
Duke Power Company obtained permits from the United States Atomic Energy Commission (AEC) authorizing the construction of two atomic powered electric generating plants. These plants are located on popular recreational lakes within a twenty-mile radius of Charlotte, North Carolina. A number of residents in the vicinity of the two plants, along with other concerned individuals, joined with the Carolina Environmental Study Group, Inc., to oppose Duke Power’s construction and operation of these nuclear power plants.

The Price-Anderson Act, adopted in 1957, sets an upper limit of $560 million on the aggregate liability of Nuclear Regulatory Commission (NRC—the current successor of the AEC) licensees for damages arising out of a single nuclear incident. In the event of an “extraordinary nuclear occurrence” the Act re-

1. The Atomic Energy Commission was created by the Atomic Energy Act of 1946, ch. 724, § 2, 60 Stat. 755 (current version at 42 U.S.C. §§ 2011-2296 (1976)). The AEC was abolished and its regulatory functions transferred to the Nuclear Regulatory Commission (NRC) pursuant to the Energy Reorganization Act of 1974, Pub. L. No. 93-438, 88 Stat. 1233 (codified at 42 U.S.C. §§ 5801-5891 (1976)). This Case Note will refer to the Commission as the NRC except in those circumstances in which reference to the AEC is necessary to preserve the historical context.
4. Id. at 205.

The term “extraordinary nuclear occurrence” means any event causing a discharge or dispersal of source, special nuclear, or byproduct material from its intended place of confinement in amounts offsite, or causing radiation levels offsite, which the Commission determines to be substantial, and which the Commission determines has resulted or will probably result in substantial damages to persons offsite or property offsite. Any determination by the Commission that such an event has, or has not, occurred shall be final and conclusive, and no other official or any court shall have power or jurisdiction to review any such determination. The Commission shall establish criteria in writing setting forth the basis upon which such determination shall be made. As used in this subsection, “offsite” means away from “the location” or “the contract location” as defined in the applicable Commission indemnity agreement, entered into pursuant to section 2210 of this title.

Specific regulations as to the minimum levels of offsite radiation and damages that must be met before the NRC may declare an incident an “extraordinary nuclear occurrence” are found at 10 C.F.R. §§ 140.81-.85 (1978).
quires NRC licensees to waive all issues or defenses of negligence, contributory negligence, assumption of risk, and governmental or charitable immunity.8

The Carolina Environmental Study Group brought an action in federal district court against the AEC and Duke Power Company seeking a declaration of the unconstitutionality of the Price-Anderson Act upper limit on aggregate liability. The district court held that the Act was in violation of the due process clause of the fifth amendment "because it allows the destruction of the property or the lives of those affected by a nuclear catastrophe without reasonable certainty that the victims will be justly compensated."9 On direct appeal to the Supreme Court,10 the lower court judgment was unanimously reversed.11 The Court held that the Act was not violative of the due process clause since it was a legitimate, and not arbitrary or irrational, attempt to serve the dual purpose of protecting the public and encouraging the development of nuclear power.12

I. BACKGROUND

A. Legislative History and Purpose of the Price-Anderson Act

The responsibility for the early development of nuclear energy in the United States rested entirely with the federal government, primarily with the armed forces. Following World War II and after much debate on the desirability of allowing private industry to avail itself of this potentially great source of energy, the Atomic Energy Act of 194613 and the Atomic Energy Act of 195414 were passed permitting the private sector to develop nuclear energy for peaceful purposes under strict regulation by the AEC.15 The Price-Anderson Act was an effort to reconcile compet-

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10. An appeal can be taken directly to the Supreme Court if a district court holds an act of Congress unconstitutional in a suit to which an agency of the United States is a party. 28 U.S.C. § 1252 (1976).
11. Although all nine Justices concurred in the result, Justices Stewart, Rehnquist, and Stevens wrote separate opinions indicating that they would have reversed on the threshold issues of standing, ripeness, or subject-matter jurisdiction and would have never considered the due process issue. Duke Power Co. v. Carolina Envt'l Study Group, Inc., 98 S. Ct. 2620, 2641-46 (1978) (separate opinions concurring in the result only by Stewart, Rehnquist, & Stevens, JJ.).
12. Id. at 2635 (majority opinion).
ing interests that became apparent after the initial decision was made to turn over development of the peacetime use of nuclear power to private industry. The nature of these interests is readily ascertainable from the stated objectives of the Act: (1) to assure the public of the availability of funds sufficient to satisfy liability claims arising out of a catastrophic nuclear accident, and (2) to set an upper limit on the aggregate dollar amount to be paid in compensation for these claims, thus removing the impediment to private sector participation caused by a fear of unlimited liability in the event of a major catastrophe.16

The limited protection provided by the Act would have expired on August 1, 1967, approximately ten years from the date of its passage.17 The Act, however, has been modified and extended twice for additional ten-year periods.18 Besides serving to prolong the life of Price-Anderson protection, these congressional extensions provided an opportunity for periodic review and significant amendment of the Act.

B. Mechanics of the Price-Anderson Act

The Price-Anderson Act creates two sources of funds for satisfying liability claims arising out of the activities of NRC licensees. The licensee is responsible for the "first level of financial protection," defined as the maximum amount of liability insurance available from private sources.19 The NRC is in essence responsible for the second level since it is required to then indemnify the licensee for compensatory damages paid out in excess of

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In order to protect the public and to encourage the development of the atomic energy industry, in the interests of the general welfare and of the common defense and security, the United States may make funds available for a portion of the damages suffered by the public from nuclear incidents, and may limit the liability of those persons liable for such losses.


the initial level of financial protection.\textsuperscript{20} An upper limit of $560 million is set on the amount of aggregate liability arising from any one nuclear incident.\textsuperscript{21} In exchange for the indemnification agreement, the NRC is authorized to collect a substantial fee from all licensees covered by the Act.\textsuperscript{22}

To ensure that all potential claims are given adequate consideration, the Act allows application by any indemnitor or other interested person to the federal district court having venue in bankruptcy over the location of a nuclear incident. Upon a finding that total liability to the public will likely exceed the maximum limit, the district court is granted great latitude in the administration of the payment of claims, including the power to apportion payments from the $560 million liability fund among claimants while reserving some funds for the payment of future claims.\textsuperscript{23}

Shortly after Congress voted the Price-Anderson Act its first ten-year extension, the Act was amended to include the waiver of defenses,\textsuperscript{24} thereby imposing on those protected by the Act a burden of strict statutory liability.\textsuperscript{25} Under current provisions of the Act, the defendant NRC licensee must waive:

(i) any issue or defense as to conduct of the claimant or fault of persons indemnified, (ii) any issue or defense as to charitable or

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\item 20. 42 U.S.C. § 2210(c) (1976).
\item 21. Id. § 2210(e).
\item 22. Id. § 2210(f). This fee is not insignificant. One commentator relates that the government collects an annual indemnity fee from each power reactor licensee. This fee is assessed on a flat basis of $30 per thousand kilowatts of thermal energy authorized in the license; since a typical modern power reactor has a power level of about 3000 to 3300 MWe (corresponding to about 1000 to 1100 MW), the annual indemnity fee for such plants is about $90,000 to $99,000. This fee is not a premium and has no actuarial basis. Furthermore, although about three-fourths of the insurance premiums collected in the years 1956-67 have been returned by the nuclear liability insurance pools to policyholders because of the industry's safety record, the indemnity fees are not returnable.
\item \ldots [T]o date the government has collected millions of dollars in indemnity fees, but has not paid out one dollar in claims . . . .
\item Lowenstein, supra note 19, at 600-01.
\item 25. The waiver provisions are not effective until the Commission determines that certain minimum thresholds of damages are surpassed. The threshold levels are set out in 10 C.F.R. §§ 140.84-.85 (1978). If damages do not exceed these limits, plaintiffs must rely on common law theories of recovery. This aspect of the Act has generated considerable comment. See, e.g., Comment, The Irradiated Plaintiff: Tort Recovery Outside Price-Anderson, 6 ENVT'L L. 859 (1976); Note, The "Extraordinary Nuclear Occurrence" Threshold and Uncompensated Injury Under the Price-Anderson Act, 6 RUT.-CAM. L.J. 360 (1974).
\end{itemize}
governmental immunity, and (iii) any issue or defense based on any statute of limitations if suit is instituted within three years from the date on which the claimant first knew, or reasonably could have known, of his injury or damage and the cause thereof, but in no event more than twenty years after the date of the nuclear incident.26

The second ten-year extension of Price-Anderson protection brought further changes. Congress amended the Act to create a scheme whereby the indemnification now provided by the NRC will be replaced by a system of deferred premiums imposed directly on all NRC licensees in the event of a nuclear incident where aggregate liability exceeds the amount of the primary level of financial protection required of each licensee.27 The 1975 amendment is summarized by one commentator:

The amendment provides for two major changes:
1. gradual substitution of industry financed indemnity for government indemnity above the amount of insurance available and,
2. an increase in the limit of liability.

The statute provides for a phasing out of governmental indemnity through a provision requiring that in the event of a nuclear incident which results in damages in excess of the base layer of insurance (now $125 million), each licensee will be assessed a prorated share of the excess damages (a “deferred premium”). The amendment authorized NRC to set the level of the deferred premium at no less than $2 million and no more than $5 million per facility.

Under the bill, the NRC will continue to provide indemnity for payment of damages exceeding the combined primary insurance layer, and the secondary (or deferred premium) layer up to a total of $560 million. As the secondary layer increases, however, it will gradually replace the government indemnity. The date at which this occurs will depend primarily on the amount set as the deferred premium and on the rate at which new power reactors come into licensed operation.

The table below shows when the replacement of government indemnity would occur assuming deferred premiums of $2, 3, 4 or 5 million, and assuming 174 reactors with operating licenses in 1985.

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In other words, assuming a deferred premium of $4 million and 174 reactors licensed for operation, the government indemnity would be eliminated by 1982 and, thereafter, the limit on liability will be increased as additional reactors are licensed to operate. At a deferred premium level of $4 million per reactor, the overall limit would reach a billion dollars in about 1988, assuming 265 reactors.

Lowenstein, supra note 19, at 599-600 (footnotes omitted). The NRC has recently set the figure for the deferred premium at $5 million. 10 C.F.R. § 140.11(a)(4) (1978).
amendments provide that the upper limit of aggregate liability may be increased to the extent that the fund created by the deferred premium plan, when added to the initial level of financial protection required, exceeds $560 million. Moreover, these most recent amendments include a proviso requiring Congress to step in and take whatever action may be necessary to "protect the public" in the event of a catastrophic nuclear incident where the limit of aggregate liability might be exceeded.

C. Reasonable, Certain, and Adequate Provision for Obtaining Compensation

In the case of *Cherokee Nation v. Southern Kansas Railway*, the Supreme Court indicated that the just compensation clause of the fifth amendment requires that holders of vested property interests be given "reasonable, certain and adequate provision for obtaining compensation" before their interests can be disturbed by state-mandated action. In this case, Congress, by virtue of the eminent domain power of the federal government, had granted to the railway company a right-of-way through Cherokee Nation lands. When the parties failed to agree on the price to be paid for the right-of-way, three independent appraisers were appointed to value the land according to the statutory plan. Before proceeding with construction the railway company was required to pay into the district court double the amount of the appraisers' average figure, the actual amount of compensation to be determined at a trial de novo in district court. A major issue in the case concerned the question of whether the Cherokee Nation was entitled to full compensation prior to the time its property interests were disturbed. This issue arose because plaintiffs feared the railway company might become insolvent before the lower court could reach a conclusion as to the value of the land. The Supreme Court found that the fifth amendment required not prior compensation but only "reasonable, cer-

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29. *Id.*
30. *Id.* These 1975 amendments were apparently in response to public criticism of the Act. Critics generally pointed to the possibility of uncompensated injuries and to the "subsidy" afforded the nuclear power industry by the indemnification arrangement. See, e.g., Collier, Are the "No Recourse" Provisions of the Price-Anderson Act Valid or Unconstitutional?, 4 Hous. L. Rev. 236 (1966).
31. 135 U.S. 641 (1890).
32. U.S. Const. amend. V: "[N]or shall private property be taken for public use without just compensation."
33. 135 U.S. at 659.
tain and adequate provision for obtaining compensation." The Court then added the caveat that absolute certainty of compensation could not, however, be reasonably required since such a requirement would be, in the words of the Court, "impracticable." 

The Cherokee Nation principle that the Constitution requires reasonable, certain, and adequate provision for obtaining compensation has been applied consistently by the courts in cases involving governmental powers of eminent domain. Most recently, reference was made to this principle by the Supreme Court in the Regional Rail Reorganization Act Cases. The Reorganization Act Cases arose out of the recent national rail crisis and Congress' attempt to deal with that crisis through the Regional Rail Reorganization Act of 1973. In effect, the 1973 Act required holders of certain railroad properties to convey their interests to CONRAIL in exchange for CONRAIL securities and federally guaranteed United States Railway Association (USRA) obligations. Plaintiffs in the action contended that the Rail Act effected a "taking of rail properties" without the reasonable, certain, and adequate provisions for obtaining compensation required by the Cherokee Nation case. The Supreme Court disagreed. The opinion primarily vindicates the broad authority of Congress to take any measure necessary to serve the best interests of the public when an entire industry, such as the railroad, is faced with financial collapse. After lengthy discussion of whether the Act did in fact result in a "taking" analogous to a taking by eminent domain, the Court found that the "reasonable, certain and adequate" standard was applicable. Employing this test, the Court held that the provisions of the Rail Act itself, together with the availability of supplementary Tucker Act remedies, were sufficient to meet the Cherokee Nation test.

The Supreme Court's reasoning in the Reorganization Act Cases emphasizes the point that the Cherokee Nation principle is necessarily limited in its application to situations in which the eminent domain powers of the state, or reasonably similar pow-

34. Id. at 660.
38. Consolidated Rail Corporation (CONRAIL) was established by the Act. 45 U.S.C. § 741 (Supp. IV 1974).
39. The USRA was also created by the 1973 Act. 45 U.S.C. § 711 (Supp. IV 1974).
40. Regional Rail Reorganization Act Cases, 419 U.S. at 118.
42. Regional Rail Reorganization Act Cases, 419 U.S. at 136, 155.
ers, are being exercised. This is understandable in light of the fact that the Cherokee Nation Court derived its "reasonable, certain and adequate" standard from the just compensation clause of the fifth amendment, which on its face is only applicable when there has been a taking of private property for public use.

D. Prospective Modification of Common Law Rights and Remedies

Though the government may not take property without just compensation, innumerable cases hold that the state may, by legislative action, prospectively modify or even eliminate a common law right or remedy. In particular, a legislature may create, modify, or eliminate an entire scheme of liability and compensation as long as it protects vested rights and stays within constitutional limitations.

In Mondou v. New York, New Haven & Hartford Railroad the Supreme Court reviewed a constitutional challenge to the Railroad Employers' Liability Act. The Act abrogated the common law fellow servant rule and severely limited the employer's resort to the defenses of contributory negligence and assumption of risk. In upholding the validity of the statutory scheme, the Court relied heavily on the following language:

A person has no property, no vested interest, in any rule of the common law. That is only one of the forms of municipal law, and is no more sacred than any other. Rights of property which have been created by the common law cannot be taken away

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43. For the Court's discussion of the "erosion taking" and "conveyance taking" issues and its struggle to determine whether these issues are sufficiently analogous to a taking of private property for public use so as to bring into play the body of law dealing with the just compensation clause, see 419 U.S. at 122-56.


45. E.g., New York Cent. R.R. v. White, 243 U.S. 188, 197-98 (1917); Mondou v. New York, N.H. & H.R.R., 223 U.S. 1, 49-50 (1911); Keller v. Dravo Corp., 441 F.2d 1239, 1242 (5th Cir. 1971); Sparks v. Wyeth Labs, Inc., 431 F. Supp. 411, 416 (W.D. Okla. 1977). "Vested" is used in the traditional sense to refer to a right or claim which has accrued or been perfected. Keller v. Dravo Corp., 441 F.2d 1239, 1242 (5th Cir. 1971).

46. 223 U.S. 1 (1911).


48. The Court in Mondou referred to the fellow servant rule as "[t]he rule that the negligence of one employee resulting in injury to another was not to be attributed to their common employer." 223 U.S. at 49.
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. 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 times and circumstances.49

A few years later, the Court in New York Central Railroad
v. White50 outlined a similar analytical framework for reviewing
comprehensive modifications of liability and compensation rules.
In White the Supreme Court considered the New York workmen’s
compensation law.51 After first reiterating its Mondou position,52
the Court expressly held that a legislature may prospectively
modify an existing body of rules governing liability and compen-
sation, especially if the statute provides a “reasonably just sub-
stitute.”53 A court need only determine whether the substitute
method of compensation falls within the limits of permissible
state action.54

In making this determination the Court announced that it
would look at the proposed scheme and consider only whether it
is “arbitrary and unreasonable, from the standpoint of natural
justice.”55 The heavy burden of proving the unconstitutionality
of the statute rested with the party challenging the statutory
scheme. Employing a balancing test, the Court sought to deter-
mine whether the benefits to potential defendants provided by an
absolute upper limit on damages were offset by significant advan-
tages to potential plaintiffs. The Court found that the certainty
of recovery and the waiver by the employer of various common
law defenses granted the plaintiffs sufficient advantages to make
the balance a fair one.56

In Crane v. Hahlo57 the Supreme Court upheld a legislative
modification of the procedure for determining damage awards
resulting from roadway improvements made by the City of New
York. Once again, the Court focused on the substitute remedy by
declaring that “so long as a substantial and efficient remedy re-

49. Id. at 50.
50. 243 U.S. 188 (1917).
51. 1914 N.Y. Laws, chs. 41, 316; 1913 N.Y. Laws, ch. 816 (current version at N.Y.
WORK. COMP. LAW §§ 1-401 (McKinney 1965)).
52. 243 U.S. at 198.
53. Id. at 201-02.
54. Id. at 202.
55. Id.
56. Id. at 201-04.
57. 258 U.S. 142 (1922).
mains or is provided due process of law is not denied by a legi-

An important shift in the Court’s framework of analysis can
be detected in the case of Crowell v. Benson, which involved a
challenge to the Longshoremen’s and Harbor Workers’ Compens-

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58. Id. at 147.
60. Ch. 509, 44 Stat. 1424 (1927) (current version at 33 U.S.C. §§ 901-950 (1976)).
61. 285 U.S. at 37. The procedural due process issue concerned the question of
whether the Act should provide for a trial de novo to determine the facts in the event that
a party did not agree with the facts as found by the administrative agency having responsi-

62. Id. at 41-42.
63. Id. at 42-65.
64. Id. at 65-95 (Brandeis, J., dissenting).
65. Id. at 41-42.
66. E.g., Keller v. Dravo Corp., 441 F.2d 1239 (5th Cir. 1971); Swanson v. Bates, 170
F.2d 648 (10th Cir. 1948); Sparks v. Wyeth Labs., Inc., 431 F. Supp. 411 (W.D. Okla.
(S.D.N.Y. 1944).
only nonvested claims of right;\textsuperscript{67} (2) the modification or abolition of nonvested rights is particularly justifiable if the legislature has provided a reasonably just substitute remedy;\textsuperscript{68} (3) the legislatively created substitute scheme will pass constitutional muster as long as it is not "arbitrary and unreasonable, from the standpoint of natural justice"\textsuperscript{69} and meets procedural due process requirements;\textsuperscript{70} and (4) in determining the arbitrariness and unreasonableness of the statute, the Court will balance the advantages to potential defendants on the one hand with the advantages to potential plaintiffs on the other.\textsuperscript{71}

II. Instant Case

A. The District Court’s Decision

In the case at hand the district court concluded that the Price-Anderson Act did in fact violate the due process clause by allowing "the destruction of the property or the lives of those affected by nuclear catastrophe without reasonable certainty that the victims will be justly compensated."\textsuperscript{72} The court identified three considerations that led to its conclusion: (1) the limited amount of recovery allowed by the Act is not rationally related to the potential losses;\textsuperscript{73} (2) the Act tends to encourage irresponsibility; and (3) the Act tends to encourage irresponsibility.

\textsuperscript{67} See, e.g., Keller v. Dravo Corp., 441 F.2d 1239 (5th Cir. 1971).

While conceding that one can have no vested interest in any rule of common law, these cases emphasized that a right created under such a rule which has been perfected could not be taken away without being violative of the Fifth and Fourteenth Amendments. . . . On the other hand, 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.

\textsuperscript{68} New York Cent. R.R. v. White, 243 U.S. 188, 201-02 (1917). The District Court for the Western District of Oklahoma emphasized this point in the following statement:

Moreover, while the prospective direct remedy of an injured person against a manufacturer has been abolished, an alternative, efficacious remedy against the United States is substituted. Such a replacement or substitution of remedies, \textit{while perhaps not technically necessary for due process}, is nonetheless even more indicative of the satisfaction of due process requirements . . . .


\textsuperscript{70} New York Cent. R.R. v. White, 243 U.S. 188, 202 (1916). Speaking of the power to substitute remedies, the Court in a later case concluded:

In the exercise of that power and to satisfy a public need, a state may choose the remedy best adapted, in the legislative judgment, to protect the interests concerned, provided its choice is not unreasonable or arbitrary, and the procedure it adopts satisfies the constitutional requirements of reasonable notice and opportunity to be heard.

\textsuperscript{67} See, e.g., Keller v. Dravo Corp., 441 F.2d 1239 (5th Cir. 1971).

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\textsuperscript{73} Id.
bility on the part of builders and operators of reactor sites; and, (3) there is no quid pro quo in the "exchange of burdens and benefits" between defendants and potential future plaintiffs.

The district court treated the first point by noting that in the event of a major catastrophe, damages to life and property might well be many times the amount set as the statutory limit. In discussing the second point the court concluded that contrary to the purpose of the Atomic Energy Act, the removal of the spectre of unlimited liability encouraged irresponsibility in the construction and operation of nuclear reactors.

The court devoted most of its efforts to discussing the third point. The court employed a balancing test to determine whether the advantage to NRC licensees of the statutorily fixed limit on liability was offset by the advantages to plaintiffs of a certainty of recovery, a more prompt release of funds, the extension of some short statutes of limitation, and the waiver of common law defenses. The court concluded its balancing test by citing Cherokee Nation and the Regional Rail Reorganization Act Cases, stating that the Price-Anderson Act fell short of providing the "reasonable, certain and adequate provision for obtaining compensation" that due process requires.

B. The Supreme Court's Analysis

The opinion of the Supreme Court, written by Chief Justice Burger, treated the due process issue only after an extensive discussion of the threshold issues of standing, ripeness, and subject matter jurisdiction. Three of the Justices wrote opinions con-
curring only in the judgment, indicating that they would have dismissed the case on the threshold issues and never reached the merits.81

Upon reaching the due process issue, the Court found it necessary to first determine the appropriate standard of review.82 In their appeal, Duke Power Company and the NRC argued that the Price-Anderson Act should be considered under traditionally deferential standards which accord a presumption of constitutionality to congressionally enacted economic regulations in the absence of proof of arbitrariness or irrationality.83 The Carolina Environmental Study Group, on the other hand, recommended a less deferential standard on the ground that the Act jeopardized rights which were "far more important" than the interests considered in traditional substantive due process cases.84 After citing the legislative history of the Act and concluding that the Price-Anderson liability limitation was "a classic example of an economic regulation,"85 the Supreme Court accepted the appellants' arguments.

The Court then considered in turn each of the three factors Warth v. Seldin, 422 U.S. 490, 501 (1975)) and a "fairly traceable" causal connection between the injury and the challenged conduct (citing Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 261 (1977)). 98 S. Ct. at 2630. The Court found that the "immediate" adverse environmental and aesthetic consequences of the thermal pollution of the two lakes constituted sufficiently distinct and palpable injury. Id. at 2631. In addition, it found a causal link based upon the district court's finding that but for the protection of the Act the nuclear power plants in question would never be completed or operated. Id. at 2631-32 (citing 431 F. Supp. at 219-20).

In addition, the Court refused to require the plaintiffs to demonstrate a connection between the injuries they claimed and the constitutional rights being asserted. Id. at 2633. Cf. Flast v. Cohen, 392 U.S. 83, 102 (1968) (requiring plaintiffs in a taxpayer suit to establish a subject matter nexus between the right asserted and the injury alleged). The Court observed that if such a showing were required, an attack on the Price-Anderson liability limit could not be maintained prior to the occurrence of an accident resulting in damages in excess of the statutory limit. 98 S. Ct. at 2633 n.23.

In determining that the issue was ripe for adjudication, the Supreme Court noted that delaying decision on the constitutionality of the Act would defeat the Act's purpose of eliminating doubts and fears on the part of private developers of nuclear power. The Court further commented that "all parties would be adversely affected by a decision to defer definitive resolution of the constitutional validity vel non of the Price-Anderson Act." Id. at 2635.

81. Four separate opinions were filed in this case: Chief Justice Burger wrote the opinion of the Court; Justice Stewart concurred in the result (plaintiffs have no standing to sue); Justice Rehnquist, joined by Justice Stevens, concurred in the judgment (lack of subject matter jurisdiction); Justice Stevens also wrote a separate concurrence (no standing, issues are not ripe for adjudication, no subject matter jurisdiction).

82. 98 S. Ct. at 2635-36.

83. Id.

84. Id. at 2636.

85. Id.
the district court identified in support of its conclusion that the Act violated the due process clause. As to the contention that the amount of recovery is not rationally related to the potential losses, the Court conceded that in light of the uncertainty concerning the extent of damage that could result from a major nuclear incident, the choice of any figure as an absolute upper limit on liability would necessarily represent a somewhat arbitrary decision. The Court concluded, however, that considering the remoteness of the possibility of an accident involving damages in excess of the limitation and the current statutory mandate for Congress to step in and take appropriate action should such a possibility materialize, Congress' decision to limit liability in order to promote development of nuclear power was neither arbitrary nor irrational. The limitation figure was also found to be reasonable and not violative of due process.

The Supreme Court then dismissed, with two pointed observations, the district court's contention that the Price-Anderson Act encourages irresponsibility on the part of builders and owners of nuclear power plants. First, nothing in the Act releases any potential indemnitee from complying with the strict rules and regulations of the Atomic Energy Act that control the review of applications for construction permits or operating licenses. Second, the risk of potential bankruptcy or severe financial loss resulting from damage to the power plant itself is certainly an incentive to the owner to avoid the irresponsibility feared by the district court.

The Court also disagreed with the district court's third contention that there was not a sufficient quid pro quo for the ban on recovery above the specified limit. The Court emphasized that in fulfillment of its objective to "protect the public" the Act assured at least a $560 million recovery fund and in addition expressly required Congress to take further appropriate action in the event of a major nuclear catastrophe. The Court found that these provisions constitute a reasonably just substitute for potential plaintiffs' common law remedies, especially in light of the very real possibility that the resources of a potential defendant

86. Id. at 2637.
87. Id. at 2637-38.
88. Id. at 2638.
89. Id. See also the Supreme Court's discussion of NRC regulation in Vermont Yankee Nuclear Power Corp. v. NRDC, 98 S. Ct. 1197, 1203 (1978).
90. 98 S. Ct. at 2640.
91. Id. at 2639-40.
would be exhausted at a figure much lower than the $560 million fund guaranteed by the Act.

Furthermore, the Court concluded that the waiver of defenses required by the Act benefits potential plaintiffs in a significant way by eliminating the delay and uncertainty that would result if it were necessary to litigate the question of liability after a major accident. The Court added that common law strict liability was subject to exceptions for acts of God or of third parties whereas no such exceptions exist under the Price-Anderson Act. In summing up its position on the quid pro quo issue the Court declared:

The Price-Anderson Act not only provides a reasonable, prompt and equitable mechanism for compensating victims of a catastrophic nuclear incident, it also guarantees a level of net compensation generally exceeding that recoverable in private litigation. Moreover, the Act contains an explicit congressional commitment to take further action to aid victims of a nuclear accident in the event that the $560 million ceiling on liability is exceeded. This panoply of remedies and guarantees is at the least a reasonably just substitute for the common-law rights replaced by the Due Process Clause. Nothing more is required by the Due Process Clause.

After summarily dismissing any challenge based on the equal protection clause, the Court pronounced its final judgment, reversing the decision of the district court and remanding for proceedings consistent with the Court's opinion.

III. ANALYSIS

It is important to note at the outset that both the district court and the Supreme Court chose to confine their due process analyses to the question of substantive rather than procedural violations of the due process clause. The opinions do not discuss problems of notice or opportunity for a hearing—the traditional components of procedural due process analysis. Indeed, it is

93. 98 S. Ct. at 2640.
94. Id.
95. Id. at 2641.
96. Id.
97. Id.
98. E.g., Fuentes v. Shevin, 407 U.S. 67, 80 (1972). The Supreme Court in Fuentes stated:

For more than a century the central meaning of procedural due process has been clear: “Parties whose rights are to be affected are entitled to be heard; and
highly unlikely that a challenge to the Price-Anderson Act on procedural due process grounds would be effective. The Act does not prevent any injured party from filing a claim and appearing before a district court. It only potentially limits the amount of recovery in the event that aggregate damages exceed the statutory limit. All potential plaintiffs will have an opportunity for a hearing and will recover some portion of the value of their legitimate claims as long as the disbursement of funds is properly administered by the district court.

A. The Appropriate Standard of Review

Before discussing the district court's due process objections to the Price-Anderson Act, the Supreme Court paused to determine the appropriate standard of review to be applied in the case.99 The failure to clearly identify the proper standard of review was the critical flaw in the district court's analysis. Indeed it is surprising, considering the district court's choice to deal with the Act on substantive due process grounds, that there was no discussion in its opinion of the legislative purpose behind the Act or of the relationship between the objectives of the Act and the means employed to achieve them. Under traditional substantive due process analysis, the court must inquire as to the legitimacy of the legislative objective and the reasonableness of the means employed to further that objective. As originally stated in Nebbia v. New York,100 due process "demands only that the law shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained."101 Later cases have indicated, as the Supreme Court in this case reiterated, that this approach affords great deference to legislative determinations.102 In stark contrast to this traditional approach, the district court's opinion made virtually no reference to the objectives of the Price-Anderson Act and therefore failed to raise the question of whether the means employed were reasonably related to the objectives of the Act.103

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99. 98 S. Ct. at 2635-36.
100. 291 U.S. 502 (1934).
101. Id. at 525.
The Supreme Court, on the other hand, referred constantly throughout its opinion to the Act’s “dual purpose” of protecting the public and encouraging the development of the atomic energy industry.\(^{104}\) Given such objectives, the Court reasoned that the Price-Anderson Act was a clear example of the kind of legislative accommodation of “the burdens and benefits of economic life” that it had recently declared should be judged by the deferential standards developed in earlier substantive due process cases.\(^{105}\) Accordingly, the Court pointed out that the burden was on the party claiming the due process violation to show that the legislative action was arbitrary or irrational.

### B. Reasonable Compensation for Potential Damages

The district court’s conclusion that the “amount of recovery is not rationally related to the potential losses”\(^{106}\) was based solely on the observation that the potential damage from a major catastrophe could be many times the statutory limit.\(^{107}\) The Supreme Court took issue with this overly simplistic analysis and examined various factors that justify the establishment of a reasonable limit on liability. The Court noted, for example, that expert opinion as to maximum potential damage was highly speculative and that the record indicated the possibility of any incident’s exceeding the liability limit is extremely remote.\(^{108}\) In essence, the Court indicated it was proper for the legislature to weigh and reasonably accommodate the competing interests of the public for assurance of compensation and of private industry for a limitation on total liability. The Court then chose not to interfere with the policy balance implicit in the legislative enactment.

In vindicating the legislatively established limit on liability the Court may have overstated its case by relying on the recently added language to the Price-Anderson Act that requires Congress to intervene and “take whatever action is deemed necessary and appropriate” in the event of a nuclear incident involving damages in excess of the statutory limit.\(^{109}\) Although this proviso is superfi-

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104. E.g., 98 S. Ct. at 2626, 2636, 2639.
106. 431 F. Supp. at 222.
107. Id.
108. 98 S. Ct. at 2636-37 & n.28.
cially reassuring, it is doubtful that it contributes in any concrete way to the potential relief available to plaintiffs who sustain injury from a major nuclear catastrophe. In fact, the vague nature of the mandate to take “appropriate action” renders the proviso virtually meaningless. Furthermore, the language of the proviso establishes Congress itself as the ultimate determinant of what constitutes “necessary and appropriate” action and thus appears to preclude any resort to the courts for review of the appropriateness of congressional action or inaction.\footnote{110} This works to the disadvantage of both potential plaintiffs who might wish to challenge an action as insufficient and potential defendants—the owners and operators of nuclear power plants—who are left to wonder whether an “appropriate” action might include the imposition of additional liability.

Although the Court’s reliance on this provision is perhaps overemphasized, such reliance does not detract significantly from the Court’s conclusion that the amount of recovery under the Act is reasonably related to the Act’s legitimate objectives of protecting the public and encouraging the development of the nuclear power industry. The significance of the Court’s opinion on this point lies in its recognition that the pondering of “imponderables”\footnote{111} and the weighing of competing interests is a matter properly left to the discretion of the legislative branch. A decision made by Congress should not be judicially supplanted absent a showing that it was arbitrary or irrational and therefore unrelated to any legitimate legislative objective.

\textbf{C. Limited Liability and the Encouragement of Irresponsibility}

The district court’s second due process objection to the Act was that it tends to encourage irresponsibility in the construction and operation of reactor sites.\footnote{112} In making this conclusion the court considered only the economic incentives that might encour-

\footnote{110. The specific language of the proviso reads: 
\textit{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 . . . . 

\textit{Id.}}

\footnote{111. 98 S. Ct. at 2637-38. The Court made reference to such “imponderables” as the remoteness of the possibility of a major catastrophe and the necessity of choosing a figure high enough to provide the public reasonable assurance of some compensation for injuries yet low enough to allay the fears of private developers of nuclear power.}

\footnote{112. 431 F. Supp. at 222.}
age or discourage responsibility in the nuclear power industry. The Supreme Court, on the other hand, correctly noted that in addition to these economic incentives the strict statutory requirements of the Atomic Energy Act are designed specifically to deal with the concerns of reactor safety and environmental protection. The Act is replete with provisions requiring the NRC to promulgate safety standards and ensure that those standards are met by NRC licensees. The Supreme Court might also have noted that upon its creation in 1971 the Environmental Protection Agency (EPA) was specifically authorized to impose strict standards on licensees of the NRC. The safety record of the industry over its brief lifespan indicates that the NRC and its licensees have adhered well to government standards and that, apparently, there is little need for the economic incentives envisioned by the district court. In any event, since only NRC licensees may construct or operate reactor sites and since all such licensees are subject to the strict regulation of the NRC and the EPA, the Supreme Court had substantial justification for concluding that the tendency to irresponsibility noted by the district court is effectively curbed by comprehensive governmental regulation of the nuclear power industry.

D. Balancing of Burdens and Benefits—The Reasonably Just Substitute Test

In its third and final due process criticism of the Price-Anderson Act, the district court found that the limit on total liability benefited NRC licensees without exacting a significant

113. 42 U.S.C. §§ 2011-2296 (1976). In its statement of purpose, the Act proclaims:

It is the purpose of this chapter to effectuate the policies set forth above by providing for—

(d) a program to encourage widespread participation in the development and utilization of atomic energy for peaceful purposes to the maximum extent consistent with the common defense and security and with the health and safety of the public . . . .

Id. at § 2013(d). See also Vermont Yankee Nuclear Power Corp. v. NRDC, 98 S. Ct. 1197, 1203 (1978).

114. E.g., 42 U.S.C. § 2133 (1976) (conditions for issuance of a commercial license); Id. § 2201 (general duties of the Commission); Id. § 2232 (requirements for license application); Id. § 2236 (allowing revocation of license for failure to observe safety standards); Id. § 2241 (establishing Atomic Safety Licensing Board).


quid pro quo from the licensees. The district court's failure to determine at the outset the appropriate standard of review caused it to depart significantly from traditional analysis and to tip the scales of its balancing test in such a way as to find the Price-Anderson Act unconstitutionally advantageous to the defendants.

The problem was largely one of assigning the burden of proof to the wrong party. The district court seized upon language from *Cherokee Nation* and the *Regional Rail Reorganization Act Cases* and required the defendant to show that the statutory scheme afforded "reasonable, certain and adequate provision for obtaining compensation." By imposing the strict *Cherokee Nation* standard, the court in essence shifted the responsibility to the defendant to show the constitutionality of the Act.

In contrast, the Supreme Court determined that the burden properly rests with the party challenging the Act on substantive due process grounds to show that the legislation is arbitrary or unreasonable. Therefore, while the district court had loaded its scale in favor of the challengers, the Supreme Court tilted its own in favor of the constitutionality of the Act. In both courts the outcome of the balancing test was largely determined by the weighting of the scales.

In the process of applying its balancing test, the Supreme Court resurrected the "reasonably just substitute" test developed years earlier in *New York Central Railroad v. White* and *Crowell v. Benson*. While the district court had devoted considerable discussion to the exchange of burdens and benefits effected by the provisions of the Act, the Supreme Court directed its analysis to the more narrow question of whether the Act provides a reasonably just substitute for the common law or state tort law remedies it replaces.

In reaching the determination that the Price-Anderson compensation scheme provides a reasonable substitute remedy, the Court relied heavily on the one aspect of the legislative scheme that the district court had totally overlooked—that in furtherance of its stated objective to "protect the public" the Act is designed to provide a guaranteed minimum fund from which recovery can be made following a major catastrophe. As commentators have

117. 431 F. Supp. at 223.
118. Id. at 224.
119. 243 U.S. 188 (1917).
120. 285 U.S. 22 (1932).
121. 98 S. Ct. at 2638-41.
noted\textsuperscript{122} and common sense dictates, allowing unlimited recovery under common law principles does not ensure that funds will be available to satisfy judgments against the tortfeasor. Since at the time of initial passage of the Act liability insurance was only available to the nuclear power industry in a limited amount,\textsuperscript{123} the Act provided a mechanism whereby the public would be guaranteed recovery up to a reasonable limit. This crucial aspect of the Price-Anderson Act and the bearing it has on the reasonableness of the substitute remedy provided by the Act was apparently never considered by the district court.

The Supreme Court, on the other hand, devoted considerable time to a discussion of this congressional assurance of recovery. The Court, in fact, treated in only the most cursory manner the multiple factors enumerated in the district court’s opinion as contributing to the conclusion that there was no quid pro quo.\textsuperscript{124} By choosing to limit itself to a consideration of whether the Act provides a reasonably just substitute remedy, the Supreme Court refused to embark on the perilous course traveled by the district court in its multifactored approach to the balancing test. Thus, the Court laid to rest any speculation that in the realm of legislatively created compensation schemes the traditionally deferential standards of substantive due process analysis might give way to a less deferential and consequently more highly interventionist standard of review. The Court essentially outlined a safe harbor for legislators, putting them on notice that modifications of common law compensation schemes will continue to pass muster under the due process clause as long as the legislation provides a substitute remedy that is “reasonably just.” A scheme that substitutes the certainty of some recovery, albeit limited, for the possibility of no recovery whatsoever is, in the Court’s opinion, “reasonably just.”

\textsuperscript{122} E.g., Lowenstein, supra note 19, at 602. Lowenstein states:

Finally, it should be noted that the right to sue above the limit of liability would not assure the ability to collect. Since the waiver of defenses by persons sued would not apply above the amount of insurance and indemnity available, it might take years to reach a final adjudication in the courts and even then there is no assurance that persons adjudicated to be liable would have resources to pay judgments.

\textit{Id.}

\textsuperscript{123} Marrone, supra note 116, at 607.

\textsuperscript{124} 431 F. Supp. at 223-24. The district court considered, among other factors, the relative merits of Price-Anderson strict liability, the effectiveness of the Act’s bankruptcy-type provisions for distribution of funds, the impact of the Act’s extension of statutes of limitation, and the uncertain nature of the Act’s proviso requiring Congress to take further appropriate action in the event of a major nuclear catastrophe. \textit{Id.}
IV. Conclusion

There is no doubt that the provisions of the Price-Anderson Act have historically been the subject of much controversy outside the courtroom. Aside from the case at hand, however, no reported cases can be found in which the Act’s constitutionality has been challenged. This is probably due to the standing and ripeness difficulties encountered by litigants in challenging a statute that does not purport to adversely affect any compensation for damages less than $560 million in the aggregate. There have been no claims alleging damages in excess of the $560 million limit. Those who criticize the Act base their criticism largely upon opposition to nuclear power in general rather than to the theoretical construct of the Act itself. However, when opponents have engaged in some sort of legal analysis of the provisions of the Act, the due process clause is most often seen as the likely tool for declaring the Act to be invalid.

This case represents the first reasoned analysis by the courts of the due process issue so often invoked by opponents of Price-Anderson and nuclear power.

The district court’s analysis suffered in at least two highly significant respects. First of all, the court imposed on the defendants the heavy burden of showing that the Act afforded “reasonable, certain and adequate provision for obtaining compensation,” a standard premised on the just compensation clause and only applied previously to situations in which a taking of vested private property interests for public use was at issue. Had the court used the traditional standard and required the plaintiff to show that the Act was arbitrary and unreasonable, there is little doubt that the court’s balancing process would have been significantly altered.

The district court also neglected to seek out and thoughtfully consider the stated objectives of the Price-Anderson Act. In particular, the court failed to recognize the crucial point that one of the primary purposes of the Act was to protect the public by guaranteeing a substantial fund from which claims for damages resulting from a major nuclear incident could be satisfied, regardless of the solvency of the tortfeasor. This oversight contributed significantly to the court’s seeming predisposition to find the Act unconstitutional.


126. See, e.g., Collier, supra note 30, at 249-68.
The Supreme Court's opinion is at least as significant for what it chose not to do as for what it did do. The Court staunchly resisted the invitation to abandon the deferential postdepression standards of substantive due process analysis in economic matters. Instead, the Court resurrected and reaffirmed the reasonably just substitute test developed in *New York Central Railroad v. White*¹²⁷ and *Crowell v. Benson*¹²⁸ as a safe harbor for legislative modifications of common law compensation schemes.

On a more practical level, the Court laid to rest doubts concerning the continued vitality of the Price-Anderson Act as a tool for encouraging private development of nuclear power while at the same time assuring a source of funds from which public liability claims may be satisfied in the event of a major nuclear incident. Although many will insist that the Court should have dismissed the case for lack of standing, ripeness, or subject matter jurisdiction, the fact remains that the Court did deal with the case on its merits and has thereby removed the cloud of uncertainty that had descended upon the nuclear power industry since the district court's decision.

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¹²⁷ 243 U.S. 188 (1917).
¹²⁸ 285 U.S. 22 (1932).