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Price-Anderson Act under Attack

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THE PRICE-ANDERSON ACT UNDER ATTACK

I. Introduction

The expansion of nuclear power as a commercial energy source has been a fertile ground for litigation over the past twenty-four years. Recently, the opponents of nuclear development gained a victory which may precipitate a slowdown in development that previous administrative and court actions have been unable to accomplish. The successful challenge was based on an attack on the constitutionality of the Price-Anderson Act.[1]

Until 1977, the constitutionality of the Price-Anderson Act had not been tested judicially. In *Carolina Environmental Study Group, Inc. v. United States Atomic Energy Commission,*[2] however, the United States District Court for the Western District of North Carolina ruled that the liability limitations in the Price-Anderson Act violated the due process and equal protection provisions of the fifth amendment. The action sought a declaratory judgement on the constitutionality of the Act by plaintiffs who lived in the vicinity of two nuclear power plants being constructed by the Duke Power Company. The decision was appealed to the United States Supreme Court in November, 1977 and probable jurisdiction was noted.[3]

This note will review the important provisions of the Price-Anderson Act to show its significance in the nuclear power regulatory scheme. Then an analysis of the district court opinion which declared the Act unconstitutional will be made. This analysis will focus on the potential resolutions for each of the key issues. Although it is unlikely that the Supreme Court will discuss every one of the issues, it will be useful to analyze them all because of the potential for future challenges to the Act.

A brief review of the history of commercial nuclear power will place the significance of the Price-Anderson Act in perspective. The United States first committed itself to the development of peaceful uses of nuclear power in the Atomic Energy Act of 1946.[4] The initial development of nuclear power was strictly a governmental function because of the security precautions taken to protect our technical superiority. After the Soviet Union had achieved a nuclear weapons capability, however, Congress enacted the Atomic Energy Act of 1954,[5] lifted some of the security restraints and attempted to accelerate the development of nuclear power through the involvement of the private sector. The Act reiterated the commitment to the peaceful use of nuclear power and outlined the regulatory procedures that would allow the participation of private industry.

By 1956 the first reactor facility was within one year of being operational. At this point serious questions arose about the availability of liability insurance

1 42 U.S.C.A. § 2210 (Supp. 1977).
2 431 F. Supp. 203 (W.D.N.C. 1977).
3 Duke Power Company v. Carolina Environmental Study Group, Inc.; United States Nuclear Regulatory Commission v. Carolina Environmental Study Group, Inc., 98 S.Ct. 426 (1977) (actions consolidated).
4 Ch. 724, 60 Stat. 755 (1946).
5 Ch. 1073, 68 Stat. 919 (1954), *as amended by* 42 U.S.C.A. §§ 2011-2281 (Supp. 1977).

for the various nuclear projects then under way or in the planning stages. The problem encountered was the lack of any available data on the risks involved in nuclear power. Individual and commercial liability policies excluded losses caused by nuclear contamination because of insurers' inability to determine the potential losses. In 1957, however, the insurance industry formed two pools. A "pool" is a group of insurance companies that collectively make their assets available in the event of a large claim so as to provide more insurance coverage than any individual company could provide. These pools provided insurance coverage to operators of nuclear reactors up to a limit of $60 million.

In addition to this private effort, the Joint Committee on Atomic Energy studied the problem extensively and concluded that the $60 million in coverage was not adequate to protect the public from potential losses. The solution to the problem was the Price-Anderson Act.[6] The major provisions of that revision to the Atomic Energy Act of 1954 required that power plants with a capacity of 100 megawatts (electric) carry the maximum amount ($60 million) of private insurance and, in addition, stated that the government would provide $500 million indemnity for a flat rate per megawatt of thermal capacity. In any single nuclear incident the liability of a nuclear power plant operator was limited to $560 million. By subsequent amendments, the applicability of the Act was extended in 1965 and 1975 so as to be effective until 1987.

II. The Price-Anderson Act

A. *Provisions of the Act*

The Price-Anderson Act, which itself was an amendment to the Atomic Energy Act of 1954, has undergone a number of revisions since its enactment in 1957. The present provisions of the Act relating to power reactors may be summarized as follows:[7]

1. Adequate financial protection is required as a condition of licensing.[8]

2. Any reactor with a rated capacity of 100 megawatts (electric) must carry the maximum amount of financial protection available from private sources.[9]

3. The Nuclear Regulatory Commission will provide indemnity to the extent of the difference between $560 million and the private financial protection required. This indemnity shall not exceed $500 million.[10]

4. The aggregate liability for a single nuclear incident shall not exceed $560 million or the amount of private insurance available, whichever is greater. In the event of a nuclear incident involving damages in excess of the liability limit, Congress will thoroughly review the incident and take appropriate action for disaster relief.[11]

6 Pub. L. 85-256, 71 Stat. 576 (1957), *as amended by* 42 U.S.C.A. § 2210 (Supp. 1977).

7 The Act also includes provisions for experimental installations and the nuclear-powered ship *Savannah* which will not be discussed here. The United States Navy's nuclear-powered ships are not covered by the Act.

8 42 U.S.C.A. § 2210(a) (Supp. 1977).

9 42 U.S.C.A. § 2210(b) (Supp. 1977).

10 42 U.S.C.A. § 2210(c) (Supp. 1977).

11 42 U.S.C.A. § 2210(e) (Supp. 1977).

5. The Commission collects a flat fee ($30) per megawatt (thermal) of rated capacity.[12]

6. In the event of an "extraordinary nuclear occurrence," the nuclear plant operator waives any defense based on negligence, contributory negligence, charitable or governmental immunity, assumption of the risk and, to some extent, statute of limitations.[13]

7. Provisions are made for the transfer of all claims to a single United States district court and for the percentage distribution of all claims when the total will exceed the liability limitation. If the total claims are adjudged to exceed the limitation, no insurer may pay out over 15 percent of the limit without court approval.[14]

These current provisions include several significant changes in the Act. As of August 1, 1977 the pools were able to furnish insurance coverage of $140 million.[15] In addition, the insurance pools can collect $5 million per reactor from each nuclear operator in the event a nuclear incident occurs which causes damage in excess of the $140 million coverage. This is called a retrospective premium. It is collected only when the funds are needed to satisfy claims against one of the insured nuclear plants. Currently, liability coverage under the Act is as follows: $140 million primary insurance coverage through the private insurance pools, $310 million available from retrospective premiums (62 nuclear reactors times $5 million), and government indemnity of $110 million.[16] Each year the amount available from retrospective premiums will increase as the total number of operating reactors increases. The Act provides that once the liability coverage exceeds $560 million, government indemnity will no longer be available and the liability limitation will rise with the available insurance coverage. Using the projected number of operating reactors from the *A.E.C. Staff Study on Price-Anderson,*[17] the liability limit should reach $1 billion around the year 1983.

Another important addition to the Act is the provision for congressional review in the event a nuclear accident exceeds the liability limitations. The legislative history of prior revisions indicated that Congress intended to conduct such a review, but it had never been mandated by the provisions of the Act.

B. *Purpose of Price-Anderson*

Hearings conducted in 1956 indicated that the potential liability of nuclear plant operators was a major roadblock to industrial participation in the nuclear field.[18] To alleviate this difficulty, Congress fashioned an insurance-indemnity program under the Act that was designed to: 1) insure adequate protection of

12 42 U.S.C.A. § 2210(f) (Supp. 1977).
13 42 U.S.C.A. § 2210(n)(1) (Supp. 1977). This section gives the Commission the power to incorporate these waivers, which are always required, into an indemnification agreement.
14 42 U.S.C.A. § 2210(n)(2) (Supp. 1977).
15 *Nuclear Liability Protection for the Public,* NEL-PIA Reports, no. 3 at 4 (Sept. 1977).
16 *Id.* at 5.
17 16 A.E.L.J. 205, 252 (1974).
18 S. REP. No. 296, 85th Cong., 1st Sess. 1, *reprinted in* [1957] U.S. CODE CONG. & AD. NEWS 1803.

the public in the event of a nuclear accident and 2) promote the development of the nuclear industry.[19] The original provisions of the Act included a requirement for private insurance, $500 million in government indemnification, and a $560 million limitation on liability. The Senate Report on the bill justified the limitation of liability as a valid exercise of "the bankruptcy power of the United States for it is improbable that any firm could survive claims against it of $500 million, over and above insurance which might be available."[20]

Since enacted, Price-Anderson has been amended several times to extend the expiration date and to modify the provisions of the Act.[21] Its present form was adopted in 1975 with the same purposes as the original Act but as will be shown later the significance of those purposes had changed.

III. Attack on Price-Anderson

A. *Statement of the Case*

Carolina Environmental Study Group, Inc. v. United States Atomic Energy Commission[22] was an action challenging the constitutionality of the provisions of the Price-Anderson Act that impose a $560 million limitation on liability. The plaintiffs were a group of people[23] residing in the vicinity of two nuclear power plants that were being constructed by the defendant Duke Power Company. They claimed that but for the Price-Anderson Act, the plants would not have been built. In addition to alleging that the normal operation of the nuclear plants would have adverse effects on the environment, they alleged that the limitation of liability would not adequately compensate them in the event of a catastrophic release of radioactive debris and therefore that they would be deprived of individual property rights without due process of law. They also claimed that the limitation on complete recovery creates an unreasonable classification of persons who are denied the equal protection of the laws.

19 *Id.* at 1811.

20 *Id.* at 1816.

21 In 1965 the Joint Committee on Atomic Energy considered the necessity for extending the applicability of the Price-Anderson Act past its expiration date in 1967. Its report stated:

> The Price-Anderson Act has clearly accomplished the second purpose for which it was enacted—removal of the deterrent to private industrial participation in the atomic energy program. This is obvious from the growth of the nuclear power industry and the huge increase in the scope and complexity of commercial nuclear energy activities. JOINT COMMITTEE ON ATOMIC ENERGY REP. No. 883, 88th Cong., 1st Sess. 5 (Aug. 26, 1965).

The availability of private insurance had not substantially increased since 1957 and thus the need to provide an adequate fund for payment of claims arising out of a nuclear incident was still present. In addition, the Joint Committee saw a continued need to promote industrial expansion of nuclear power. In discussing recent trends the Committee noted that the concern centered not on the mere survival of the industry but rather on its continued technological advancements: "The development of some of these more advanced reactors is at roughly the same stage today as was the case with low conversion ratio light water reactors in 1957, and this development should similarly be encouraged through extension of the Price-Anderson legislation." *Id.* at 8.

The Price-Anderson Act was extended for ten years by Pub. L. 89-645, enacted in 1966. A major addition to the legislation was the inclusion of a waiver of defenses provision that must be signed by a nuclear operator as part of the government indemnification agreement.

22 431 F. Supp. at 203.

23 No mention of the Carolina Environmental Study Group is made in the opinion. The Group has standing if its members have standing as individuals. United States v. Students Challenging Regulatory Procedures (SCRAP), 412 U.S. 669 (1973).

The two nuclear plants are located within a twenty-mile radius of Charlotte, North Carolina (one in North Carolina and one in South Carolina). Each was being constructed by the Duke Power Company under permits issued by the Atomic Energy Commission (now the Nuclear Regulatory Commission), the plaintiffs having unsuccessfully opposed the issuance of the construction licenses. Neither plant was licensed to operate at the time of the trial.

The defendants moved to dismiss plaintiffs' complaint on the grounds that the plaintiffs lacked standing and that the claims were not ripe for adjudication. The trial judge withheld a decision on the motion until evidence was presented at a hearing. A major portion of the evidence was devoted to assessing the likelihood of a nuclear accident and the extent of the injury and damages expected from such an accident. The defendants relied heavily on the *Reactor Safety Study*[24] published by the Nuclear Regulatory Commission in October, 1975.[25] The conclusions reached in the *Reactor Safety Study* cannot be easily summarized, but the results indicate that any major nuclear incident is extremely unlikely.[26] Even given the deviations predicted in the report, the results suggest that the risk of nuclear accident is far less than any other man-caused or natural accident.[27]

The plaintiffs presented evidence that attacked the credibility of the *Reactor Safety Study.* Some of the major deficiencies cited were:

> 1. Evaluation of component and human failure is impossible under the current state of the arts.
>
> 2. Safety systems have never been tested under actual accident conditions.
>
> 3. Sabotage was not considered.
>
> 4. Radiation effects on health were not fully evaluated.
>
> 5. Deviation from the probabilities stated could be much greater than those estimated in the report.
>
> 6. Groundwater contamination was not considered.
>
> 7. The fault-tree and event-tree analysis technique eliminated many of the possible accident sequences.[28]

On these facts the court resolved the issue of risk on a middle ground between the two parties:

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24 UNITED STATES NUCLEAR REGULATORY COMMISSION, WASH-1400 (1975).

25 This study, the most comprehensive available on nuclear plant safety, was conducted over several years under the independent direction of Professor Norman C. Rasmussen of the Massachusetts Institute of Technology.

26 For example, assuming that one hundred nuclear reactors are in operation, the report concluded that that there is a one in ten thousand chance that an accident will cause one immediate death. That accident is estimated to result in 170 latent cancer deaths per year and $900 million in property damage. WASH-1400 at 84-85.

27 The risks claimed for nuclear power plants were approximately the same as the risk of injury from meteorites. WASH-1400 at 120.

28 A complete discussion of the evidence appears at 431 F. Supp. at 210-14.

> [T]he significant conclusion is that under the odds quoted by either side, a nuclear catastrophe is a real, not fanciful, possibility. The court finds, without being as rosily optimistic as the Reactor Safety Study nor as pessimistic as Dr. Kendall, that a core melt at McGuire or Catawba can reasonably be expected to produce hundreds or thousands of fatalities, numerous illnesses, genetic effects of unpredictable degree for succeeding generations . . . and widespread damage to property.[29]

Having resolved this basic issue, the court went on to consider each of the elements necessary to establish the plaintiffs' case.

B. *Causation*

The establishment of a causal relationship between the allegedly unconstitutional Act and the injuries sustained is critical to the discussions of standing and ripeness which follow this section. Difficulties arise because the liability limitation provisions under attack have not caused any present injury and it cannot be said that injury is imminent. There is no question that if the plaintiffs were uncompensated victims of a nuclear accident the causal relationship between the limitation of liability and the inadequate compensation would be established. In the instant case, however, the relationship is not so obvious.

The plaintiffs must establish that without Price-Anderson the nuclear power plants in question would not have been built. As mentioned previously, one of the purposes of the Act was to promote industrial participation in nuclear power in the fact of serious concern over potential liability. The Act was unquestionably a vital catalyst in the early development of the industry.[30] As the industry matured, Price-Anderson played a continuing role in the development of nuclear power, but the emphasis had changed.

In 1956, testimony before the Joint Committee on Atomic Energy (J.C.A.E.) made it clear that the nuclear industry could not survive without some type of insurance program. Some of that testimony was cited in the *Carolina Environmental Study Group* opinion:

> [I]t appears to be virtually unanimously agreed that a legislative solution to the public liability problem is necessary if one of the principal purposes of the act—"to encourage widespread participation in the development and utilization of atomic energy for peaceful purposes"—is to be possible. . . . [I]f the financial protection needed is not reasonably available, *we will not be able to go ahead* with the Westinghouse testing reactor [at Waltz Mill, Pa].[31]

This testimony was representative of the industry-wide feelings on the issue.

By 1975 the emphasis of the testimony before the J.C.A.E. had changed. Price-Anderson was seen as a spur to further development of the industry rather

29 431 F. Supp. at 214. McGuire and Catawba are the nuclear generating stations in question.

30 *See* note 22 *supra.*

31 431 F. Supp. at 215.

than as a prerequisite for its continued existence.[32] Some of the 1975 testimony addressed the issue directly:

> A more serious difficulty with the position that unlimited liability should be allocated to the industry lies in the validity of the assumption as to the consequences of such a policy. Although it is difficult to assess what the actual result of termination of Price-Anderson protection would be, it seems clear that it would not result in the total cessation of the construction of new plants. The situation is quite different from that which obtained in 1957. Utilities, vendors and architects-engineers have substantial investment in the industry and have a history of safe operation. While it is difficult to evaluate public statements by industry as to the impact of termination of Price-Anderson in the current political context, these statements do not indicate that it intends to abandon the nuclear field.[33]

Even the 1975 testimony quoted in *Carolina Environmental Study Group* to support a finding of causation lacked the definitive statements made in the 1956-57 hearings.[34]

Other authorities are in accord with the 1975 testimony. The *A.E.C. Staff Study of the Price-Anderson Act* concludes that "no consensus has been expressed as to whether utilities would not build and operate reactors, or that large suppliers would not fabricate reactor components in the absence of the limitation of liability."[35] In 1975, Senator Tunney opposed the extension of the Act because "the available evidence suggests that nuclear power plants would continue in operation even without the protection of Price-Anderson."[36]

In addition to this failure to show an industry-wide consensus, the district court did not focus on the individual power plants in question. Would these particular plants have been constructed in the absence of the Price-Anderson Act? None of the evidence discussed in the opinion relates to these plants, but there is testimony that is generally relevant. A statement made in 1976 by the president of Duke Power Company revealed that it would attempt to continue using nuclear power even without the Act. In his testimony, he recognized that difficulties with suppliers would be encountered but expressed an intent to continue nuclear operations.[37]

A letter from the Duke Power Company outlined its commitment to nuclear power but endorsed the Act because, "[f]ailure to extend Price-Anderson could well cause erosion of this confidence, resulting in higher cost of capital and/or inadequate supply. Such a consequence would only add to the consumer's economic burden."[38] This evidence, even viewed in a light most favorable to the plaintiffs, does not support the conclusion that "but for" the Act, the plants would not have been built.

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32 *See* S. REP. No. 454, 94th Cong., 1st Sess., *reprinted in* [1975] U.S. CODE CONG. & AD. NEWS 2251; SELECTED MATERIALS ON ATOMIC ENERGY INDEMNITY AND INSURANCE LEGISLATION, 93d Cong., 2d Sess. (1974).

33 SELECTED MATERIALS ON ATOMIC ENERGY INDEMNITY AND INSURANCE LEGISLATION, 93d Cong., 2d Sess. (1974).

34 431 F. Supp. at 215-18.

35 16 A.E.L.J. at 298.

36 S. REP. No. 454, 94th Cong., 1st Sess. 30, *reprinted in* [1975] U.S. CODE CONG. & AD. NEWS 2251, 2273.

37 431 F. Supp. at 218.

38 *Id.* at 218.

In 1956 the Price-Anderson Act clearly was a prerequisite to the construction and operation of nuclear power plants, but that conclusion is no longer valid. The lack of proof of causation (or the remoteness of the causation[39]) significantly weakens the plaintiffs' case, as will be shown in the following sections.

C. *Standing*

The district court judge found that the plaintiffs had standing to challenge the constitutionality of the Price-Anderson Act. In determining what factors to consider on the standing issue the court said: " 'Standing' focuses upon the litigant and raises the question whether the litigant is the proper party to fight the lawsuit, not the question of whether the issue is justiciable."[40] Quoting extensively from *Arlington Heights v. Metropolitan Housing Development Corp.*,[41] the court emphasized that standing requires a causal connection between the act complained of and the asserted injury.

In *Arlington Heights* the Supreme Court held that potential tenants of a real estate development had standing to challenge the defendant's refusal to rezone a lot for multi-family dwellings. The specificity of the plans for the project made the causal connection between the denial and the injury (inability of the plaintiffs to live near their place of work) sufficiently concrete.

In *Carolina Environmental Study Group,* the court concluded that a "but for" causal connection existed between the Act and the construction of the nuclear plants. Those key words, "but for," are not words of art when used in the context of standing. In *Arlington Heights,* the Court considered the necessary causal relationship to establish standing in terms of "substantial probability." There was a substantial probability that the housing project would be built if the zoning restrictions were lifted. Therefore, failure to lift the restrictions was a cause of the plaintiffs' inability to live in the vicinity of their work. Applying that analysis to *Carolina Environmental Study Group,* it must be determined whether there is a substantial probability that the plants would not have been built without the Price-Anderson Act. The previous section on causation suggests the absence of such a probability.

Another recent Supreme Court decision involving standing and the relationship between the injury and the action under attack was *Simon v. Eastern Ky. Welfare Rights Organization.*[42] That case was brought by indigent tenants against the Internal Revenue Service. The plaintiff-respondents objected to an IRS revenue ruling which granted favorable tax treatment to nonprofit hospitals that offered only emergency room service to indigents. The plaintiffs contended that the extension of these tax benefits to hospitals that did not extend more comprehensive treatment to indigents was an improper interpretation of the Internal Revenue Code. They alleged that they had sought and been denied,

39 Strictly speaking, the Price-Anderson Act does have a causal connection to the current construction of power plants. Without the 1957 version of the Act the nuclear industry might never have gotten off the ground. This line of causation seems to be much too attenuated to be seriously considered.

40 431 F. Supp. at 219.

41 429 U.S. 252 (1977).

42 426 U.S. 26 (1976).

because of their indigency, treatment at hospitals enjoying tax benefits.

The Supreme Court vacated the judgment of the district court that the ruling was contrary to the Internal Revenue Code and ordered a dismissal for lack of standing. In reviewing the principles of standing, the Court said:

> In sum, when a plaintiff's standing is brought into issue, the relevant inquiry is whether, assuming justiciability of the claim, the plaintiff has shown *an injury to himself that is likely to be redressed by a favorable decision.* Absent such a showing, exercise of its power by a federal court would be gratuitous and thus inconsistent with the Art. III limitation.[43]

In its opinion, the Court conceded that the indigent plaintiffs had alleged an injury, but asserted that they had failed to show that the injury could be traced to the defendants' actions. The Court concluded that it was purely speculative whether the hospitals would offer the desired services if the favorable tax treatment were conditioned on a wider range of free services to indigents. The respondents had submitted to the district court a statement made by an official of a hospital association to Congress describing the importance of the favorable tax treatment they receive as charitable corporations. The Solicitor General submitted evidence that challenged the reliance of hospitals on private philanthropy. In light of this evidence the Court found that merely alleging that a hospital receives substantial amounts of charitable contributions did not establish that these hospitals were dependent on the contributions.

There is a strong similarity between the arguments presented by the plaintiffs in *Carolina Environmental Study Group* and those presented by the plaintiffs in *Eastern Ky. Welfare Rights Organization.* Both attempt to rely on general propositions drawn from congressional hearings to establish a specific causal connection. Although the evidence in the former case is more detailed than in the latter, there is still lacking the needed specificity to establish "a substantial likelihood that victory in this suit would result in respondents receiving the hospital treatment they desire."[44] Stated in terms of *Carolina Environmental Study Group* there must be a substantial likelihood that declaring Price-Anderson unconstitutional would result in the suspension of construction or operation of the Duke Power Company power plants.

The issue of standing in *Carolina Environmental Study Group* presents a different problem from that addressed in previous opinions. The injury alleged is not a single injury, but several separate injuries. The first is the injury caused by the low-level radioactive discharge that inevitably results from the operation of a nuclear power plant[45] and the increased water temperatures in local water sources used to cool the reactors. The second is the injury caused by the potential for nuclear accidents; there is alleged an element of present injury in that the specter of such a catastrophe causes great concern among local residents. Some of the plaintiffs claim they have moved because of their fear of the consequences

43 *Id.* at 38 (emphasis supplied).
44 *Id.* at 45-46.
45 This discharge is expected, but is strictly regulated to meet Nuclear Regulatory Comm. standards.

of reactor operations.[46] A third element of injury is the inability to recover adequate compensation in the event of a nuclear accident which causes damage in excess of the Price-Anderson limitation. Accepting the fact that the first two injuries "allege some threatened or actual injury"[47] there still exists the problem of showing that they flow from the allegedly unconstitutional Act. The plaintiffs do not allege any grounds for a direct attack on the plants themselves.[48] Their standing then must rest on the existence of a substantial likelihood that without the Price-Anderson Act the plants would not have been built. As discussed previously, the district judge did find a "but for" causal relationship between the Act and the plants, but this finding can be seriously challenged in light of *Simon v. Eastern Ky. Welfare Rights Organization.*

The third injury (inadequate compensation) alleged does not have the causality problems associated with the first two. The inability to get a complete recovery of damages would be the direct result of the Price-Anderson liability limitation. The issue here is the existence of any immediate injury. At the *present* time, are these plaintiffs the proper persons to be bringing this action? The question illustrates the overlap between standing and ripeness. An example of this is the case of *O'Shea v. Littleton*[49] which straddled the line between the two issues. The plaintiffs in *O'Shea,* representing themselves and a class, complained of discrimination in bond setting, sentencing and jury fee practices in criminal cases before an Illinois county circuit court. The Supreme Court held that the allegations of previous discriminatory practices against the class were insufficient to show an immediate threat of repeated injury. The Court said: "As in *Golden v. Zwickler* [394 U.S. 103] we doubt that there is 'sufficient immediacy and reality' to respondent's allegations of future injury to warrant invocation of the jurisdiction of the District Court."[50]

Even given the plaintiffs' evidence in *Carolina Environmental Study Group* on the inevitability of a nuclear accident, the immediacy requirement of *O'Shea* would not appear to be met. In *O'Shea,* the plaintiffs alleged that the discrimination had occurred in a continuing pattern of injuries; but in *Carolina Environmental Study Group* the plaintiffs could allege no pattern since over 300 reactor years[51] of operation had not produced a nuclear accident. The present plaintiffs stand in a better position only because there is some certainty that people in the vicinity of a reactor will be injured if an accident were to occur of sufficient magnitude to invoke the liability limitation. The *O'Shea* plaintiff would have to be arrested before there would be a possibility of discrimination. In both cases, though, the nature of the speculation is similar.

The appellants, Duke Power Company and the Nuclear Regulatory Commission, will seek to have the Supreme Court reverse the district court and

46 No mention is made in the opinion of any allegations of a present decrease in property values.

47 Linda R.S. v. Richard D., 410 U.S. 614, 617 (1973).

48 This suit will have no direct effect on the plants because no injunction or damages are sought. Even if the Act is declared unconstitutional Duke may elect to continue with the construction. Some of the plaintiffs unsuccessfully "fought against nuclear power at numerous administrative and legal levels." 431 F. Supp. at 205.

49 414 U.S. 488 (1974).

50 *Id.* at 497.

51 431 F. Supp. at 214.

remand the case because of a lack of standing.[52] The district judge's finding of a "but for" causal relationship between the Price-Anderson Act and the nuclear power plants is the key to this issue. Although the lower court has made a strong argument for the existence of the relationship, the facts relied upon are susceptible to a different interpretation. It is because of this attenuated relationship between the injury and the allegedly unconstitutional Act that the standing issue is important. The Supreme Court will have to relax the application of the standards set out in *Simon v. Eastern Ky. Welfare Rights Organization*[53] in order to find standing.[54]

D. *Ripeness*

The question of ripeness is closely related to standing. The Article III requirement of a "case or controversy" discussed in conjunction with standing also has relevance in considering ripeness.[55] The focus of ripeness is on the readiness of the case for judicial review. The issues must be well-defined and grounded on facts.

In analyzing the ripeness of *Carolina Environmental Study Group,* the injuries alleged can be divided into two categories: those which are alleged to be the immediate result of the normal operation of a nuclear power plant, and those which are potential losses caused by the Price-Anderson limitation on liability. The first of these, the immediate injuries, present an issue that is sufficiently concrete to be ripe for review. The environmental impact of a nuclear power plant can be accurately assessed. In the course of Nuclear Regulatory Commission licensing procedures, a detailed study of the consequences of the plant's operation is made. Requiring the plaintiffs to wait until actual operation of the plant would not appreciably sharpen the controversy.

A different result must be reached when considering the possible damages of an uncompensated injury. The district judge compared the situation to the "erosion taking" dealt with in the *Regional Rail Reorganization Cases.*[56] There, the Supreme Court held that an issue was ripe although injury was only a possibility. The Tucker Act had authorized the continued operation of eight railroads during proceedings under the Bankruptcy Act. Owners of interests in the Penn Central Railroad objected to the operation, claiming that it jeopardized the value of their assets and, as such, was a taking without just compensation. The Court held the issue ripe because "failure to decide the availability of the Tucker Act would raise the distinct possibility that those plaintiffs would suffer an 'erosion taking' without adequate assurance that compensation will ever be provided."[57] Although the injuries complained of were not a certainty, the Court held the issue to be ripe.

52 46 U.S.L.W. 3300 (U.S. Nov. 7, 1977) (72-262).
53 426 U.S. 26 (1976).
54 In *Simon,* the action was brought against the I.R.S. alone even though it was the hospitals that had denied the medical treatment. It is unlikely that the mere presence of the hospitals as defendants would have altered the result.
55 Warth v. Seldin, 422 U.S. 490, 498 (1975).
56 419 U.S. 102 (1974).
57 *Id.* at 124.

The plaintiffs in *Carolina Environmental Study Group* stand in a weaker position. Although specific probabilities cannot be assigned, the possibility of uncompensated loss is somewhat more remote than the chance of "erosion taking." The Penn Central owners had shown that the railroad had operated with large deficits in the past. It was not overly speculative to conclude that operation under court supervision would not be any more successful. An uncompensated injury in the *Carolina Environmental Study Group* case will result only *if* a nuclear accident occurs, and *if* the extent of the damage caused exceeds liability limitations, and *if* the plaintiffs are injured by the accident. The case is clearly one in which the issues are too remote to warrant review at the present time. Moreover, in the *Regional Rail Reorganization Cases* the Court relied on the lack of any certain provision for adequate compensation. The Price-Anderson Act, on the other hand, will provide certain compensation. Although the plaintiffs object to its reasonableness it also should be remembered that, in addition to the indemnity provisions, the Act requires that Congress evaluate any nuclear incident which exceeds liability limits to determine the necessity for additional relief.[58] Swift congressional action in the face of a disaster might render valid an otherwise unacceptable provision. The issue of uncompensated injury is not sufficiently concrete because there are too many variables that must be weighed to determine the Act's constitutionality. Judicial action at this stage would be engaging in constitutional adjudication in the abstract, a method that is completely unacceptable.[59]

To summarize, this case involves a ripe controversy only with regard to the imminent injuries alleged. The potential for uncompensated loss cannot serve as the basis for this action because the facts of the issue are not sufficiently crystallized. This heightens the importance of the causation discussion because the plaintiffs' standing to pursue the only issue that is ripe depends on the finding of a causal connection between the Act and the construction of the power plants.

E. *Merits*

The previous sections dealing with standing and ripeness indicate that the appellee-plaintiffs will have difficulty showing that they have met the threshold requirements necessary to allow the Supreme Court to consider the merits of their case. A review of these issues is undertaken here because the widespread concern over nuclear power makes it likely that future challenges will be mounted.

1. Due Process

The alleged violation of the due process clause is not a violation of procedural due process, but involves substantive due process. Although the lower court opinion does not articulate the standards to be applied in determining whether an act violates the due process clause, it will be assumed that the court

58 42 U.S.C.A. § 2210(e) (Supp. 1977).
59 United Public Workers v. Mitchell, 330 U.S. 75, 89 (1947).

intended to follow established principles. Due process requires that an act bear a reasonable relation to a permissible legislative objective.[60] The legislative action cannot be so irrational that it may be branded "arbitrary."[61]

The opinion does not address the propriety of the legislative objective, but clearly the regulation of nuclear power for the welfare of the industry and the public is a permissible objective. It is the reasonableness of the means used to reach the legislative objective that is the subject of the attack. The court's holding that the liability limitation provision of the Price-Anderson Act is a violation of due process is based on three arguments: 1) the amount of recovery is not rationally related to the potential losses; 2) the Act tends to encourage irresponsible operation of nuclear power plants because the operators are insulated from liability; and 3) there is no *quid pro quo* for the limitation on liability.

The first of these grounds represents an improper application of the "rational basis"[62] test. The recovery, or limitation thereof, need only be rationally related to the permissible legislative purpose. Other types of statutes (workmen's compensation,[63] no-fault insurance,[64] malpractice limitations[65]) have been upheld even though these contain "arbitrary" limitations in the sense that the amount selected cannot be derived from any mathematical formula. The critical issue was the relationship between the limit and the purpose of the act. The fact that the legislation is not in accord with the common law remedy is immaterial. There is no vested interest in recovery on a common law right. In *Silver v. Silver*,[66] the Supreme Court upheld the constitutionality of an automobile guest statute citing "the rule that the Constitution does not forbid the creation of new rights, or the abolition of old ones recognized by the common law, to attain a permissible legislative object."[67]

The second of the court's reasons, that the Act fosters irresponsible operation, appears to be a matter of pure speculation on the part of the trial judge. No evidence was introduced to support a conclusion that lax safety practices occurred because of the liability limit. Even if the assumption is valid, it does not support the argument for irrationality because of the existence of other incentives for safe operation. The huge financial investment and the pervasive regulation of the industry must be balanced against any negative effects of the Act. The trial judge has substituted his opinion for the judgement of Congress on the acceptability of the balance. His views may be correct, but that does not mean the Act is irrational.

The necessity for a *quid pro quo* when abolishing common law rights is not firmly established. Replacement of a common law right with some other acceptable remedy stems from the decision in *New York Central Railroad v. White*.[68] In upholding the constitutionality of a workmen's compensation

60 West Coast Hotel Co. v. Parrish, 300 U.S. 379, 391 (1936).
61 Kelley v. Johnson, 425 U.S. 238 (1976).
62 United States v. Carolene Products, 304 U.S. 144, 152 (1938).
63 New York Central Railroad v. White, 243 U.S. 188 (1917).
64 Pinnick v. Cleary, 360 Mass. 1, 271 N.E.2d 592 (1971).
65 Jones v. State Board of Medicine, 97 Idaho 859, 555 P.2d 399 (1976) (remanded for further consideration).
66 280 U.S. 117 (1929).
67 *Id.* at 122 (*dicta*).
68 243 U.S. 188 (1917).

statute, the Supreme Court analyzed the statutory remedy as a substitute for common law remedies. The Court stated that it did no need to reach a conclusion as to the necessity for such a substitute. Although that point has never been decided by the Supreme Court, later cases have intimated that there is no requirement for an adequate substitute.[69] Several state courts have reviewed the Supreme Court cases on the issue and expressed serious doubts about the absolute necessity for a *quid pro quo*.[70]

Assuming that some adequate replacement for a common law remedy is required does not automatically invalidate the Price-Anderson Act. The Act contains several provisions which can be viewed as substitutes for the common law remedy, the most important of which is the waiver of defenses provision. The defendants claim that the nuclear operators gave up significant rights which benefit the public when the waiver of defenses provision became effective. The court concluded that this was of no real benefit because the doctrine of strict liability would be applied in North Carolina regardless of the Price-Anderson Act. The court's generalized conclusion as to the present applicability of strict liability without the Act is based on a citation from Dean Prosser.[71] Although there has never been a case dealing with a nuclear incident, an action was brought as a result of nuclear weapons testing. In *Bartholomae Corporation v. United States*[72] the Ninth Circuit refused to apply strict liability where a nuclear test caused damage to the buildings of the plaintiff. The case underscores the speculative nature of any conclusion about strict liability.[73]

More recently the Columbia University Legislative Drafting Research Fund examined the situation. Its conclusion was relied upon in the Senate Report on the latest revision to the Act:

> The study concluded that the resulting legal situation in the event of a nuclear incident would be chaotic. Injured parties would be subject to whatever tort law prevailed in the State in which the incident occurred or in which they suffered harm. There would be wide variation in the grounds for recovery, the standards of proof, and the defenses available to the defendants. Recovery would be uncertain and could be delayed for many years.[74]

The elimination of this uncertainty establishes the value of the waiver pro-

69 *See* Silver v. Silver, 280 U.S. 117 (1929); Arizona Employers Liab. Cases, 250 U.S. 400 (1919).

70 *See* Jones v. State Board of Medicine, 97 Idaho 859, 555 P.2d 399 (1976); Montgomery v. Daniels, 38 N.Y.2d 41, 378 N.Y.S.2d 1, 340 N.E.2d 444 (1975).

71 Although rockets already have made their appearance in the field of strict liability, the first case raising the question as to the use of nuclear energy has yet to reach the courts. When it does, it may be predicted with a good deal of confidence that this is an area in which no court will, at last, refuse to recognize and apply the principle of strict liability found in the cases which follow *Rylands v. Fletcher.* PROSSER, THE LAW OF TORTS 516 (4th Ed. 1971).

72 253 F.2d 716 (9th Cir. 1957).

73 For a discussion of nuclear tort liability *see* Note, *Nuclear Torts: The Price-Anderson Act and the Potential for Uncompensated Injury,* 11 N. ENG. L.R. 111 (1975); Note, *The "Extraordinary Nuclear Occurrence" Threshold and Uncompensated Injury under the Price-Anderson Act,* 6 RUT. CAM. L.J. 360 (1974).

74 S. REP. No. 454, 94th Cong., 1st Sess. 7, *reprinted in* [1975] U.S. CODE CONG. & AD. NEWS 2251, 2257.

visions. The finding that at least one jurisdiction would not be benefited does not render this alternative remedy inadequate.

The proper analysis of the due process claim should have included a discussion of the reasonableness of the legislative scheme in accomplishing the valid legislative purpose, the purpose of the Act being twofold: protection of the public and promotion of the industry.[75] The Senate Report[76] accompanying the most recent revision of the bill includes an ample discussion of the means selected to reach the conclusion that there is a reasonable relationship. Of course, Congress cannot immunize its legislation from scrutiny merely by asserting the validity of the means selected, but no evidence was introduced challenging the validity of the report's conclusions. If the Supreme Court does reach the merits of this case, it will apply the "rational basis" test. Given the above considerations it is unlikely that it will find the Act to be unconstitutional.

2. Equal Protection

It is important to start the consideration of equal protection with a discussion of the applicable standards for review. This is particularly true in light of the development of what has been called the "newer" equal protection. The subtleties of the shifts in emphasis could be the subject of several articles, so the attempt here will be to outline the development adequately to place *Carolina Environmental Study Group* in the proper context.

Until recently, the test that the Supreme Court has applied in equal protection cases has been a two-tier approach. Most legislation has been subjected to the first tier of review, sometimes called a "minimum rationality" test. The classification established by the legislation must be reasonably related to a legitimate state interest.[77] The application of this test virtually assured the constitutionality of the act. It was commonly applied to economic regulations, and only one case since 1937 invalidated an economic act on equal protection grounds. That case, *Morey v. Doud*,[78] was specifically overruled by *City of New Orleans v. Dukes*[79] in 1976.

The second tier has been applied where the classification involved a discrete and insular minority or a fundamental right. Although various justices have advocated expansion of these categories, their scope is fairly well defined. The suspect classifications are those based on race[80] and alienage.[81] The fundamental rights include voting,[82] criminal appeals,[83] travel,[84] and procreation.[85] Cases involving these suspect criteria are subjected to "strict scrutiny." The classifica-

75 *See* text accompanying note 19 *supra*.
76 S. REP. No. 454, 94th Cong., 1st Sess., *reprinted in* [1975] U.S. CODE CONG. & AD. NEWS 2251.
77 City of New Orleans v. Dukes, 427 U.S. 297 (1976).
78 354 U.S. 457 (1957).
79 427 U.S. 297 (1976).
80 *See, e.g.*, Loving v. Virginia, 388 U.S. 1 (1967).
81 *See, e.g.*, Graham v. Richardson, 403 U.S. 365 (1971).
82 *See, e.g.*, Harper v. Virginia Board of Elections, 383 U.S. 663 (1966).
83 *See, e.g.*, Griffin v. Illinois, 351 U.S. 12 (1956).
84 *See, e.g.*, Shapiro v. Thompson, 394 U.S. 618 (1969).
85 *See, e.g.*, Skinner v. Oklahoma, 316 U.S. 535 (1942).

tion must be necessary for a compelling state interest.[86] This test almost invariably results in a finding of unconstitutionality.

While the two-tier test appears straightforward, its application has not been mechanical. Some cases that have not required strict scrutiny have been subjected to a more rigorous standard than the rational basis test.[87] This recognition of some intermediate level of review has been called a "sliding scale," a term first used by Justice Marshall in his dissent in *Dandridge v. Williams*.[88] The exact status of this intermediate level of review is uncertain. In *Board of Retirement v. Murgia*[89] the Court seemed to revert to a strict two-tier approach, but in *Craig v. Boren*[90] the language used implied an adoption of the intermediate level, wherein the classification must be substantially related to important government objectives.[91] Illegitimacy also appears to be a classification that will be subjected to this level of review.[92] Categories or rights (such as wealth, welfare rights) that have been suggested as candidates for strict scrutiny may become subject to the "sliding scale" review if this approach is fully embraced by the Court.

The district court opinion in *Carolina Environmental Study Group* did not outline the appropriate standard to be used, but the language indicates that the minimum rationality test was applied. The Price-Anderson classification which the court found offensive was those "people who happen to live in the areas which may be touched by radioactive debris."[93] The court concluded that those people are treated unequally because geographical happenstance dictates the distribution of the losses associated with a nuclear incident, and because they are treated differently than people damaged by other types of accidents.

Although the concept of rationality is highly subjective the Supreme Court has been liberal in upholding legislation that has only a tenuous relationship to the objective sought. An example of how far the Court will go in finding rationality is found in *Williamson v. Lee Optical Co.*[94] In commenting on a state law the Court said that the law "may exact a needless and wasteful requirement"[95] as long as the legislature was not unreasonable in believing that the statute was of some value.

Given this "hands-off" approach when applying a minimum rationality test, it is extremely difficult to see how the Price-Anderson Act can fail to meet it. One of the express purposes of the Act is the development of the nuclear industry. No complaint is made about the permissibility of this purpose. The extensive congressional testimony cited earlier in the discussion of the Act and the quotations included in the district court's opinion clearly establish a reasonable rela-

86 Shapiro v. Thompson, 394 U.S. 618, 638 (1969).
87 Reed v. Reed, 404 U.S. 71 (1971).
88 397 U.S. 471 (1970).
89 427 U.S. 307 (1976).
90 429 U.S. 190 (1976) (different drinking ages based on sex).
91 *Id.* at 197.
92 Trimble v. Gordon, 430 U.S. 762 (1977).
93 431 F. Supp. at 225.
94 348 U.S. 483 (1955).
95 *Id.* at 487. This statute was upheld on both equal protection and due process grounds. Although the above quote was taken from the due process discussion, the philosophy reflected is applicable to an equal protection argument.

tionship between the Act and the congressional purpose. The court bolsters its conclusion of irrationality by finding that the act is "unnecessary to serve any legitimate public purpose"[96] but this does nothing to improve the appellee plaintiff's position. A finding of necessity is not required.[97]

The failure to show that the Act is irrational will not automatically lead to reversal. In *Reed v. Reed*,[98] a sex discrimination case, the Supreme Court concluded that the strict scrutiny test was inapplicable and seemingly went on to apply a minimum rationality test. The Court struck down the Act after subjecting it to closer scrutiny than the language suggested. This indicates that some intermediate level of review was applied.

In *Carolina Environmental Study Group* the appellee plaintiffs must convince the Supreme Court that the "sliding scale" should be applied to the review of the Price-Anderson Act. In effect, this is what the district court did without specifically so stating. The difficulty in supporting this position arises from the fact that the classification objected to is not one which has ever been suggested to require close scrutiny. The right to recover for property damage is an economic or property right which has been traditionally subjected to a minimum rationality standard. The case does not seem to involve issues to which the Court will apply a "sliding scale" review. For this reason, the judgement of the district court should be reversed. If the Supreme Court does reach the merits of the equal protection claims it will likely apply a level of scrutiny that will allow it to uphold the Act.

IV. Conclusion

The Price-Anderson Act was drafted in response to a liability insurance crisis during the early stages of industrial participation in nuclear energy development. The Act was designed to fulfill two purposes, financial protection of the public from losses caused by a nuclear accident and promotion of the development of the nuclear industry. These purposes have not changed through several revisions of the Act. The goal of public protection is accomplished through mandatory insurance, government indemnification for losses above insurance limits, waiver of defenses (strict liability), and procedural rules for consolidating claims. The development of the industry is promoted by moderately priced government indemnification (to be replaced by a system of retroactive premiums) and a limitation on the liability that can be incurred from any nuclear incident.

The Carolina Environmental Study Group and the other individual plaintiffs challenged the constitutionality of the liability limitation provision. They claimed that the construction of two nuclear power plants near their homes by the Duke Power Company will subject them to environmental injuries that are caused by the normal operation of a nuclear power plant. They alleged that

96 431 F. Supp. at 225.

97 In Whalen v. Roe, 429 U.S. 589 (1977), the Supreme Court held that an inability to demonstrate the necessity for the disclosure of a patient's name on required drug prescription reports did not invalidate the requirement. They said the act "may not be held unconstitutional simply because a court finds it unnecessary in whole or in part." *Id.* at 597.

98 404 U.S. 71 (1971).

without the Price-Anderson Act these plants would not be built and operated. Additionally, they claimed that there would be the potential for uncompensated losses in the event of a nuclear incident. The District Court for the Western District of North Carolina heard the case and invalidated the limitation provisions of the Price-Anderson Act on due process and equal protection grounds. The case has been appealed directly to the Supreme Court.

The appellees will have difficulty establishing their standing to maintain the action and the ripeness of the issue. The problems stem from the tenuous relationship between the Act and the construction of the plants and the speculative nature of the risks associated with operation of a nuclear plant. In order to reach the merits of the case, the Supreme Court will have to take a more liberal approach to both standing and ripeness than they have in previous cases. Such an occurrence is not anticipated.

In the event that the merits are reached in this or some future case, it is unlikely that the Supreme Court will affirm the decision of the district court. Since the legislation affects property rights and therefore is economic in nature, the Court will not subject the Act to strict scrutiny. There is ample evidence to find a rational relationship between the Act and its purposes. Although it used the language of "rational basis," the district court appeared to apply a stricter standard in reviewing the Act. There is no reason to believe that the Supreme Court will adopt an intermediate level of scrutiny in this case. It is most probable that the Court will reverse the district court and uphold the constitutionality of the Price-Anderson Act.

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