, at 767. There is evidence of an uneven increase in trial awards. Id. at 764-66. The extensive data regarding awards has no direct bearing on the efficacy of a statute of repose, though it has considerable bearing on the finding of excessive damage awards. H.R. 956, supra note 2, § 2(a)(3).
trative Office of the United States Courts and a review of published state and federal decisions, empirical evaluation establishes that plaintiffs' success rates in published opinions have declined from 56% in 1979 to 39% in 1989 and fell 24% at the federal district court level during the same time frame. Comparing the data to states with and without effective repose statutes reveals no meaningful difference.

This national trend cuts across most product types. The success rate decline has affected claims focused on such key products as industrial machinery, automobiles and construction equipment. Of the twenty-one major product categories specified, only four showed an increase in successful actions. Of these four, only two, toxic substances and tools, are substantial.

The disparate elements necessary for ascertaining the need for a statute of repose all suggest that no rational basis for its creation exists. The scope of the proposed statute is highly limited and will have no effect on core areas of litigation such as asbestos and Bendectin. The number of products and potential products related claims precluded by the act is so insignificant as to have no meaningful effect on insurance availability or rate setting. The insurance crisis was largely attributable to causes outside of actual case history and has abated. The litigation explosion is primarily attributable to increases in commercial and entitlement litigation. Plaintiffs are facing a nationally observable reduction in successful litigation. Lyrics from a well known rock musical put the need for such action

285. Eisenberg & Henderson, supra note 227, at 741. From 1985-89, plaintiffs' success rate has declined in 36 states while increasing in only 13. The decline includes many states with major populations and does not show a skewed or aberrant result based on a single state experience. Id. at 773. A similar reduction of plaintiffs' success rate is found in the federal courts. Id.

A twelve month study ending June 30, 1992 indicates that of 762,000 state civil cases decided in 75 of this country's most populated counties, only 1504 (2%) were decided by juries. Only 360 of these were products liability actions. Plaintiffs' 41% success rate in these actions is remarkably close to the 99% rate found by Eisenberg and Henderson for 1989. See Prod Liab. Rep. (CCH) No. 837 (July 24, 1995) (summarizing U.S. Dep't of Justice, Bureau of Statistics, Rpt. No. NCJ-154346, Civil Jury Cases & Verdicts in Large Counties).

286. Compare the states listed in the Appendix with the data provided by Eisenberg and Henderson. See Eisenberg & Henderson, supra note 229, at 797, app. A, tables A1-A11.


288. Id. The proposed national repose statute would be inapplicable to toxic substance claims. Judicial outcome is already limiting suits in a manner consistent with the legislative objective.
into focus: “What’s the buzz? Tell me what’s a happening.”

2. The International Competitiveness Canard

The assertion that products liability law undermines America’s ability to compete in the international market is stated as a congressional finding. This finding, though subject to debate, is based on facts sufficient to support the need for national legislation. It is, however, inadequate to provide a rational basis for concluding that a national statute of repose will lead to improved international competitiveness. Inasmuch as the proposed statute of repose is to be upheld even if it is an “imperfect fit” with congressional objectives, the extent of the fit between international competitiveness and this specific section of the Act must be explored.

Assertions that products liability law adversely impacts competitiveness are founded on two key factors: (1) the uncertainty in the litigation process, and (2) the high cost of products liability insurance in the United States. The litigation process is, by definition, an uncertain endeavor. The pending Act’s provisions dealing with damage limitations, comparative fault, and an alcohol and drug defense will, over time, provide some degree of uniformity and predictability as courts interpret and apply these terms. The proposed statute of repose will have little or no impact on uniformity, predictability or insurance costs.

Related to these factors is the capacity of American courts to assert jurisdiction over foreign companies whose products cause injury in the United States. Unless jurisdiction can be gained, foreign competitors will receive a highly favorable cost advantage. Through the early 1970s, courts failed to exercise the full scope of in personam jurisdiction available to them thereby insulating foreign manufacturers from suit in the United States. Foreign manufactu-

289. Andrew Lloyd Webber & Tim Rice, What’s the Buzz/Strange Things Mystifying, on Jesus Christ Superstar Libretto (Leeds Music Ltd. 1969).
290. H.R. 956, supra note 2, § 2(a)(7).
293. See, e.g., Harvey v. Chemie Grunenthal, G.m.b.H., 354 F.2d 428 (2d Cir. 1965) (holding that German manufacturer of thalidomide whose product sold in Germany, but used in New York, was not subject to jurisdiction), cert. denied, 384 U.S. 1001 (1966); Delagi v. Volkswagenwerk AG, 278 N.E.2d 895 (N.Y. 1972) (holding that New York domiciliary injured in Germany alleged due to defective automobile purchased in Germany cannot sue manufacturer in United States); cf.
turers were adept at creating United States subsidiary importers to
insulate the parent company from suit thereby gaining litigation
and marketing advantages that lowered their cost of doing business
in comparison to domestic companies. Foreign companies were
further advantaged by a favorable exchange rate that made it ad-
vantageous to market in the United States while raising the price of
American products marketed abroad. These factors no longer
exist.

The Yen, for example, is vastly stronger today and, absent unre-
lated Japanese trade practices, the exchange rate would en-
courage marketing of American products. Moreover, foreign
manufacturers are normally subject to jurisdiction in the United
States consistent with the broad reach of modern long-arm service
statutes and a liberal application of what was once a restrictively
interpreted minimum contacts doctrine.

Foreign manufacturers subject to American jurisdiction are
subject to American law. They are treated and judged, consistent
with local substantive law, like any domestic company. Litigation
and transaction costs of doing business in the United States, insofar
as they relate to products liability, are the same regardless of the
home nation of the product manufacturer. These costs apply with

New York resident injured at hotel in England could bring suit in New York).

294. Perhaps the leading case as to the inability of a plaintiff to reach the
parent of an independent subsidiary is Cannon Mfg. Co. v. Cudahy Packing Co.,
267 U.S. 333 (1925). The distinct roles created difficulties in the discovery process
when manufacturer’s research and development or quality control records were
sought and also protected the foreign company’s assets. Id.

295. For example, automobile dealership practices are partially responsible
for the fact that America’s Big Three automotive manufacturers have achieved
only a 1% market in Japan while Japanese manufacturers enjoy a 23% market
share in the United States. See Paul Blustein & Warren Brown, In Doing Business, A
Deal of Difference; Contrasts in U.S., Japanese Sales Alliances Shed Light on Automotive

the need for minimum contacts with a state in order to assert in personam jurisdic-
tion over foreign corporations to comport with due process in the interest of
“traditional notions of fair play and substantial justice.” Id. at 316. Jurisdictional
outer parameters were established in Asahi Metal Industries Co. v. Superior Court,
480 U.S. 102 (1987), a case arising out of a dispute between Japanese companies.
Absent such aberrational facts, exercising jurisdiction over foreign companies in
American courts is readily accomplished. See, e.g., Tobin v. Astra Pharmaceutical
Prods., Inc., 993 F.2d 528 (6th Cir. 1993) (involving Dutch drug manufacturer);
manufacturer of rail cutting saw), aff’d without opinion, 16 F.3d 411 (4th Cir. 1994);
Newport Components, Inc. v. NEC Home Elecs., 671 F. Supp. 1525 (C.D. Cal.
1987) (involving Japanese manufacturer of electronic products); see also H.R. 956,
supra note 2, § 107 (addressing jurisdiction over foreign companies in manner
consistent with due process).
equal force to all manufacturers and all equally benefit from a statute of repose.

Two areas in which jurisdiction determinations relate to choice of law issues require further explication. The first is where an American manufacturer is subjected to the jurisdiction of a foreign nation whose choice of law rules lead to application of American law when its own companies, in identical situations, could be subject to more business oriented domestic law. This possibility cannot be dismissed even though its extent is unknown. Paradoxically, foreign application of the proposed statute of repose would be detrimental to American competitiveness. Application of the American repose provision, with at least a fifteen year time frame and its various built in exceptions, could often replace a far more stringent foreign statute that would preclude many more actions. The repose statute contained in the European Directive relied upon by Congress297 contains a blanket ten year limitation period.

Congress can rejoice in the fact that a federal repose statute would most likely be deemed inapplicable in foreign forums thereby aiding American competitive ability.298 Passage of such a provision would potentially confuse the issue and allow foreign courts, at least those within the European Community, to expand the liability of American companies by applying the American repose statute to them while continuing to protect domestic companies through application of a more stringent local statute of repose. Application of the proposed American repose statute will be injurious, not advantageous.

The second choice of law related situation that could yield a competitive disadvantage occurs when a product related injury takes place in a foreign nation and the injured party brings suit in the United States against an American manufacturer seeking application of American law.299 As noted by the Senate: "[t]he dimin-

298. For example, French and German courts characterize statutes of limitation as substantive for choice of law purposes. 1 ERNEST RABEL, THE CONFLICT OF LAWS, A COMPARATIVE STUDY 70 (2d ed. 1958). In civil law nations, the principle of the place of the wrong as governing the rights of the parties extends to limitations upon the time for bringing the action as part of the substantive law. Id. at 294. Thus, most of the nations which comprise the European Community would apply the Community's own Directive as to repose, set forth infra note 312, rather than the American statute of repose. The same result follows for nations that view limitation statutes as procedural unless deemed a part of the substantive right. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 142-143 (1969).
299. It is unlikely, though not impossible, for a foreign national injured in a foreign nation by an American manufactured product to succeed in gaining the benefit of American law if suit was brought in the United States. Such forum shop-
ished importance of lex loci means U.S. manufacturers may be held to higher and more costly product liability standards in both U.S. and foreign markets while foreign competitors only confront U.S. law in the United States." The Senate fails to recognize that United States companies, whose acts or products cause injury in foreign nations, may obtain dismissal of actions filed against them in the United States based on forum non conveniens. Such a dismissal, with suit now to be filed in the foreign nation, could then be controlled by the local law of the foreign forum thereby providing a benefit to the American company. As a forum non conveniens motion may be denied, this argument remains sufficient to justify a national products liability act that reduces the cost of such actions. The argument has no significant bearing on the validity of a statute of repose as, once again, the statute applies to all with equal force. Moreover, the statute of repose will have a de minimis effect on foreign manufacturers as the number of foreign products coming within its purview will be highly limited.

The underlying question is whether products liability reform is an appropriate means to improve American competitiveness or whether improvement can better be made through addressing the wide variety of other factors that bear on international competitiveness. The Committee Reports argue that products liability reform is an appropriate means to this end.

The Senate focuses largely on insurance cost differentials that have no true relationship to the statute of repose. For example,
the Senate's claim of an insurance cost differential is significantly based on a 1982 study finding that "the price of imported products can be lower due to the difference in liability insurance rates, if the importer does not sell all of its products in the United States."\(^\text{304}\) This reliance is misplaced. First, it implicitly suggests that foreign companies would gain less protection from a statute of repose than would American manufacturers as fewer of its products would be targeted in products liability litigation. Second, since 1982, there has been a substantial influx of foreign products into the United States.\(^\text{305}\) This influx will influence foreign companies' insurance rates as the number of litigation occurrences will rise.\(^\text{306}\) Additional factors, relied upon by the House Committee, require further analysis.

The House Report on the Common Sense Product Liability Reform Act argues that American companies face a "patchwork of liability standards" that inhibit their ability to compete.\(^\text{307}\) It is asserted that foreign competitors face no such handicap in their own domestic markets due to uniform products liability regulations found in both the European Community and in Japan.\(^\text{308}\) There is, unquestionably, a significant degree of uniformity in products liability law among the nations that comprise America's major trading

Although the data relied upon is outdated as to marketing and liability changes, and subject to question in terms of how rates are set, the underlying position has sufficient validity for purposes of application of a rational basis test in regard to overall national legislation.

\(^\text{304}\) Id.


To my personal knowledge, a single German automobile manufacturer was a target defendant in over 200 products liability suits at any given time between 1967 and 1970. The number of imported products currently in the United States and which have been in the United States for years, guarantees that foreign companies will face a substantial number of products liability claims governed by American law with a commensurate effect upon their insurance rates.

\(^\text{306}\) Although some intangible factors affect insurance rate setting, it is well recognized that the primary factor is the occurrence rate. See McGovern, supra, note 5, at 593; note 183 and accompanying text; and text accompanying note 190.

\(^\text{307}\) H.R. REP. NO. 63, supra note 1, at 10.

\(^\text{308}\) Id. at 10-11.
partners. The House Report delineates six factors that create this handicap:309 (1) a unified definition of defect; (2) a complete defense for products which meet mandatory regulations set by public authority; (3) limitation on non-economic damages; (4) punitive damages are largely unknown; (5) a limit on liability based on known technical knowledge (state of the art defense); and (6) a ten year statute of repose.310

The pending legislation provides no unitary definition of defect or general liability standard nor does it create a government regulation compliance defense or address a state of the art defense. It does address both damages aspects and will have a salutary effect in this area. Within this limit, the proposed national Act will address imbalances that deter American competitiveness in the international arena.311 This has no bearing upon, and is not true of, the statute of repose.

The proposed statute of repose is substantially longer than, and contains exceptions that are not found in, the foreign statute relied upon by the Committee.312 Even assuming some benefit from a statute of repose, it takes little thought to recognize that a stiff ten year provision will have far more effect than a muddled fifteen or twenty year provision. This flaw exists without regard to the dangers the statute presents for resolution of choice of law issues.

309. Id.

310. Id. The minority view strongly suggests that the benefits relied upon by the House Committee majority are exaggerated. S. REP. NO. 69, supra note 4, at 71-72 (minority views of Sen. Hollings).

311. The sufficiency of some facts relied upon in the House outweigh the lack of completeness and currency of data for provisions other than the statute of repose. The repose data are insufficient. For example, there is no support for the claim of a twenty-fold differential in insurance costs. There is also no specification of the impact such costs have on pricing nor any significant indicator of whether this small aspect of total production cost will have an adverse effect on marketing capacity. See H.R. REP. NO. 63, supra note 1, at 10-11.

312. Ferdinando Albanese & Louis F. Del Duca, Developments in European Product Liability, 5 Dick. J. Int'l. L. 193, 242 (1987). Article 10 of The European Community Directive of July 25, 1985 provides for a three year statute of limitations modified by a discovery rule. Id. Article 10, however, is limited by the repose provision of Article 11 that provides:

Member States shall provide in their legislation that the rights conferred upon the injured person pursuant to this Directive shall be extinguished upon the expiry of a period of 10 years from the date on which the producer put into circulation the actual product which caused the damage, unless the injured person has in the meantime instituted proceedings against the producer.

Id. The Directive operates "without exceptions." Hearings S. 687, supra note 74, at 44 (testimony of Victor E. Schwartz).
Far more important than the limited role played by products liability law upon international competitiveness are the more significant reasons for failure of American competitiveness that lie elsewhere and require a vastly different solution. A statute of repose does not represent a step by step approach to the resolution of international competitiveness issues. Products liability claims do not inhibit American capacity to compete in the international marketplace. The statute represents a misstep.

As noted by the Office of Technology Assessment in 1990, the four most important steps necessary to improve competitiveness are: (1) lowering the cost of capital; (2) improving the quality of human resources through education and quality of the workforce; (3) improving the diffusion of manufacturing technology to small and medium businesses; and (4) providing government funding for research and development.\footnote{To truly enhance American competitiveness our focus must turn to these and other factors.} To truly enhance American competitiveness our focus must turn to these and other factors.\footnote{These approaches would be vastly more effective in increasing American competitiveness than any products liability legislation. Products liability litigation plays a minor role in this complex arena. The proposed statute of repose plays virtually no role in this matrix and cannot be justified as a means to enhance American international competitiveness.}

III. Conclusion

Statutes of repose will have no more than a negligible effect upon manufacturers' ability to obtain insurance coverage at affordable rates. Such statutes will have virtually no impact on the number of tort actions filed in the United States and represent only a few grains of sand in the beach of products liability actions. There is no rational basis for the imposition of a fifteen year national products liability statute of repose. True products liability reform would obviate the need for such statutes by providing the substantive protection truly needed by American industry.

\footnote{S. Rep. No. 69, supra note 4, at 69 (minority views of Sen. Hollings). This view also attacks the foundations of various cost claims, the relationship between products liability law and competitiveness and other premises. \textit{Id}. It, nevertheless, fails to establish a challenge sufficient to invalidate the overall Act.}

\footnote{Such factors include negotiation of fair trade agreements, tariffs or other steps to increase the cost of goods manufactured through the use of child or sweatshop labor in foreign nations, retention of valid product and workplace safety regulation while reviewing and discarding those regulations which are ineffective in their ability to protect consumers and workers, creation of tax laws which encourage research and development and passage of a complete national products liability reform act.}
### A. Existing Statutes:

<table>
<thead>
<tr>
<th>State Repose Provision</th>
<th>Constitutional Validity</th>
</tr>
</thead>
</table>
KAN. STAT. ANN. § 60-3303 (1994) (ten years)
Valid by implication as section was interpreted in Bauman v. Excel Indus., 845 P.2d 65 (Kan. Ct. App. 1993).

NEB. REV. STAT. § 25-224(2) (Reissue 1989) (ten years)

N.H. REV. STAT. ANN. § 507-D:2 (1983) (twelve years)

N.C. GEN. STAT. § 1-50(6) (1994) (six years)

N.D. CENT. CODE § 28-01.1-02(1) (1991), as amended, Laws 1995, ch. 305 (ten/eleven years). § 28-01.1-02(1) was replaced by 28-01.3-08
The N.D. Supreme Court has invalidated the repose provision of the Wrongful Death Act, but upheld the repose provision relating to real property. Compare Vantage, Inc. v. Carrier Corp., 467 N.W.2d 446 (N.D. 1991) with Bellemare v. Gateway Builders, Inc., 420 N.W.2d 733 (N.D. 1988).

OR. REV. STAT. § 30.905(1) (1987) (eight years)

R.I. GEN. LAWS § 9-1-13(b) (1976) (ten years)
CONSTITUTIONAL DIMENSION OF REPOSE STATUTES

TENNESSEE CODE ANN. § 29-28-103 (1980) (ten years)

Valid. Kochins v. Linden-Alimak, Inc., 799 F.2d 1128 (6th Cir. 1986); Jones v. Five Star Eng’g, Inc., 717 S.W.2d 882 (Tenn. 1986).

TEXAS CIV. PRAC. & REM. CODE ANN. § 16.012(2)(b) (West 1996) (fifteen years)

Valid by implication as the real property improvement provision has been applied in several cases. See, e.g., Trinity River Auth. v. URS Consultants, Inc.—Texas f/k/a URS/Forrest and Cotton, Inc., 889 S.W.2d 259 (Tex. 1994); Karisch v. Allied-Signal, Inc., 837 S.W.2d 679 (Tex. Ct. App. 1992).

B. REPEALED STATUTES:

FLA. STAT. ANN. § 95.031(2) (twelve years), repealed by, 1986


S.D. CODIFIED LAWS § 15-2-12.1 (six years), repealed by, S.L. 1985, ch. 157, § 2


UTAH CODE ANN. § 78-15-3 (ten years), repealed by, 1989 Utah Laws ch. 119 § 1


This appendix does not include reference to the array of other, often related, repose provisions such as those governing products utilized in the improvement of real property, statutes directed to discrete products such as Agent Orange, product groups such as herbicides or provisions of the Uniform Commercial Code.
Various exceptions and special provisions found within given statutes are also excluded.