Fordham Urban Law Journal

Volume 6 | Number 2 Article 14

1978

CONSTITUTIONAL LAW--Due Process and Equal Protection--Price-Anderson Act's $560,000,000 Limit on Liability From A nuclear Power Plant Accident Is Unconstitutional

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CASE NOTES

CONSTITUTIONAL LAW—Due Process and Equal Protection—Price-Anderson Act's $560,000,000 Limit on Liability From A Nuclear Power Plant Accident Is Unconstitutional. *Carolina Environmental Study Group v. United States Atomic Energy Commission,* 431 F. Supp. 203 (W.D.N.C.), *cert. granted,* 98 S. Ct. 426 (1977).[1]

Plaintiffs, who live in the vicinity of Charlotte, North Carolina, contested the constitutionality of the Price-Anderson Act,[2] which sets a $560,000,000 limit on the aggregate amount that victims of a nuclear accident may recover.[3] Two dual reactor atomic turbine plants are under construction adjacent to the city of Charlotte by the Duke Power Company,[4] which joined with the defendants in this action. Since, in the event of an accident at these facilities the Act's limit may deny plaintiffs full compensation,[5] plaintiffs obtained a

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1. A direct appeal was taken pursuant to 28 U.S.C. § 1252 (1975), since an Act of Congress was declared unconstitutional and an agent of the United States was a party to the proceeding.

2. Act of Sept. 2, 1957, Pub. L. No. 85-256, 71 Stat. 576, *codified at* 42 U.S.C. § 2210 (1970).

3. 42 U.S.C. § 2210(c) (1970).

4. The Catawba Nuclear Station is sixteen miles south of Charlotte and the McGuire Nuclear Stattion is on Lake Norman seventeen miles north of Charlotte (population approximately 300,000). Carolina Environmental Study Group v. United States, 431 F. Supp. 203, 206 (W.D.N.C.), *cert. granted,* 98 S. Ct. 426 (1977).

5. These nuclear power plants pose basically two hazards. Certain areas north of Lake Norman will reach more than 95 degrees when the one and one half to two million gallons of water per minute used to cool the reactor is recirculated into the lake. The environmental, aesthetic and recreational value of the lake will surely diminish. *Id.* at 208. The Price Anderson Act provides a shield to insulate nuclear facilities from liability for the second hazard. In case of a loss of coolant accident (LOCA) a "core melt" may occur with the potential release of all accumulated fission products. Each of the McGuire Nuclear Station's reactors contain about 1,000 times the amount of radioactive material used in the Hiroshima atomic bomb. *Id.* at 207.

A 1957 study prepared for the Atomic Energy Commission (AEC) hypothesized that a core melt in a then existing nuclear reactor could result in as many as 3,400 deaths, 43,000 injuries and as much as $7,000,000,000 in property damage from long term contamination. AEC, THE THEORETICAL POSSIBILITIES AND CONSEQUENCES OF MAJOR ACCIDENTS IN LARGE NUCLEAR POWER PLANTS (1957). A summary of these conclusions, by Harold Vance, is included in the Joint Committee's Report on the Price-Anderson Bill, H.R. REP. No. 435, 85th Cong., 1st Sess. 31-34 (1957).

An updating of the AEC's 1957 study was undertaken in 1965. The results, however, were

declaration holding the Price-Anderson Act unconstitutional as violative of due process and equal protection.[6]

The Price-Anderson Act, passed in 1957, limits the aggregate liability of utilities and the amount recoverable by those injured in a nuclear incident[7] to $560,000,000.[8] Duke Power Company is required

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never disclosed "presumably to avoid unduly alarming the public." Green, *Nuclear Power: Risk, Liability, and Indemnity*, 71 Mich. L. Rev. 479, (1973). A commissioner of the AEC did refer to the 1965 study by stating "that seven years after the first study, one is considering theoretically conceivable accidents in a reactor which is considerably larger than in 1957, located somewhat closer to population centers, with the confidence of increased operating experience and constantly improving designs and engineering safeguards. *Id.* at 493. In 1965, the Chairman of the AEC further stated that "assuming the same kind of hypothetical accidents as those in the 1957 study, the theoretically calculated damages would not be less and under some circumstances would be substantially more than the consequences reported in the earlier study (of $7,000,000,000 in property damage alone)." Hearings before the Subcommittee on Legislation of the Joint Committee on Atomic Energy on Proposed Extension of A.E.C. Indemnity Legislation, 89th Cong. 1st Sess. 347-48 (1965). The Commissioner further stated that the "probability of catastrophe is exceedingly low, even lower than our estimate of the remote probability of such an event in 1957 . . . We cannot say, however, that the likelihood is non-existent." *Id.* at 348. As the possibility of such an accident is undisputed, the probability that $560,000,000 would not cover the consequent damages is equally obvious.

6. The *Carolina* court held that the Act violated due process for two reasons: because it limits a common law right of action without providing for a compensatory benefit to those whose rights have been limited (no quid pro quo) and because the Act permits the destruction of life and property without reasonable certainty of just compensation. The court also held that the Act violated equal protection because it irrationally and arbitrarily burdens those least able to shoulder the damages in the event of a nuclear accident. Carolina Environmental Study Group v. United States, 431 F. Supp. 203, 222-25 (W.D.N.C.), *cert. granted*, 98 S. Ct. 426 (1977).

A representative of Duke admitted that the company's continued participation in the nuclear energy field was contingent upon the Price-Anderson Act. *Id.* at 218. Once shown that the Act is the sine qua non of nuclear plant construction, any injury, however slight, caused by the building of these plants gives rise to standing to challenge the Act. *See* Sellers v. Friedrich Refrigerators, Inc., 283 N.C. 79, 194 S.E.2d 817 (1973). The *Carolina* court deemed the present threat of "having to make the Hobson's choice of moving away or living with the constant and present fear of future catastrophe" was sufficient injury to constitute standing. 431 F. Supp. at 221. The court also noted, as an equitable matter, that it may be too late to challenge the Act's constitutionality if the plaintiff's are to wait until a reactor accident occurs. *Id.* at 226.

7. 42 U.S.C. §§ 2210(a), 2210(c) (1970). A "nuclear incident" is defined to include any personal injury or property damage resulting from exposure to radiation. 42 U.S.C. § 2014(a) (1970).

8. In recognition that this amount may prove insufficient to compensate victims of a nuclear accident, Congress further provided: "That in the event of a nuclear incident involving damages in excess of that amount of aggregate liability, the Congress will thoroughly review the particular incident and will take whatever action is deemed necessary and appropriate to protect the public from the consequences of a disaster of such magnitude." 42 U.S.C. § 2210(e) (1970).

to carry the maximum amount of private insurance available.[9] The balance of the $560,000,000 liability not covered by private sources is assumed by the Nuclear Regulatory Commission (formerly the Atomic Energy Commission), under an idemnification agreement.[10] If a court decides that claims may exceed the mandated limit, the $560,000,000 is distributed among the claimants on a pro rata basis with due regard to latent injury claims that may later be filed.[11]

The Price-Anderson Act is one of Congress' most ambitious attempts at providing protection from liability outside the workmen's compensation field.[12] An analogous limitation on liability is the re-

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9. Reactors producing 100,000 electrical kilowatts or more must carry the maximum amount of private insurance available. 42 U.S.C. § 2210(b) (1970). Each of the reactors at the McGuire Nuclear Station will produce approximately 1,180,000 kilowatts. 431 F. Supp. at 206. Private insurance groups now offer a maximum of $125,000,000 liability protection per nuclear facility. N.Y.L.J., Jan. 23, 1978, p. 24.

10. 42 U.S.C. § 2210(c) (1970). Considering the $125,000,000 available from private sources, the federal government would, at most, be required to contribute $435,000,000 in the event of an accident. The government charges nuclear facilities a fee for providing such insurance which is, at its highest, thirty dollars per year per thousand kilowatts generated and at least one hundred dollars a year. 42 U.S.C. § 2210 (f) (1970). In 1975, Congress amended the Price-Anderson Act to promote greater financial responsibility by industry within the $560,000,000 limit. In the event of a nuclear incident causing damage in excess of the private insurance available, the government is authorized to charge a "standard deferred premium" against all nuclear facilities obliged to carry the maximum private insurance. This deferred premium may be as much as $5,000,000, for each facility, with the government guaranteeing payment for those facilities that default. 42 U.S.C. § 2210(b) (Supp. V 1975). The aggregate of the deferred premium plus the amount covered by private sources shall in no event exceed the $560,000,000 limit. 42 U.S.C. § 2210(c) (1970).

11. 42 U.S.C. § 2210(o) (1970).

12. *But see* Indemnity Ins. Co. of North America v. Pan American Airways, 58 F. Supp. 338, 340 (S.D.N.Y. 1944), where the court upheld the Warsaw Convention's limitation on liability for airplane accidents, stating: "The argument that the treaty is invalid because it deprives the plaintiff of its property without due process is rejected. Statutes for the limitation of liability are no novelty." The *Carolina* court distinguished the Warsaw Convention case by stating: "[T]reaties with other countries [do not] follow the same rules as lawsuits or ordinary Acts of Congress." 431 F. Supp. 203, 224. This statement is difficult to reconcile with the fact that treaties also are bound by the parameters of equal protection and due process. Reid v. Covert, 354 U.S. 1 (1957). *See also* Carr v. United States, 422 F.2d 1007 (4th Cir. 1970) upholding the Federal Drivers Act, 28 U.S.C. § 2679(d) (1970), which abrogates the common law right of suing an individual tortfeasor if the tortfeasor is a government driver acting in the scope of his employ. The sole remedy for such negligence is to sue the Federal Government under the Federal Tort Claims Act, 28 U.S.C. § 2674 (1970). However, if the plaintiff is a federal government employee injured in an activity incident to service he is denied permission to sue the government. Feres v. United States, 340 U.S. 135 (1950). If the plaintiff is so unlucky as to be a serviceman injured by a tortfeasor covered by the Federal Drivers Act, he is denied a right to sue altogether. Thomason v. Sanchez, 398 F. Supp. 500 (D.N.J. 1975).

cent trend among state legislatures to limit the damages recoverable in medical malpractice actions. Twenty-one states have passed such legislation[13] and conflicting case law concerning the constitutionality of these statutes is now being generated.[14]

The *Carolina* court relied on *N.Y. Central R.R. Co. v. White*[15] in deciding that due process requires a quid pro quo, or an exchange of benefits, when a common law right of action is limited by the legislature.[16] This leading Supreme Court case, upholding the constitutionality of workmen's compensation, stated in dictum that "it perhaps may be doubted whether the state could abolish all rights of action, on the one hand, or all defenses, on the other, without setting up something adequate in their stead."[17] Other federal authorities[18] when deciding the constitutionality of legislative limitations on common law rights of action, have rejected the idea that due process requires a quid pro quo.

The Supreme Court, in holding that the Federal Employees Liability Act superseded the immutability of common law rights, quoted from *Munn v. Illinois*[19] to the effect that

> [a] person has no property, no vested interest in any rule of the common law . . . Rights of property which have been created by the common law cannot be taken away without due process; but the law itself as a rule of conduct, may be changed at the will . . . of the legislature, unless prevented by constitutional limitations.[20]

See also Murray v. New York Central R.R. Co., 287 F.2d 152, *cert. denied*, 366 U.S. 945 (1961), upholding the Limitation of Vessel Owner's Liability Statute, 46 U.S.C. §§ 181-96 (1970), which limits a vessel owner's liability for acts not caused by his own negligence to the value of his interest in the ship plus the value of the ship's cargo.

13. American Insurance Association, Medical Malpractice Insurance Reports (1976). *See e.g.*, CAL. CIV. CODE § 39-4204 (Supp. 1975) ($250,000); IDAHO CODE § 39-4204 (Supp. 1975) ($150,000); ILL. ANN. STAT. ch. 70, § 101 (Smith-Hurd 1975) ($500,000); IND. CODE ANN. § 16-9.5-2-2(b) (Burns Supp. 1975) ($500,000); LA. REV. STAT. ANN. § 40:1299.42(B)(1) (1975) ($500,000); NEB. REV. STAT. §§ 44-2801 to 44-2855 (Supp. 1976) ($500,000); 1975 N.D. SESS. LAWS ch. 264, § 11 ($500,000); OHIO REV. CODE ANN. § 2307.43 (Baldwin 1975) ($200,000); OREGON LAWS ch. 796 P. 2316 ($500,000).

14. Jones v. State Bd. of Medicine, 97 Idaho 859, 555 P.2d 399 (1976); Wright v. Central DuPage Hosp. Ass'n, 63 Ill. 2d 313, 347 N.E.2d 736 (1976); Pendergast v. Nelson, 199 Neb. 97, 256 N.W.2d 657 (1977); Simon v. St. Elizabeth Med. Center, 3 Ohio Op. 3d 164, 355 N.E.2d 903 (1976); Oregon Med. Ass'n. v. Rawls, 276 Or. 1101, 557 P.2d 664 (1976).

15. 243 U.S. 188 (1917).

16. 431 F. Supp. at 223.

17. 243 U.S. 188 (1917).

18. *See* notes 17, 19, *supra* and 21, 23, 24 *infra*.

19. 94 U.S. 113, 114 (1876).

20. Mondou v. New York, N.H. & H. R.R., 223 U.S. 1, 50 (1912). Although *Munn* dealt

In the *Arizona Employers Liability Cases*[21] the Court elaborated further, stating that: "[common law tort rules] are not placed, by the Fourteenth Amendment, beyond the reach of the state's power to alter them, as rules of future conduct and test of responsibility, through legislation designed to promote the public welfare."[22]

The requirement of a quid pro quo that the *White* case suggested in dictum should have been entirely dispelled after the Supreme Court stated in *Silver v. Silver*[23] "the rule that the Constitution does not forbid the creation of new rights and the abolition of old ones recognized by the common law, to attain a permissable legislative object."[24] In *Carr v. United States*[25] the Fourth Circuit cited this quote from *Silver* in holding that the complete abrogation of a common law right of action did not require the creation of some new benefit as a quid pro quo.[26] Finally, the Fifth Circuit,[27] in upholding a workmen's compensation statute quoted Munn's statement that a person has no property interest in any common law[28] and elaborated further that "one cannot be heard to question the sufficiency of due process if the rule of law, which merely held the potential to create a property right, was changed before any right vested . . . The abolition of non-vested rights is *especially* innocuous if, as here, one remedy is substituted for another."[29] The idea of a quid pro quo requirement for due process is best considered "nothing more than a make-weight argument."[30]

Some state courts, in deciding the analogous limitation on recovery mandated by state medical malpractice ceilings, agree with the constitutional interpretation of the *Carolina* court that a quid pro

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with state regulation of commercial interest, the quote here was used to uphold the supremacy of workmen's compensation over the common law.

21. 250 U.S. 400 (1919).

22. *Id.* at 421.

23. 280 U.S. 117 (1929) (upholding automobile guest statutes against due process attack even though these statute abrogate simple negligence as a cause of action for invitee passengers).

24. *Id.* at 122.

25. 422 F.2d 1007 (4th Cir. 1970). *See also* Thomason v. Sanchez, 398 F. Supp. 500 (D.N.J. 1975).

26. *See* note 12 *supra.*

27. Keller v. Dravo Corp., 441 F.2d 1239 (5th Cir. 1971).

28. *See* notes 17 and 18 *supra.*

29. Keller v. Dravo Corp., 441 F.2d 1239, 1242 (5th Cir. 1971).

30. Jones v. State Bd. of Medicine, 97 Idaho 859, 555 P.2d 399, 401 (1976).

quo is an essential component of due process. The supreme courts of Illinois[31] and Ohio[32] both struck down limitations on malpractice recoveries as violating due process, since those injured by the limitation on recoverable damages were not given a compensatory benefit in exchange for surrendering their right to full recovery.[33] The Illinois court distinguished that state's medical malpractice limitation from the limitation on recoverable damages that workmen's compensation imposes by stating: "The Workmen's Compensation Act provided a quid pro quo in that the employer assumed a new liability without fault but was relieved of the prospect of large damage judgments, while the employee, whose monetary recovery was limited, was awarded compensation without regard to the employer's negligence."[34] The malpractice victim on the other hand, must prove the same degree of liability and be subject to the same defenses while he "might be unable to recover all the medical expenses he might incur . . ."[35]

Jones v. State Board of Medicine,[36] however, expressly rejected the proposition that due process requires an exchange of benefits when a right of action is limited.[37] The Idaho Supreme Court in *Jones* reversed a finding that the state's limit on medical malpractice recovery was unconstitutional stating: "We agree . . . that the United States Supreme Court in *White* did not intend to engraft upon the traditional due process test an additional standard when the challenged statute involves alteration of some prior existing common law doctrine."[38]

The Price-Anderson Act was deemed to violate due process for a

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

32. Simon v. St. Elizabeth Med. Center, 3 Ohio Op. 3d 164, 355 N.E.2d 903 (1976).

33. Wright v. Central DuPage Hosp. Ass'n, 63 Ill. 2d 313, 347 N.E.2d 736, 742 (1976); Simon v. St. Elizabeth Med. Center, 3 Ohio Op. 3d 164, 355 N.E.2d 903 (1976).

34. Wright v. Central DuPage Hosp. Ass'n, 63 Ill. 2d 313, 347 N.E.2d 736, 742 (1976).

35. *Id.*

36. Jones v. State Bd. of Medicine, 97 Idaho 859, 555 P.2d 399 (1976).

37. *Id.* at 868, 555 P.2d at 409. New York has also expressly rejected the need for a quid pro quo to satisfy due process. Montgomery v. Daniels, 38 N.Y.2d 41, 56, 340 N.E.2d 444, 453, 378 N.Y.S.2d 1, 14 (1975). The highest court of New York decided that a $50,000 recovery limitation imposed by "no fault" insurance was constitutional stating that a "serious question exists as to whether this 'adequate substitute test' is any test at all."

38. 97 Idaho 859,868, 555 P.2d 399, 409. *See also* Prendergast v. Nelson, 199 Neb. 97, 256 N.W.2d 657, 671 (1977). The Nebraska Supreme Court upheld that state's ceiling on medical malpractice recovery, flatly stating, "There is no merit to the argument that if a common law right is to be taken away something must be given in return."

second reason. The Act contains no "reasonable, certain and adequate provision for obtaining compensation which due process requires."[39] However, the *Carolina* court seems to be confusing an eminent domain proceeding with a legislative limitation on a right of action.[40] The court's reliance on the *Regional Rail Reorganization Act Cases*[41] is misplaced since that opinion dealt with the direct taking of personal property without provision for compensation.[42]

The *Carolina* court also held that the Price-Anderson Act violated equal protection.[43] The court reasoned that the Act was unconstitu-

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39. 431 F. Supp. at 224 *quoting from* Regional Rail Reorganization Cases, 419 U.S. 102, 124-25 (1974).

40. It is interesting to note that this argument is similar to the exchange of benefits argument in that both would mandate that a form of compensation be given to those whose recovery is limited by the legislature. However, the "taking" of an unperfected right of action requires no compensation and cannot be analogized to an eminent domain action.

Even if the Price-Anderson Act's limitation of a right of action could be interpreted as a taking of a property right, compensation would still not necessarily be required. The regulatory authority of the Act is based on the war powers, the commerce clause and the need to protect the public health and safety. H. R. Rep. No. 2181, 83rd Cong., 2d Sess. 10 (1954); S. Rep. No. 1699, 83rd Cong., 2d Sess. 10 (1954); 42 U.S.C. § 2012(c) (1970). Under the war and public welfare powers a much more immediate invasion of property rights has been sanctioned. In *United States v. Central Eureka Mining Co.*, 357 U.S. 155 (1958), a prohibition on the mining of gold was upheld under the war powers because "the mere fact that the regulation deprives the property owner of the most profitable use of his property is not necessary to establish the owner's right to compensation." *Id.* at 168. In an emergency such as a tree blight, the destruction of private property does not rquire compensation. *Miller v. Schane*, 276 U.S. 272 (1928). Of course, a factual question remains whether the energy crisis is an emergency of the requisite magnitude.

41. Regional Rail Reorganization Cases, 419 U.S. 102 (1974).

42. Plaintiffs, who had an interest in the bankrupt Penn Central Railroad, objected to the compelled continuation of rail operation while a final plan for the governmental ownership was being formulated. The plaintiffs asserted that accrual of post-bankruptcy claims with priority over the plaintiffs' claims would operate as an erosion of the plaintiffs' interest. *Id.* at 124.

43. 431 F. Supp. 203, 225. Equal protection analysis traditionally uses one of two tests. If the classification involves a suspect class, such as race, or a fundamental right, such a religion, then the statutory classification would be subjected to a strict scrutiny test. The statutory discrimination would be upheld only if it served a compelling state interest and was the least restrictive means available for achieving that interest. *See* Shapiro v. Thompson, 394 U.S. 618 (1969) (fundamental right to travel); Loving v. Virginia, 388 U.S. 1 (1967) (race as a suspect classification).

The second tier of equal protection scrutiny applies to most non-suspect classification, including the regulation of business and industry. By this rational basis test a statutory discrimination will not be set aside if there is any reasonable basis upon which to justify it. *See* Dandridge v. Williams, 397 U.S. 471 (1970); McGowan v. Maryland, 366 U.S. 420 (1961). In practice, this two tier system means that there may be no statutory discrimination within the first tier on almost any basis while if there is no justifying rationale for the classifications

tional on this basis because the liability limitation irrationally burdens those who happen to live in the area of the plant, those injured people least able to afford the damage and because a better method could be devised to achieve the statute's purpose.[44]

State courts have applied conflicting equal protection tests in deciding the analogous liability limitations on medical malpractice. The Ohio Supreme Court in *Simon v. St. Elizabeth Medical Center*[45] applied a compelling governmental interest test to strike down that state's limitation.[46] The Illinois Supreme Court in *Wright v. Central DuPage Hospital Ass'n*[47] used a rational basis test to find a $500,000 limit on malpractice damages unconstitutional.[48] The following year, in *Prendergast v. Nelson,*[49] the Nebraska Supreme Court used the same equal protection test to achieve an opposite result. There the court upheld a $500,000 limits saying: "despite the fact that in practice its laws may result in some inequality, we will not set aside a statutory discrimination if any state of facts reasonably exists to justify it." Oregon's supreme court reversed and remanded a decision upholding the constitutionality of that state's limit,[50] while Idaho's supreme court took the same action with a lower court's holding that the statute was unconstitutional.[51] Both cases appeared to be applying a middle tier equal protection test. The Oregon court quoted from the Idaho case to the effect that: "It is thus impossible for this Court to assess the necessity for this legislation and whether or not the limitations . . . bear a fair and

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within the lower tier, the court will supply one by using its imagination. *See generally* Gunther, *The Supreme Court, 1971 Term-Forward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection,* 86 Harv. L. Rev. 1 (1972) (hereinafter Gunther). The Supreme Court has also created various intermediate or middle tier approaches which require more than a rational basis but less than a compelling reason. Under these approaches, the Court will balance the state interest advanced against the right interfered with. These tests have been utilized when classifications of sex and illegitimacy have been involved. *See* Matthews v. Lucas, 96 S. Ct. 2755 (1976); Weinberger v. Wisenfeld, 420 U.S. 636 (1975); Jimenez v. Weinberger, 417 U.S. 628 (1974); Frontiero v. Richardson, 411 U.S. 677 (1973); Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164 (1972); Reed v. Reed, 404 U.S. 71 (1971). For a thorough discussion of the intermediate approaches, *see* Gunther, *supra.*

45. 3 Ohio Op. 3d 164, 355 N.E.2d 903, 911 (1976).
46. *Id.* at 171, 355 N.E.2d at 911.
47. Wright v. Central Du Page Hosp. Ass'n, 63 Ill. 2d 313, 347 N.E.2d 736, 743 (1976).
48. *Id.*
49. 199 Neb. 97, 256 N.W.2d 657 (1977).
50. Oregon Med. Ass'n v. Rawls, 276 Or. 1101, 557 P.2d 664, 669 (1976).
51. Jones v. State Bd. of Medicine, 97 Idaho 859, 555 P.2d 399 (1976).

substantial relationship to the asserted purpose of the Act."[52] Medical malpractice liability limits are patently for the purpose of economic or social welfare. The Supreme Court has held that if this is the case, "A statutory discrimination may not be set aside if any state of facts reasonably may be conceived to justify it."[53] State courts, however, are experiencing difficulties applying a traditional rational basis test to liability limits.

Both the *Carolina* court and many state courts considering liability limiting statutes strain to apply stricter equal protection analyses and attempt to engraft a quid pro quo requirement to due process. The equities in disputes concerning limitations on malpractice recoveries, as under the Price-Anderson Act limitation, lie with the potentially undercompensated victim. Finding a way to reflect this in applicable legal concepts, without adding additional requirements to due process or doing too much damage to the existing principles of equal protection, was the challenge the *Carolina* court faced.

The preponderance of prior case law rejects the requirement of an exchange of benefits, or quid pro quo component to due process when a common law right of action is limited.[54] Many of these cases, however, relate to limitations on recovery imposed by workmen's compensation statutes.[55] The distinction between workmen's compensation statutes on the one hand and the Price-Anderson Act or malpractice damage limits on the other, is that the purpose of workmen's compensation was to remove the formidable barriers preventing just compensation for victims of industrial injuries,[56] whereas the Price-Anderson Act and malpractice damage limitations are addressed at protecting the nuclear power industry and the medical profession, by compelling the undercompensated tort victim to shoulder the societal costs of that protection. While this is a sympathetic case for the application of the quid pro quo requirement,[57] it would hinder the progress of all law to so sanctify the common law rules that a surrender of all or part of them to the legislature yields

52. 97 Idaho at 873, 555 P.2d at 413-14, *quoted at* 276 Or. at 1106, 557 P.2d at 669.
53. Mc. Gowan v. Maryland, 366 U.S. 421, 426 (1961).
54. *See* notes 45-53 *supra.*
55. *But see* notes 23-24 and accompanying text *supra.*
56. *See* W. PROSSER, HANDBOOK OF THE LAW OF TORTS, (4th ed. 1971), at 525-34.
57. But it is certainly no more sympathetic a case than *Thomason*. *See* note 12 *supra.*

the due process right to demand a substitutionary benefit. The Supreme Court clearly precluded the imposition of such absolute strictures upon legislative action in *Munn v. Illinois*[58] by stating that: "(The common law) is only one of the forms of municipal law, and is no more sacred than any other . . . Indeed, the great office of statutes is to remedy defects in the common law as they are developed, and to adapt it to the changes of time and circumstances."[59]

Even assuming the existence of a quid pro quo or exchange of benefits component to due process, the Price-Anderson Act probably would meet the test. The instant case held that there could be no exchange of benefits and burdens since, in the event of an accident, the utility operating the nuclear facility would almost certainly be held to strict liability as an ultra-hazardous activity.[60] However, the Act not only provides a waiver of the defense of due care, but also mandates a twenty year statute of limitations and a denial of the assumption of the risk defense.[61] These provisions may constitute a satisfactory exchange for the limited liability that the Price-Anderson Act allows utilities to enjoy. Waiver of assumption of risk would benefit the victims of a nuclear accident since this defense might apply against all those who move into the area after the reactor is functioning.[62] An extended statute of limitations is valuable to the potential plaintiffs due to the peculiar nature of nuclear injuries such as leukemia, thyroid cancer and genetic mutation which take many years to become manifest.[63]

Equal protection guarantees provide the most flexible vehicle to protect the rights of the undercompensated. Even in this area, however, prior cases tend to support the constitutionality of statutes limiting liability. The purpose of the Price-Anderson Act's limita-

58. 94 U.S. 113 (1876).

59. *Id.* at 134.

60. 431 F. Supp. at 223-24. *Trull v. Carolina-Virginia Well Co.*, 264 N.C. 687, 142 S.E.2d 622 (1965), states that with an "ultrahazardous activity" North Carolina follows the rule of *Rylands v. Fletcher, L.R.*, 3 H.L. 330 (1868), by imposing liability in the event of an accident upon the one who brought the hazard into the community regardless of due care.

61. 42 U.S.C. § 2210(n)(1) (1970).

62. McClung v. Louisville & N. Ry. Co., 225 Ala. 302, 51 So. 2d 371 (1951). By the plaintiff voluntarily choosing a place to live, with knowledge of the risk, he assumes the risk.

63. N.C. GEN. STAT. § 1-15(b) (1971) provides for a discovery doctrine. Those defects or injuries not readily apparent at the time of origin are deemed to have accrued at the time of discovery, but no longer than ten years from the time of the incident causing the injury. The Price-Anderson Act provides for a twenty-year discovery doctrine.

tion on liability is an economic one, to stimulate the growth and development of nuclear energy by inducing the investment of private industry.[64] As with statutes limiting medical malpractice damages, there appears to be a patently rational relationship between the Act and the legislative purpose. By traditional equal protection analysis it is established that "[i]n the area of economics and social welfare" equal protection is not violated "merely because the classifications made by its laws are imperfect."[65] Nor is a statute unconstitutional because it "is not made with mathematical nicety or because in practice it results in some inequality."[66] Also, if a rational basis test is being applied the method chosen to achieve the legislature's purpose need not be the best alternative. It need only be rationally related to that purpose.[67]

The *Carolina* court could not be applying a rational basis test since, if it were, a "state of facts reasonably may be conceived to justify it."[68] When the court speaks of the limitation as being "unnecessary to serve any legitimate purpose"[69] it is using a middle tier scrutiny to balance the legislative interest advanced against the right interfered with.[70] Although this is a novel test to apply in the area of economic legislation,[71] it is clear that the courts, as well as legislatures,[72] are uncomfortable with legislative fiats that deny

64. S. REP. No. 1699, 83rd Cong., 2d Sess. 3 (1954); H.R. REP. No. 2181, 83rd Cong., 2d Sess. 3 (1954).

65. Dandridge v. Williams, 397 U.S. 471, 485 (1970). In the *Carolina* case, as in *Dandridge*, there is no allegation of racial or religious discrimination which would require a compelling governmental interest to justify the legislation. Shapiro v. Thompson, 394 U.S. 618 (1969). The *Dandridge* Court recognized that the application of a rational basis test has

> in the main involved state regulation of business or industry. The administration of public welfare assistance, by contrast, involves the most basic economic needs of impoversished human beings. We recognize the dramatically real factual differences between the cited cases and this one, but we can find no basis for applying a different constitutional standard. 397 U.S. at 485.

66. Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78 (1911).

67. Williamson v. Fortson, 376 F. Supp. 1300 (N.D. Ga. 1974).

68. McGowan v. Maryland, 366 U.S. 421, 426 (1961).

69. 431 F. Supp. at 225.

70. *See* note 37 *supra.*

71. Two of the five cases considering the constitutionality of limits on medical malpractice damages have also applied middle tier equal protection scrutiny. Jones v. State Bd. of Med. 97 Idaho 859, 555 P.2d 399, 411 (1976); Oregon Med. Ass'n v. Rawls, 276 Or. 1101, 557 P.2d 664, 669 (1976).

72. *See* note 7 *supra.* Section 2210(e) of the Price Anderson Act provides that if the kind of catastrophic accident against which the Act protects utilities occurs, Congress is to override

plaintiff's common law right to full compensation merely upon the showing of any rational justification.

A middle tier of equal protection scrutiny, such as the *Carolina* court suggest it is applying, provides a flexible tool to ensure that the legislative interest advanced is worth the sacrifice of these plaintiff's common law claim to full compensation. This test is also capable of reflecting the equities of the undercompensated without perverting established principles of equal protection or creating additional requirements to due process. A balancing of the legislative interest advanced against the right interfered with obviates the need for a quid pro quo requirement since any benefit given in return for a limitation on a right of action would be considered in determining the extent of interference with that right. The existence of a quid pro quo would thereby make the discriminatory statute less offensive under a middle tier scrutiny.

Existing principles of equal protection also would not be undermined by this intermediate test. Established liability limiting statutes, such as workmen's compensation, would be left standing, not only because of the significant governmental interest advanced, but also because the plaintiff's right to compensation is not interfered with since the purpose of workmen's compensation was to remove obstacles to recovery.

While the Price-Anderson Act may be one of the simpler means of inducing private industry to invest in nuclear power, the allocation of the program's cost must be examined in the light of basic fairness. The Supreme Court of Idaho accomplished this with respect to medical malpractice damage limitations by applying a middle tier equal protection analysis. The court recognized that while "legislation should be upheld so long as its actions can reasonably be said to promote the health, safety and welfare of the public . . . where the discriminatory character of a challenged classification is apparent on its face . . . then a more stringent inquiry is required beyond that mandated by *McGowen*."[73] Although the statutory pur-

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the Act and take "whatever action is deemed necessary." New York "no-fault" insurance exempts from that statute's liability limit those who are "seriously injured." N.Y. INS. LAW § 671(4) (McKinney 1976).

73. Jones v. State Bd. of Med., 97 Idaho 859, 555 P.2d 399, 411 (1976). An explanation of the Idaho court's willingness to use a middle tier equal protection analysis may be that the Idaho court was reversed by the United States Supreme Court in *Reed v. Reed*, 404 U.S. 71 (1971), a landmark case in the establishment of intermediate equal protection scrutiny. In

pose of providing electric energy is socially beneficial and legitimate, the means employed—forcing those who live near nuclear reactors to pay for the plant's construction by shouldering the entire risk concomitant with nuclear energy—is patently unfair.

It is doubtful that the Price-Anderson Act will withstand the constitutional scrutiny of a middle tier equal protection analysis if such as test is applied on appeal. The right to full compensation is a significant one, based on the fundamental tort law principle that the one who causes the harm is under a duty to fully compensate those injured.[74] Another consideration causing the scales of this middle tier scrutiny to weigh against the constitutionality of the Price-Anderson Act is that other, less onerous means could be employed to ensure full compensation while still encouraging participation in the nuclear power industry. As the *Carolina* court suggested, the institution of an industrywide liability pool or an outright government guarantee to cover the cost of nuclear accidents[75] would be more equitable alternatives to making those most injured by nuclear accidents go uncompensated.

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that case, the Idaho court used a rational basis test to uphold a statutory presumption that fathers, rather than mothers, should manage their child's estate. The United State Supreme Court reversed, holding that the justification for the discrimination, administrative convenience, was not a "fair and substantial" enough legislative interest to justify the presumption. *Id.* at 76

74. W. PROSSER, HANDBOOK OF THE LAW OF TORTS, (4th ed. 1971) at 6, 16-23.

75. 431 F. Supp. at 225.